

THE HIGH COURT

[2013 No. 51 EXT.]

IN THE MATTER OF THE EXTRADITION ACT 1965 AS AMENDED

BETWEEN

ATTORNEY GENERAL

APPLICANT

-AND-

ALI CHARAF DAMACHE

RESPONDENT

AND IN JUDICIAL REVIEW

[2013 No. 670 J.R.]

ALI CHARAF DAMACHE

APPLICANT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

-AND-

MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

-AND-

[2014 No. 112 J.R.]

ALI CHARAF DAMACHE

APPLICANT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

-AND-

MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

Judgment of Ms. Justice Donnelly delivered on the 21st day of May, 2015.

1. Introduction

1.1. The United States of America ("the U.S.A.") seeks the extradition of Mr. Ali Charaf Damache ("Mr. Damache") to face trial for two offences. Mr. Damache, a Muslim, is accused of committing offences of international terrorism. Those two facts, amongst others, are relied upon by counsel for Mr. Damache to ground points of objection to his extradition.

1.2. Some of those grounds relate to the conditions of detention in which, it is alleged, Mr. Damache will be held if he is extradited to the U.S.A.. Others cover the sentencing procedure under U.S. Federal Sentencing Guidelines ("the Sentencing Guidelines"), the plea bargaining system and the nature and length of the sentence he is bound to receive. A particular issue, unique to extradition law, called the rule of speciality is also raised. Further issues, also unique to extradition law such as double criminality or correspondence of offences, must be established if extradition is to be permitted.

1.3. In separate proceedings, Mr. Damache seeks to review the decision of the Director of Public Prosecutions ("the DPP") not to prosecute him in this jurisdiction arising from the factual allegations underpinning the extradition request. In particular, he wants to know the reasons for the DPP's decision.

1.4. A third set of proceedings is also before the Court. In these proceedings, Mr. Damache seeks to review the failure of the DPP to reconsider or review her decision not to prosecute him. That reconsideration had been sought by Mr. Damache in light of the change of circumstances, namely that subsequent to the initial decision not to charge him, he was arrested on the extradition request by the U.S.A.. Mr. Damache has an interest in being prosecuted in this jurisdiction, because, regardless of the outcome if he were to be so prosecuted, he could not be extradited to the U.S.A..

1.5. Counsel for the Attorney General, who also represented the DPP and the Minister for Justice and Equality in the judicial review proceedings, told the Court that the State parties wished to have all three sets of proceedings dealt with by the Court. In other words, even if the case could be disposed of on by a ruling on certain grounds, it was in the interests of the administration of justice that a judgment covering all relevant issues be given. Certainly, from the point of view of the parties, it may be better to have a High Court decision on each relevant issue which can then form the basis of a complete appeal by either side should they wish to so appeal. For the sake of convenience, the Attorney General, and where appropriate the DPP and the Minister for Justice and Equality ("the Minister"), will be referred to as the State in these proceedings except where necessary to distinguish between each of those parties.

1.6. This judgment will cover the following matters in the following order:-

1. *Introduction*
2. *The Required Proofs for Extradition*
3. *The Requirement of Double Criminality/Correspondence of Offences and Minimum Gravity*
4. *Deficiencies in the Extradition Request*
5. *The Role of the Irish Human Rights and Equality Commission*
6. *Federal Guidelines and Disproportionate Disregard for Character of the Accused*
7. *Specialty*
8. *Sentencing Provisions: Sentencing for the Relevant Conduct of Co-Conspirators and for Uncharged and Acquitted Conduct on the Basis of the Preponderance of the Evidence*
9. *De Facto Life Sentence and Irreducible Life Sentence*
10. *Coercive Plea Bargaining and Special Administrative Measures*
11. *Prison Conditions and Restrictions*
12. *The Judicial Reviews*

1.7. Background

1.7.1. Mr. Damache is sought by the U.S.A. for prosecution of, in the words of the Embassy of the U.S.A., "terrorism – related offenses". He is sought in relation to two separate offences set out in a superseding indictment filed on 20th October, 2011, in the U.S. District Court for the Eastern District of Pennsylvania.

1.7.2. *The two offences on which Mr. Damache is indicted are as follows:-*

"Count 1: Conspiracy to provide material support to terrorists, in violation of Title 18, United States Code, Section 2339A, and carrying a maximum penalty of 15 years' imprisonment and

Count 2: Attempted identity theft to facilitate an act of international terrorism as defined in Title 18, United States Code, Section 2331(1), in violation of Title 18, United States Code, Section 1028(a)(2), (b)(4), (f) and 2, carrying a maximum penalty of 30 years' imprisonment."

1.7.3. In synopsis, the facts alleged against Mr. Damache, as set out in the extradition request and supporting documentation, indicate that in early 2009, Mr. Damache met Ms. Colleen LaRose online. It is alleged that Mr. Damache told Ms. LaRose, a U.S. citizen then residing in Pennsylvania, that he was a devoted jihadist living in Ireland and that he wanted to travel to Pakistan to fight against U.S. and allied troops. Soon thereafter, Mr. Damache, Ms. LaRose, and others developed plans to form a European terror cell. The plan called for a small group to travel from Europe to an Al-Qaeda training camp in Pakistan to get training in military tactics and explosives. After the completion of training, "the Damache led group" was to return to Europe and support attacks on targets that were to include U.S. and Western European citizens. In August 2009, Ms. LaRose travelled to the Netherlands, journeying eventually to join Mr. Damache in Ireland to assist in his effort. Through electronic communications, Mr. Damache coordinated Ms. LaRose's departure from the U.S.A. and arrival, transportation and accommodation in Amsterdam. In Amsterdam, Mr. Damache provided Ms. LaRose with spiritual guidance and planned her move from Amsterdam to Ireland to join his group. Ms. LaRose later flew to Ireland and moved in with Mr. Damache and his new wife.

1.7.4. Ms. LaRose returned to the U.S.A. on 15th October, 2009, and was arrested based on a warrant issued on 10th October, 2009. In an interview following her arrest, it is alleged that Ms. LaRose admitted that she had travelled overseas with the intent to join Mr. Damache and commit violent attacks on U.S. and European citizens, that she was involved in a plot to kill Swedish artist, Mr. Lars Vilks ("Mr. Vilks"), a cartoonist who had drawn depictions of Muhammad, that she tried to raise funds for Al-Qaeda and that she had intentionally misled investigators by providing false information on two occasions in order to further the conspiracy.

2. The Required Formal Proofs for Extradition

2.1. Section 29(1) of the Extradition Act 1965, as amended, ("the Act of 1965") sets out the duties of the High Court where a person is before the Court under the provisions of either section 26 or section 27 of the said Act of 1965. A person can only come before the Court where a warrant for arrest has been issued by a judge of the High Court under s. 26 or under s. 27. Such a warrant may only issue under s. 26 after the Minister has certified that the request for extradition has been made. Section 27 allows for the provisional arrest of a person where no such certificate has issued provided there is urgency in the request and particular grounds are satisfied.

2.2. Under the provisions of s. 29(1), the High Court shall make an order committing a person to custody to await the order of the Minister for his or her extradition, where it 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 [Part II of the Act of 1965] or by the relevant extradition provisions, and

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

This Part of the judgment only deals with the formal proofs required for extradition. The potential prohibitions on extradition with

which this case was concerned are individually addressed later in this judgment. In so far as Part II of the relevant extradition treaty may contain other potential prohibitions not directly addressed in this judgment, none have been established before me and the extradition of Mr. Damache is not thereby prohibited.

2.3. A person before the High Court under s. 26 of the Act of 1965?

2.3.1. The request for the extradition of Mr. Damache was sent on the 11th January, 2013, by the Embassy of the U.S.A. in Dublin to the Minister for Foreign Affairs and Trade. It was received by the legal division of the Department of Foreign Affairs and Trade on the 14th January, 2013, and by the Minister for Justice and Equality on the 18th January, 2013. On the 8th February, 2013, the Minister for Justice and Equality certified that the request for extradition had been duly made by and on behalf of the U.S.A. and received by him in accordance with Part 2 of the Act of 1965. An application was made to a Judge of the High Court (Edwards J.) in accordance with the provisions of the Act of 1965 and a warrant for the arrest of Mr. Damache was issued on the 15th February, 2013. Mr. Damache was arrested on the 27th February, 2013, in Waterford Courthouse on foot of this warrant.

2.3.2. In those circumstances, I am satisfied that Mr. Damache is before the High Court under s. 26 of the Act of 1965.

2.4. Extradition to a Country to which Part II of the Act of 1965 applies

2.4.1. As the request can only be duly made if the requesting state is a state to which Part II of the Act of 1965 applies, I will deal with the proofs required under s. 29(1)(b) prior to dealing with s. 29(1)(b) of the Act of 1965.

2.4.2. On the 13th July, 1983, Ireland signed the Treaty on Extradition between this State and the U.S.A. at Washington D.C. ("the Washington Treaty"). On the 25th June, 2003, the U.S.A. and the European Union ("the EU") entered into an agreement on extradition. Article 3.2 of that agreement anticipated that each state would modify their bilateral treaties. The terms of the EU/U.S. extradition agreement were approved by Dáil Éireann and Seanad Éireann on the 16th October, 2008. Ireland and the U.S.A. signed an instrument on the 14th July, 2005, as contemplated by the said Article 3.2. That instrument was approved by Dáil Éireann on the 21st October, 2008.

2.4.3. Under the terms of s. 8 of the Act of 1965 as it applied at the material time, it is stated at s. 8(1):-

"[w]here 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."

2.4.4. The government, by means of the Extradition Act 1965 (Application of Part II) Order 2000 (S.I. 474 of 2000), made an order pursuant to s. 81 of the Act of 1965 applying Part II of the Act to the U.S.A.. Notice of the making of the said order was published in Iris Oifigiúil on the 6th February, 2001. Part 9 of S.I. 474 of 2000 was subsequently amended, in order to give effect to the provisions of the EU/U.S. extradition agreement and the Instrument signed by Ireland and the U.S.A., by virtue of the Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (S.I. 45 of 2010). Notice of the making of that order was published in Iris Oifigiúil on the 19th February, 2010. There was a brief amending S.I., namely S.I. 173 of 2002 – the Extradition Act 1965 (Application of Part II) (Amendment) Order 2002. The amendments therein are merely textual and do not affect the application of Part II to the U.S.A..

2.4.5. Pursuant to the provisions of s. 4 of the Documentary Evidence Act 1925, the Attorney General proved the regulations by the production of them to the Court. Thus, the U.S.A. is a country to which Part II of the Act of 1965 applies.

2.5. Extradition Duly Requested

2.5.1. Section 9 of the Act of 1965 imposes a duty of extradition on this State in the following terms:-

"[w]here 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 accordance with the provisions of this Part, be surrendered to that country."

2.5.2. Section 23 of the Act of 1965 provides:-

"[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."

2.5.3. As referred to above, the request was made by the Embassy of the U.S.A. in Dublin to the Minister for Foreign Affairs and Trade. The manner in which the request must be made is set out in the terms of the Washington Treaty and as amended by the 2010 Instrument referred to above. The Explanatory Note at Part B 1(a) provides that Article 5 of the EU/U.S. extradition agreement, as set forth in Article VIII (1) and (7) of the annex to the Instrument ("the integrated Washington Treaty"), shall govern the mode of transmission and requirements concerning certification, authentication or legalisation of the extradition request and supporting documents.

2.5.4. Article VIII(1) of the integrated Washington Treaty provides that the request for extradition shall be made in writing and shall be transmitted with supporting documents through the diplomatic channel which shall include transmission as provided for in para. 8 of this Article. That paragraph relates to the situation where a person is held under provisional arrest by the requested state. The diplomatic note was sent from the embassy of the U.S.A. to the Department of Foreign Affairs and Trade. This is through the diplomatic channel. The diplomatic channel is a means provided in the relevant extradition provisions and thus s. 23 of the Act of 1965 is satisfied.

2.6. Documents to Support Request

2.6.1. Section 25 subsection 1 provides that the 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 may be, of the warrant of arrest or other order having the same effect and issued in accordance with the procedures laid down in the law of the requesting country;

(b) a statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law 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."

Evidence of Documents

2.6.2. Pursuant to s. 37(1) of the Act of 1965, a document supporting a request for extradition, and any evidence in writing received, from a requesting country shall be received in evidence without further proof if it purports to:-

(a) be sealed or signed by a judge, magistrate or office of the requesting country and

(b) be certified by being sealed with the seal of a minister of state, ministry, department of state or such other person as performs in that country functions the same as or similar to those performed by the Minister for Justice and Equality under the Act of 1965 as may be appropriate, and judicial notice shall be taken of such seal.

2.6.3. Article VIII(7) of the integrated Washington Treaty provides:-

"[d]ocuments that bear the certificate or seal of the Department of Justice, or Department responsible for foreign affairs, of the Requesting State shall be admissible in extradition proceedings in the Requested State without further certification, authentication, or other legalisation."

In the U.S.A., the department of justice means the Department of Justice of the U.S.A.. In Ireland, the relevant department of justice is the Department of Justice and Equality.

2.6.4. In the present case, the original diplomatic note and the original extradition request with the seal of the Department of Justice of the U.S.A. were presented to the Court. The Department of Justice of the U.S.A. performs the same functions under the Act as our Minister for Justice and Equality. The relevant affidavits are witnessed and signed by a judge or magistrate judge of the U.S.A..

2.6.5. Article IX of the integrated Washington Treaty provides for the submissions of extra evidence or information, if required, for the decision on the request for extradition. Such additional evidence or information may be requested and furnished directly between the U.S. Department of Justice and the Department of Justice and Equality in Ireland. Subsequent documentation has been forwarded by the U.S. Department of Justice to the Department of Justice and Equality.

2.6.6. The request for extradition was received through the diplomatic channels and bore the appropriate seals. After the initial request, further documentation was received and placed before the Court as either a document supporting extradition or as evidence in writing. As an example, the affidavit of Ms. Williams of the 18th March, 2013, is put forward in support of the request for extradition and it is signed and sworn before a U.S. Magistrate Judge. However, there is no immediately apparent indication that it was certified by the seal of the U.S. Department of Justice. Similarly, the Supplementary booklet contains a document sent by e-mail from the U.S. Department of Justice to our Department. The supplemental affidavit was sent by covering letter from the U.S. Department of Justice. In relation to the replying affidavits, the Court was provided with a letter from the Department of Justice and Equality which stated that the original affidavits were forwarded by the U.S. Department of Justice.

2.6.7. On none of the above documents is there evidence of a seal. They are certainly on headed notepaper but a seal has in ordinary meaning a connotation of some material attached to a document as a guarantee of authenticity or, at the very least, a design resembling a seal embossed on it as a similar guarantee of authenticity. This was not a matter raised on behalf of Mr. Damache, although he put the State on proof of all matters. Therefore, there was no argument on this aspect of the case.

2.6.8. In light of the findings I proceed to make in this judgment, it is perhaps best not to make a definitive ruling on this particular issue pending a more considered hearing. It is quite possible that there is authority that would permit the use of documents or evidence forwarded in these circumstances or that on a proper construction, headed notepaper in combination with a signature amounts to a seal. Indeed, the term signed, sealed and delivered appears often to be used to permit individuals to execute documents without any formal requirements to append an actual seal. Moreover, with reference to s. 29(2)(c) of the Act of 1965, it may well be possible to regard this as a technical failure to comply with a provision of the Act which does not impinge on the merits of the request for extradition and which does not cause an injustice. In all the circumstances, I will proceed as if the documents can be considered under the terms of section 37(1).

Warrant of Arrest

2.6.9. Details of the charges are contained in the affidavit in support of the request for extradition of Mr. Damache sworn by Ms. Jennifer Arbittier Williams on the 7th December, 2012. Ms. Williams is an Assistant U.S. Attorney for the Eastern District of Pennsylvania and is familiar with the charges and evidence in the case against Mr. Damache. Her affidavit also exhibits the superseding indictment. That superseding indictment forms the basis for the domestic U.S. warrant in this case.

2.6.10. The superseding indictment was returned in circumstances where a grand jury sitting in the Eastern District of Pennsylvania had already returned an indictment against Mr. Damache alleging that he conspired to provide material support to terrorists and that he participated in the attempted theft of U.S. identity documents to facilitate an act of international terrorism. U.S. federal law permits a grand jury to return a superseding indictment if additional evidence is presented to a grand jury as to a defendant against whom an indictment has already been returned. On the 20th October, 2011, a grand jury sitting in the Eastern District of Pennsylvania returned a superseding indictment against Mr. Damache that added another man, Mohammad Hassan Khalid ("Mr. Khalid"), as a co-conspirator. The charges against Mr. Damache in the superseding indictment were identical to those in the earlier indictment.

2.6.11. On the 28th July, 2011, a deputy clerk of the U.S. District Court for the Eastern District of Pennsylvania signed an arrest warrant for "Ali Charaf Damache aka 'the black flag'" pursuant to r. 9 of the Federal Rules of Criminal Procedure which are exhibited in the affidavit of Ms. Williams. The clerk of a court is the authority competent to sign arrest warrants and deliver them for execution to law enforcement authorities competent to make arrests. The clerk of the court signed the arrest warrant. A further arrest warrant did not issue after the superseding indictment was returned by the grand jury. Ms. Williams averred that this is not necessary after a superseding indictment although an arrest warrant may issue.

2.6.12. On 27th February, 2012, Mr. Mark Ciamaichelo, the deputy clerk of the U.S. District Court for the Eastern District of Pennsylvania, issued a new arrest warrant for Mr. Damache on behalf of the clerk of the court. Ms. Williams deals with two aspects of this in her affidavit. In the first place, she says that the function to sign and deliver arrest warrants also resides in and is appropriately, customarily and lawfully exercised by deputy clerks of the court. She averred that in nearly every case in the district, a deputy clerk, and not the appointed clerk, signs and delivers arrest warrants. Thus, it is said that Mr. Ciamaichelo is the appropriate person to sign the arrest warrant.

2.6.13. According to Ms. Williams, the reason for the renewed warrant was that it was apparently the practice of the U.S. District Court for the Eastern District of Pennsylvania not to release original arrest warrants or provide certified copies of unexecuted arrest warrants. Therefore, the original warrant issued on 28th July, 2011, or a certified copy thereof could not be attained for purposes of this request. In order to satisfy the requirements of the Washington Treaty with the approval of the U.S. District Court for the Eastern District of Pennsylvania, the office of the clerk of the court issued the new arrest warrant dated 27th February, 2012. The arrest warrant replaces the arrest warrant issued on 28th July, 2011, and remains valid and executable against Mr. Damache for the charges set forth in the superseding indictment.

2.6.14. I am satisfied on the basis of the foregoing that in accordance with the terms of s. 25(1)(a), the request for extradition has been supported by the original warrant of arrest issued in accordance with the procedure laid down in the law of the requesting country.

Statement of Offence and Other Required Documents

2.6.15. Section 25(1)(b) and s. 25(1)(e) shall be dealt with together below.

Relevant Law

2.6.16. In relation to this matter, the U.S.A. has forwarded copies of the relevant enactments of their law. Through various affidavits, Ms. Williams has provided a statement of the law where this has been judge-made. In particular, she has set out the proofs required in relation to each offence by the law of the U.S.A. with particular reference, but not limited to, the offence of conspiracy. I am satisfied that there has been compliance with s. 25(1)(c).

Identity

2.6.17. In relation to identity, the U.S. authorities have given as accurate a description as possible of the person claimed. I was informed at the outset that identity in this case was not at issue. I am satisfied there has been compliance with s. 25(1)(d).

2.6.18. Thus, subject to ss. 25(1)(b) and (e) dealt with further below, I am satisfied that the request has been made in accordance with the provisions of the Act of 1965.

3. The Requirement of Double Criminality/Correspondence of Offences and Minimum Gravity

3.1. Pursuant to s. 10 of the Extradition Act 1965, as amended ("the Act of 1965"), extradition shall only be granted in respect of the prosecution of an offence which is punishable under the laws of the requesting country and of this State by imprisonment for a maximum period of at least one year or by a more severe penalty. This requirement of double criminality or correspondence of offences is a significant feature of many international extradition agreements. By contrast, the European Arrest Warrant ("the EAW") system provides for surrender without the need for proof of double criminality in respect of certain offences as defined in the law of the issuing state.

3.2. The Applicable Date for Assessment of Correspondence

3.2.1. Section 10(3) of the Act of 1965 defines an offence punishable under the laws of the State as:-

"(a) an act that, if committed in the State on the day on which the request for extradition is made, would constitute an offence, or

(b) in the case of an offence under the law of a requesting country consisting of the commission of one or more acts including any act committed in the State (in this paragraph referred to as 'the act concerned'), such one or more acts, being acts that, if committed in the State on the day on which the act concerned was committed or alleged to have been committed would constitute an offence,

and cognate words shall be construed accordingly."

Subsection 4 states that an offence punishable under the laws of the requesting country means:-

"an offence punishable under the laws of the requesting country on

(a) the day in which the offence was committed or is alleged to have been committed, and

(b) the day on which the request for extradition is made,

and cognate words shall be construed accordingly."

3.2.2. I am satisfied on the affidavit evidence of Ms. Williams that the offences set out in the charges were offences under the laws of the U.S.A. on the date they were alleged to have been committed and on the day on which the request for extradition was made.

3.2.3 Counsel for the State submitted that the relevant date for the purpose of the corresponding offence in this jurisdiction is the date upon which the request for extradition was made pursuant to s. 10(3)(a). Given that the acts alleged against Mr. Damache are alleged to have been committed in this State, in that he is alleged to have been a resident of Ireland and met with and communicated with persons in Ireland in furtherance of the alleged conspiracy, it appears that s. 10 (3)(b) is the relevant section. Thus, the Court is concerned with assessing whether the acts, which if committed in the State on the day in which the acts done in Ireland were committed or alleged to have been committed, would constitute offences on that day. In other words, it is the date of the alleged offences that is the relevant date for correspondence purposes rather than the date of the extradition request. As will become clear on the basis of the facts in this case, there is no difference in the result as correspondence with an offence can be found no matter

which date is relied upon.

3.3. The Basis for Assessment of Correspondence

3.3.1. Counsel for the State relied upon the leading Irish cases concerning correspondence of offences. As the principles outlined in these cases have implications not just for the assessment of correspondence but for what they say about the difference between a statement as to facts and a statement of law, it is a worthy exercise to cite from some of them.

3.3.2. In *Wyatt v. McLoughlin* [1974] I.R. 378, Walsh J. stated at pp. 397-398 that:-

"[i]t is not the legal qualification of the offence according to the foreign law concerned or the name it has in that law which is of importance but it is the facts underlying the offence as ascertainable from the warrant or conviction as the case may be, or as may be ascertained from such other documents as may accompany the warrant (emphasis added) ...because the acts complained of, although having identical names, may constitute quite different criminal offences in different countries or, indeed, no offence at all in one of them."

3.3.3. Similarly, in *Hanlon v. Fleming* [1981] I.R. 489, Henchy J. reiterated at p. 495 that:-

"it is a question of looking at the factual components of the offence specified in the warrant, regardless of the name given to it, and seeing if those factual components, in their entirety or in their near-entirety would constitute an offence..." (emphasis added)

3.3.4. In *Attorney General v. Dyer* [2004] IESC 1, Fennelly J. at p. 48 noted that the Supreme Court in the case of *Wilson v. Sheehan* [1979] I.R. 423 "...was at pains to restate the basic principle in respect of the examination of correspondence and to extinguish any misunderstandings arising from the earlier cases." Fennelly J. cited from the judgment of the Supreme Court in *Wilson v. Sheehan* wherein Henchy J. stated at pp. 428-429:-

"[i]t is the essential factual ingredients that determine whether two offences have the necessary correspondence...it is necessary for the specification of the offence in the warrant (or in the warrant and its attendant documentation) to go further and identify the offence by reference to the factual components relied on; it is only by looking at those components that a court in this State can decide whether the offence so specified (regardless of what name is attached to it) would constitute, if committed in this State, a corresponding offence of the required gravity."

3.3.5. In *Attorney General v. Hilton* [2005] 2 I.R. 374, it was asserted, *inter alia*, that the offence specified in the warrant did not correspond with any Irish offence. At para. 16, Denham J. stated:-

"The test for determining 'correspondence' when analysing an offence of another jurisdiction is well established in Irish law. The court looks to the alleged acts of the person sought as stated on the warrant and considers whether they would constitute an offence in this jurisdiction..."

3.4. The Facts upon which Reliance is Based to Establish Correspondence

3.4.1. Mr. Damache is sought for prosecution for two alleged offences. With respect to the precise allegations against Mr. Damache, the relevant papers are:-

(a) the Diplomatic Note which refers to "the underlying facts of the charges";

(b) the Extradition Request containing the affidavit of Ms. Williams sworn on the 7th December, 2012, including the "summary of the facts of the case", the allegations as contained under the heading "[t]he charges and pertinent United States law" and the various exhibits thereto (including the superseding indictment filed on the 20th October, 2011, and the arrest warrant dated 5th March, 2013, and the relevant law);

(c) the supplemental affidavit of Ms. Williams sworn on the 18th March, 2013;

(d) the supplemental affidavit of Ms. Williams, which despite an incorrect notation is accepted to have been sworn on the 22nd August, 2013.

Count One

3.4.2. An analysis of the documentation shows that Count One on the superseding indictment alleges an offence that is particularised as having been committed over the period from in or about 2008 through in or about July 2011, in the Eastern District of Pennsylvania and elsewhere. Some of the facts have already been referred to above. Mr. Damache (and his alleged co-conspirator Mr. Khalid) conspired and agreed with Ms. LaRose, Ms. Jamie Paulin Ramirez ("Ms. Ramirez"), and others known and unknown to the grand jury to provide "material support and resources" as defined in 18 U.S.C. s. 2339A(b) (including but not limited to logistical support, recruitment services, financial support, identification documents, and personnel, and to conceal and disguise the nature, location, source and ownership of such material support and resources):-

"knowing and intending that the material support and resources were to be used in preparation for and in carrying out violations of Title 18, United States Code, Section 956 (conspiracy to kill in a foreign country)".

The relevant legislation is included within the request or subsequent documentation. The superseding indictment particularises the "manner and means" of the foregoing conspiracy and further sets out the "overt acts" that it is alleged were performed in furtherance of this conspiracy.

3.4.3. The facts set out in the affidavit of Ms. Williams, and in the superseding indictment, allege that in early 2009, Mr. Damache met online Ms. LaRose who is a citizen of the U.S. residing in Pennsylvania at the time. Mr. Damache told Ms. LaRose that he was a devoted jihadist living in Ireland and that he wanted to travel to Pakistan to fight against U.S. and allied troops. It is alleged that, thereafter, Mr. Damache, Ms. LaRose and others developed plans to form a European terror cell. The plan called for a small group to travel from Europe to an Al-Qaeda training camp in Pakistan to get training in military tactics and explosives. After the completion of training, the Damache led group was to return to Europe and support attacks on targets to include U.S. and Western European citizens. Women, particularly those European in appearance, were a key element to this plan due to their ability to access areas that could be difficult for someone of Middle Eastern or South Asian descent to reach without attracting attention. However, since women

were not allowed to travel into Pakistan alone for training, it was to be Mr. Damache's job to find Islamic husbands or male caretakers for the women in his group.

3.4.4. In addition to arranging training and escorts, Mr. Damache was to be in charge of helping the group to enter Pakistan. The plot was disrupted before the travel to Pakistan occurred. It is alleged that Ms. LaRose took the social security card and birth certificate of her boyfriend for use by "a brother" prior to her departure. It is alleged that every step of her departure from the U.S.A. was closely coordinated by Mr. Damache through electronic communication. It is alleged that her purpose in leaving the U.S.A. was to avoid further scrutiny from law enforcement and to join Mr. Damache in Ireland to assist in his efforts to target U.S. and Western European citizens. It is alleged that Ms. LaRose came to Amsterdam in August 2009 and that Mr. Damache coordinated her arrival, transportation and accommodation in Amsterdam. She resided there with a friend of Mr. Damache's for approximately three weeks. While in Amsterdam, Mr. Damache provided Ms. LaRose with spiritual guidance and planned her eventual move from Amsterdam to Ireland to join his group.

3.4.5. On 9th September, 2009, co-conspirator Ms. Ramirez purchased airline tickets for herself and her son to travel to Cork, Ireland. She arrived in Ireland on 13th September, 2009, and on that same day or the day after, Ms. Ramirez and Mr. Damache married in an Islamic ceremony. The following day at Mr. Damache's instruction, Ms. LaRose flew from Amsterdam to Cork after which Mr. Damache, Ms. Ramirez and Ms. LaRose moved in together.

3.4.6. The superseding indictment in dealing with Count One, namely the conspiracy to provide material support to terrorists, sets out in considerable detail the overt acts allegedly done in furtherance of this conspiracy. The conspiracy is alleged to begin when Ms. LaRose on 20th June, 2008, posted a comment on YouTube using the username "Jihad Jane" stating that she is "desperate to do something somehow to help our Ummah [the Muslim people]". There were electronic communications between Ms. LaRose and other unnamed persons. One of those persons, a CC#2, allegedly sent an electronic communication to Mr. Damache stating that CC#2 is "with T" and that he "also go with brothers of AQ...the exact specialisation of me and my other group is explosive". Mr. Damache is alleged to have responded by saying that his own "plan and the plan of my brothers here is to get a good training and then come back to Europe to do some plays". It is alleged that Mr. Damache sent various electronic communications using the username "The Black Flag" to Mr. Khalid asking Mr. Khalid to recruit online "some brothers that can travel freely...with EU passports....and I also need some sisters too". Mr. Damache is also alleged to have further advised Mr. Khalid that the group would train "either with Aqim or Isi" and would be "a professional organised team".

3.4.7. On or about 31st August, 2009, Ms. LaRose sent an electronic communication to CC#1 telling CC#1 that Mr. Damache was "very eager to join other brothers" and wished to correspond with CC#1. On or about 7th August, 2009, Mr. Damache sent an electronic communication to CC#5 a resident of an Eastern European country, recruiting CC#5 to find brothers and sisters to go to "camp for training...and then come back to Europe to do the job...the job is to knock down some individual that are harming Islam." On or about the 7th August, 2009, it is alleged that Mr. Damache sent an electronic communication to CC#5 explaining that Mr. Damache is structuring "an ORGANISATION" divided into "planning team...research team...action team...recruitment team...finance team." On or about 10th August, 2009, Mr. Damache sent an electronic communication to CC#2 asking "when do you need the document". CC#2 replied that he will advise Mr. Damache when he, CC#2, is ready to receive the documents.

3.4.8. In what may be a pithy synopsis, Ms. Williams states at para. 31 of her affidavit of the 7th December, 2012, with respect to Count One, that the "evidence will establish that Damache conspired with LaRose, Ramirez, Khalid, and others to create a terror cell in Europe capable of targeting both U.S. and Western European Citizens."

3.4.9. In her affidavit of 18th March, 2013, Ms. Williams averred with apparent reference to Count One, that in or about August 2009, Ms. LaRose knowingly took and transferred to Mr. Khalid the U.S. passport of K.G. as well as other documents and material belonging to K.G. without the permission of K.G. in order to provide the passport to the "brothers". Ms. Williams went on to say that on or about 4th August, 2009, Mr. Damache allegedly sent an electronic communication to Mr. Khalid advising Mr. Khalid to send the "packages" from Ms. LaRose to Mr. Damache using a fake name. Ms. Williams said that the government intend to prove at trial that the 4th August, 2009, is the date that Ms. LaRose transferred the documents to Mr. Khalid. In or about August 2009, Mr. Khalid removed the U.S. passport of K.G. from the package sent to him by Ms. LaRose and forwarded the remainder of the package to Mr. Damache and hid the passport away in order to provide it to the "Muhajideen" later. Those are all allegations set out in the superseding indictment apparently concerning Count One.

3.4.10. In that affidavit sworn by Ms. Williams, it is said that Mr. Damache did not know that Mr. Khalid would move the active passport before transferring the package of documents to Mr. Damache and did not intend this to be the case. It is said that Ms. LaRose will say in testimony that Mr. Damache was supposed to forward the documents to another co-conspirator but that he still had the documents with him in Ireland and that he gave them back to her as she was returning to the U.S.A.. It is said that an FBI agent will confirm through testimony that all of the documents that Ms. LaRose stole from K.G. and transferred to Mr. Khalid, who then transferred them to Mr. Damache, were seized from Ms. LaRose at the time of her arrest except for the active passport.

Count Two

3.4.11. The superseding indictment charges Mr. Damache:-

"[f]rom in or about August 2009 through in or about July 2011, in the Eastern District of Pennsylvania and elsewhere... knowingly transferred and attempted to transfer an identification document, that is a United States passport belonging to K.G., knowing that such document was stolen...in order to facilitate an act of international terrorism (as defined in, S1028(a)(2), (b)(4), (f) and 2 of Title 18(United States Code)."

3.4.12. According to Ms. Williams, the proofs in respect of the foregoing are specified as:-

(1) Mr. Damache transferred an identification document or attempted to do so, or aided and abetted another in the transfer of an identification document;

(2) When Mr. Damache transferred, attempted to transfer, or aided and abetted another in the transfer of the identification, he did so knowing that the document was stolen;

(3) The identification document was or appears to have been issued by or under the authority of the U.S.; and,

(4) That Mr. Damache transferred the identification document or attempted to do so or aided and abetted another in the transfer of the document to facilitate an act of international terrorism (for increased penalties).

3.4.13. It may be noted that the superseding indictment takes over 12 pages to outline the details of the alleged conspiracy under Count One while Count Two is dealt with in a single paragraph as outlined above. That may or may not have to do with the requirements of U.S. law as regards a conspiracy charge but for the purposes of correspondence, it is necessary for this Court to look at the facts alleged and see if they constitute an offence in this jurisdiction.

3.4.14. Ms. Williams spends very little space in expanding upon Count Two in that affidavit. Apart from setting out the legal proofs required, she said the following in relation to the facts of the case:-

"The government's evidence will establish that Damache conspired with LaRose, Khalid, and others to steal the U.S. identity documents of K.G. for use by a co-conspirator located in Pakistan who the group believed to be a member of Al Qaeda. This will be proven at trial by the testimony of numerous witnesses as well as physical evidence that corroborates the testimony of these witnesses."

3.4.15. As stated previously, the detail of the alleged theft and transfer of the identification documents were given under the heading of Count One. Yet the offence alleged is a particular offence, i.e. transferring a document knowing it was stolen to facilitate an act of international terrorism. The factual assertions do not explain the act of international terrorism beyond that stated, i.e. that it was for use by a co-conspirator located in Pakistan who the group believed to be a member of Al-Qaeda.

3.5. The Corresponding Offences Proffered by the State

3.5.1. Counsel for the State referred the Court to a number of offences as corresponding offences in relation to Count One:-

(a) Directing the activities of a criminal organisation contrary to s. 71(a) of the Criminal Justice Act 2006 ("the Act of 2006")

3.5.2. The above offence carries a penalty of life imprisonment. Section 71A(2) of the Act of 2006 provides:-

"A person who directs, at any level of the organisation's structure, the activities of a criminal organisation is guilty of an offence ...".

3.5.3. "[D]irects" includes "mak[ing] ... a request" with respect to the carrying on of activities. Counsel for the State submitted that an organisation of the nature alleged, the objectives of which were violent jihad, can only be a criminal organisation within the meaning of the legislation and that any one of the acts alleged amount to directing its activities. Mr. Damache is the director of this "Damache led group".

3.5.4. A criminal organisation under the Act of 2006 is a structured group composed of three or more persons acting in concert that is established over a period of time and has as its main purpose or activity the commission or facilitation of one or more serious offences in order to obtain, directly or indirectly, a financial or other material benefit.

(b) Participation in or contribution to any activity of a criminal organisation contrary to s. 72 of the Act of 2006

3.5.5. The above offence carries a maximum fifteen years imprisonment. Section 72(1) of the Act of 2006 provides:-

"A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in [section 72(1)], the person participates in or contributes to any activity (whether constituting an offence or not) -

(a) intending either to -

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence, or

(b) being reckless as to whether such participation or contribution could either -

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence."

3.5.6. Counsel for the State asserted that at an absolute minimum, and in the context of an organisation the objectives of which are alleged to be violent jihad, the doing of any of the acts alleged (and which act need not even be a criminal offence) must amount to participation in or a contribution to its activities intending to, or being reckless as to whether such act would enhance the organisation's ability to commit (or facilitate the commission or the organisation) of a "serious offence", which would be satisfied by anything from murder contrary to common law to assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997.

(c) Membership of a terrorist group being an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939 ("the Act of 1939").

3.5.7. The above offence carries a maximum penalty of eight years. Section 5(1) of the Criminal Justice (Terrorist Offences) Act 2005 ("the Act of 2005") provides:-

"A terrorist group that engages in, promotes, encourages or advocates the commission, in or outside the State, of a terrorist activity is an unlawful organisation within the meaning and for the purposes of the Offences Against the State Acts 1939-1998 and section 3 of the Criminal Law Act, 1976."

3.5.8. Section 21 of the Act of 1939 provides:-

"(1) It shall not be lawful for any person to be a member of an unlawful organisation.

(2) Every person who is a member of an unlawful organisation in contravention of this section shall be guilty of an

offence..."

3.5.9. A "terrorist group" is defined by virtue of s. 2 of the Act of 2005 in accordance with its definition in the Framework Decision on Combating Terrorism as:-

"a structured group of more than two persons, established over time and acting in concert to commit terrorist offences."

Terrorist activity is defined in s. 4 of the Act of 2005 as:-

"an act that is committed in or outside the State and that

(a) if committed in the State, would constitute an offence specified in Part 1 of Schedule 2 (which includes murder and possession of explosives with intent to endanger life) and

(b) committed with the intention of

(i) seriously intimidating a population

(ii) unduly compelling a government or an international organisation to perform or abstain from performing an act, or

(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structure of a state or an international organisation."

3.5.10. Counsel for the State submitted that a violent jihadist organisation must satisfy the definition of "terrorist group". Membership thereof is therefore an offence as an unlawful organisation.

(d) A terrorist offence contrary to s. 6 of the Act of 2005

3.5.11. The penalties for the above offence vary under s. 7 of the Act of 2005 but all of which exceed the minimum gravity requirements of the Act of 1965. Section 6(1) of the Act of 2005 provides:-

"... a person is guilty of an offence if the person – (a) in ... the State – (i) engages in a terrorist activity or ... , (ii) attempts to engage in a terrorist activity ... ; or (iii) makes a threat to engage in a terrorist activity ..."

3.5.12. Counsel for the State submitted that having regard to the definition of terrorist activity (and the fact that murder is an offence specified in Part 1 of Schedule 2) and the alternative requirement that it be one that is committed with the intention of "seriously intimidating a population", Mr. Damache could be prosecuted in the State for the offence of attempting to engage in a terrorist activity, namely murder, in circumstances where the actions taken in pursuit of the murder of a resident of Sweden, referred to as RS#1 in the indictment (by implication from the statement of facts in the evidence of Ms. Williams, this is Mr. Lars Vilks), went beyond preparatory and Ms. LaRose travelled to Sweden to, *inter alia*, find and kill RS#1 and indeed in circumstances where by the 30th September, 2009, she pledged that "only death will stop me here that I am so close to the target".

3.5.13. In the alternative it was submitted that Mr. Damache could be prosecuted on the basis of secondary participation (albeit indicted as a principal offender) pursuant to s. 7(1) of the Criminal Law Act 1997, and specifically in terms of aiding same. At a minimum, Mr. Damache attempted to engage in the above murder (on the basis of joint enterprise) and in respect of which he, *inter alia*, recruited CC#3 (a resident of a Western European country), to take care of Ms. LaRose upon her arrival in Europe, and advising that "this is real".

(e) Inviting a person or persons generally to join a terrorist group (as an unlawful organisation in terms of s. 5 of the Act of 2005 or to take part in, support or assist its activities contrary to s. 3 of the Criminal Law Act 1976 ("the Act of 1976")

3.5.14. The above offence carries a maximum penalty of 10 years. Section 3 of the

Act of 1976 provides:-

"Any person who recruits another person for an unlawful organisation or who incites or invites another person (or other persons generally) to join an unlawful organisation or to take part in, support or assist its activities shall be guilty of an offence..."

3.5.15. Counsel for the State once again noted that the allegations against Mr. Damache include multiple endeavours of recruitment, and at a minimum, inviting such persons to assist its activities, including actions specifically carried out by Mr. Damache, such as his enquiries of CC#2 as to "other brothers" that were willing to join "us" in the jihad field; his recruitment of CC#3 to take care of Ms. LaRose upon her arrival in Europe, at which time he advised that "this is real"; and, his communications with CC#5 and recruiting him to find brothers and sisters to go to a "camp for training ... and then come back to Europe to do the job... [T]he job is to [k]nock down some individual(s) that are harming Islam" and Mr. Damache's explanation to CC#5 that he is structuring an organisation divided into planning, research, action, recruitment and finance teams.

(f) Knowingly rendering assistance to an unlawful organisation contrary to s. 21A of the Act of 1939.

3.5.16. This carries a maximum penalty of eight years imprisonment. Section 21A of the Act of 1939 provides:-

"A person who knowingly renders assistance...to an unlawful organisation whether directly or indirectly, in the performance or furtherance of an unlawful object is guilty of an offence."

3.5.17. Counsel for the State submitted in this regard that at an absolute minimum, Mr. Damache personally:-

(1) communicated with CC#2 in terms of arranging training in explosives for himself and his brothers;

(2) requested Mr. Khalid to recruit brothers on the basis that this group would train with AQIM or ISI and would be a professional organised team;

(3) requested that CC#5 find brothers and sisters who would be trained and come back to Europe to do the job, the job being to knock down individuals that are harming Islam and explaining to CC#5 that he was structuring an organisation divided into planning, research, action, recruitment and finance teams;

(4) recruited CC#3 to take care of Ms. LaRose upon her arrival in Europe, his telling him that "this is real" and against a background whereby he has told Mr. Khalid that he has organised everything for "sister Fatima" and "willing to die in order to protect her" and Mr. Khalid communicating with Mr. Damache that he hopes to see videos if the strikes are successful.

(5) endeavoured to secure travel documents for CC#2 that were taken from K.G.1 by Ms. LaRose and provided to Mr. Khalid for transmission onwards to Mr. Damache.

3.5.18. In relation to Count Two, counsel for the State submitted that the following offences would correspond to what is alleged against Mr. Damache:-

(a) Possession of stolen property contrary to s. 4 of the Criminal Justice Theft and Fraud Act 2001

3.5.19. The penalty for the above offence is up to five years imprisonment. Section 18(1) of the Act of 2001 provides:-

"A person who, without lawful authority or excuse, possesses stolen property (otherwise than in the course of the stealing), knowing that the property was stolen or being reckless as to whether it was stolen, is guilty of an offence."

3.5.20. Counsel for the State asserted that after Ms. LaRose stole K.G.'s documents and transferred them to Mr. Khalid's possession, Mr. Damache requested that Mr. Khalid send the stolen documents to him. Mr. Khalid removed one passport from the documents and the balance of the documents were sent to Mr. Damache. At a minimum, Mr. Damache personally took physical possession of all documents stolen from K.G., save K.G.'s active U.S. passport.

(b) The attempted possession of stolen property contrary to common law

3.5.21. The above offence also carries a penalty of up to five years imprisonment. Counsel for the State submitted that after Ms. LaRose stole K.G.'s documents and transferred them to Mr. Khalid's possession, Mr. Damache requested that Mr. Khalid send all of the stolen documents to him, including the one passport that Mr. Khalid, unknown to Mr. Damache, had removed from the packages such that those sent to Mr. Damache did not contain the active U.S. passport. At a minimum, Mr. Damache attempted to take possession of the U.S. passport that Mr. Khalid (unknown to Mr. Damache) removed from the packages prior to sending the contents thereof to Mr. Damache.

(c) A similar offence of participation in or contributing to a criminal organisation contrary to s. 72 of the Act of 2006

3.5.22. This offence carries a penalty of up to 15 years imprisonment. Counsel for the State submitted that the very fact of taking possession or attempting to take possession of stolen documents and specifically and with the intention that same might be transferred onwards to another member of that organisation (i.e. CC#2) and for use by him, amounts to participation in, or at the very least contributing to, any activity of the organisation intended to enhance the ability of the organisation to commit a serious offence or being reckless as to whether the foregoing could enhance the ability of the organisation to commit or facilitate the commission by the organisation of such a serious offence. This may be established by reference to:-

(i) Mr. Damache's agreement and endeavours to secure the transfer to himself of all documents that were stolen from K.G., and his view to transferring same onwards to CC#2;

(ii) his agreement to take actual physical possession of all of the foregoing (from Ms. LaRose via Mr. Khalid) and with a view to transferring same onwards to CC#2; and,

(iii) his actual physical possession of all documents stolen from K.G., including an inactive U.S. passport (but excluding the active U.S. passport).

(d) Knowingly rendering direct or indirect assistance to a terrorist group (as an unlawful organisation in terms of s. 5 of the Act of 2005 in the further of an unlawful object and contrary to s. 21A of the Act of 1939

3.5.23. This offence carries a maximum penalty of eight years imprisonment. Counsel for the State submitted similarly that at a minimum, this may be established by (a) Mr. Damache's agreement to take physical possession (from Ms. LaRose via Mr. Khalid) of all documents that were stolen from K.G.; and, (b) his actual physical possession of all of the documents that were stolen from K.G., including an inactive U.S. passport (but excluding the active U.S. passport).

3.5.24. Counsel for Mr. Damache objected to counsel for the State putting forward more than one offence for the purpose of establishing correspondence. In my view, there is simply no basis for such objection. The role of the Court is in the nature of an enquiry (see *Attorney General v. Parke* [2004] IESC 100). It is the duty of the Court to inquire if there is an offence in this jurisdiction which corresponds to that alleged in the extradition request. The Court cannot be denied the assistance of the State in the enquiry into that aspect of the case. The State must be free to advance a number of matters. Similarly, the Court is free to accept or reject those arguments or to identify an offence of its own motion.

3.5.25. Apart from the above objection and putting the State on proof of correspondence, counsel for Mr. Damache made no further submissions on this issue.

3.6. The Court's Analysis

The Applicable Law

3.6.1. Counsel for the State asserted, in answer to a query from the Court, that it is sufficient to establish correspondence if part of what is alleged against the respondent is an offence in this jurisdiction. This is said to be sufficient as otherwise one would have to establish that the same offence existed in both jurisdictions. Counsel for the State relied upon the fact that it is the acts that one

has regard to, rather than the title of the offence.

3.6.2. It is undoubtedly the case that one has to have regard to the acts or the factual component of the offence alleged. On the other hand, the authorities cited by the State in their written submissions on correspondence and referred to above appear to indicate that it is "the facts underlying the offence" that is important. Those facts or factual components of the offence specified in the warrant must, according to the Supreme Court in *Hanlon v. Fleming* [1981] 1 I.R. 489 and quoted approvingly by the Supreme Court in *Attorney General v. Dyer* [2004] 1 I.R. 40, be looked at to see if they "in their entirety or in their near entirety" constitute an offence.

3.6.3. I have considered whether the phrase "entirety or in their near entirety" is to be interpreted as meaning that it is not sufficient to take a part of the factual component of the offence and simply point to a corresponding offence. This interpretation would not be the same as saying there must be correspondence of the legal definitions of the offences in both states. This would simply mean that it is the totality of the conduct in the requesting state alleged to amount to an offence that must amount to an offence in this jurisdiction.

3.6.4. An unusual example might suffice. A person is charged in the requesting state with a breach of the peace aggravated by publishing the event on social media. The aggravated feature increases the penalty from 12 months to 12 years imprisonment. The factual components of that offence as set out in the warrant outline a breach of the peace and the subsequent uploading of a video of the breach onto YouTube by the requested person. Assuming that an offence of breach of the peace might reach minimum gravity (which it does not under the Criminal Justice (Public Order) Act 1994), is it correct to say that the factual components of the offence in the requesting state in their "entirety or near entirety" amount to an offence in this jurisdiction? The fact of the uploading of the video to YouTube, while a necessary ingredient in the requesting state, does not form part of the factual matrix of an offence of breach of the peace in this jurisdiction. Thus, the entirety of the factual basis of the offence in the requesting state does not amount to an equivalent offence here.

3.6.5. In the case of *Minister for Justice, Equality and Law Reform v. Ward* [2008] IEHC 53, Peart J. could not find, on the particular facts, that the UK offence alleged of dangerous driving causing death corresponded to an offence here (as the requested person was not the driver and it was not alleged that he was aware of the defects in the vehicle) but found that the facts alleged amounted to the lesser offence of driving a mechanically propelled vehicle with defects which could have been discovered with the exercise of ordinary care. Although the precise issue I am addressing as to the meaning of entirety or near entirety was not directly raised in that case, it is an example of how correspondence has been approached by the High Court to date. If any part of the facts (which are considered in their entirety or near entirety) amounts to an offence in this jurisdiction, then there is correspondence or double criminality under the European Arrest Warrant Act 2003 ("the Act of 2003") or the Act of 1965.

3.6.6. I would also note that in an extradition request made under Part 2 of the Act of 1965, there is a requirement that a legal description of the relevant offence be given and copy of the relevant enactments or a statement of the relevant law. The EAW must set out the nature and legal classification of the offences and the applicable statutory provision or code. In my view, the requirement to give that information has a relevance to the functions that the Court undertakes, one function being the assessment of correspondence of offences. This is not a question of matching the legal requirements between the jurisdictions but it clarifies for the requested state which of the factual components set out in the extradition request or the EAW relate to the actual accusation of the offence. A request or a warrant may include many facts that may be irrelevant to the establishment of the underlying offence, e.g. that the thief wore black or the knife was long. It is by reference to the particular legal provision that the facts underlying the offence can be identified and the process of correspondence carried out.

3.6.7. In relation to the matter of correspondence, the Supreme Court in *Minister for Justice, Equality and Law Reform v. Dolny* [2009] IESC 48 stated that for the purpose of correspondence, it is appropriate to read the warrant as a whole. Denham J., as she then was, stated that in so reading the particulars, it is a question of determining whether there is a corresponding offence. It is a question of determining if the acts alleged were such that if committed in this jurisdiction they would constitute an offence. While that case is authority for perhaps an expansive look at what is being alleged, I am of the view that it does not alter the requirement that the factual components be considered in their entirety or near-entirety.

3.6.8. The final point I would make is that the law regarding the approach to correspondence does not permit the facts to be assessed from the point of view of what Mr. Damache is alleged to have done in this jurisdiction but to transpose the facts completely. An example of this in action is provided by the case of *R. (Al-Fawwaz) v. Governor of Brixton Prison* [2002] 1 A.C. 556, which was cited with approval by the Supreme Court in the case of *Minister for Justice and Equality v. Szall* [2013] IESC 7, [2013] 1 I.R. 470 at para. 4.8 as follows:-

"At para. 95 of Norris, the single judgment cited the opinion of Lord Millett in R (Al-Fawwaz) v Governor of Brixton Prison [2002] 1 AC 556. In that case, the United States sought the extradition of a Mr. Al-Fawwaz on charges of conspiring to murder American citizens, officials, diplomats and others, both in the United States and elsewhere. Lord Millett, at paras. 109-110, said the following:-

'109...Given that the court is concerned with an extradition case, the crime will not have been committed in England but (normally) in the requesting state. So the test is applied by substituting England for the requesting state wherever the name of the requesting state appears in the indictment. But no more should be changed than is necessary to give effect to the fact that the court is dealing with an extradition case and not a domestic one. The word 'mutandis' is an essential element in the concept; the court should not hypothesise more than necessary.

110. The one point to which I would draw attention is that it is not sufficient to substitute England for the territory of the requesting state wherever that is mentioned in the indictment. It is necessary to effect an appropriate substitution for every circumstance connected with the requesting state on which the jurisdiction is founded. In the present case the applicants are accused, not merely of conspiring to murder persons abroad (who happen to be Americans), but of conspiring to murder persons unknown because they were Americans. In political terms, what is alleged is a conspiracy entered into abroad to wage war on the United States by killing its citizens, including its diplomats and other internationally protected persons, at home and abroad. Translating this into legal terms and transposing it for the purpose of seeing whether such conduct would constitute a crime 'in England or within English jurisdiction', the charges must be considered as if they alleged a conspiracy entered into abroad to kill British subjects, including internationally protected persons, at home or abroad."

Count One

3.6.9. The putative offences put forward as far as they relate to activities of a criminal organisation suffer from what appears to be a considerable deficiency. Irish law requires that to be a criminal organisation, the main purpose or object of the commission of the serious offences must be in order to obtain, directly or indirectly, a financial or other material benefit. The State submitted that this organisation has as its objectives "violent jihad". On the basis of a consideration of all the material put before me, I accept that the alleged conspirators had an overall objective of "violent jihad."

3.6.10. This is not the place for a learned treatise of the meaning of "jihad" and indeed no evidence has been put forth in that regard. Jihad must be given the meaning it has in common or everyday use particularly when juxtaposed with the word "violent". In my view, it is used in the request and in the submissions of the State, in the sense of a war or a struggle by those of Muslim faith against unbelievers. It is used in a quasi-religious sense, therefore. There is clearly no objective to have a financial benefit and there is also no objective to have material benefit. Material or financial benefit is, in my view, the opposite of spiritual or religious benefit and therefore, this group or organisation cannot be said to be a criminal organisation within the meaning of the Act of 2006.

3.6.11. The other offences proffered all require that the facts alleged be considered as amounting to the co-conspirators being members of a terrorist group. I am quite satisfied that on the totality of the information in the request and supporting documentation, the allegations, if true, would mean the group of which Mr. Damache was allegedly a leader, was a terrorist group. The aims of this group were, at a minimum, to support attacks on targets including U.S. and Western citizens having received training in military tactics and explosives in Pakistan. The support of such attacks was a promotion of terrorist activity, an encouraging of such activity or the advocating of it. These attacks were clearly meant to seriously intimidate a population or to destabilise, at a minimum, the social structures of a state. Thus, the group was a terrorist group.

3.6.12. The offence of membership of a terrorist group is one that is based upon s. 3 of the Act of 1976 or s. 21A of the Act of 1939. The original offences set out in the relevant sections of the Act of 1976 or the Act of 1939, are territorial in nature and do not have extraterritorial reach. Section 5 of the Act of 2005 provides that a terrorist group involved in or outside the State in terrorist activities (which by definition may be committed in or outside the State) is an unlawful organisation under those Acts. The Framework Decision on Combating Terrorism, which the Act of 2005, implements does not require a claim to global jurisdiction but I am quite satisfied it does not exclude it (see art. 9(5) thereof).

3.6.13. Section 6(1)(b) and s. 6(2) of the Act of 2005 limit the extraterritoriality of an offence under s. 21 to an offence committed outside the State where, *inter alia*, the act is directed against the State or an Irish citizen. I take the act as being membership of a terrorist group involved in terrorist activity that is directed against the State or an Irish citizen.

3.6.14. In the transposed factual context under consideration, Mr. Damache is a U.S. citizen living in the U.S.A. who is involved in terrorist activities against Irish and Western European citizens. I am therefore satisfied that his activities, if proven, would amount to membership of a terrorist group in this jurisdiction.

3.6.15. In so far as the State have pointed to an attempt to engage in a terrorist activity, namely the murder of Mr. Vilks, it is not clear that correspondence has been made out because the extraterritorial jurisdiction of the State is limited in the case of s. 6 offences by s. 6(2). For such activity to be an offence in this jurisdiction, a relevant requirement is that the offence be directed against this State or a citizen of the State. As referred to above, in transposing the allegations, which is a necessary exercise for the purpose of considering correspondence, Mr. Damache would have to be presumed to be a U.S. citizen engaging in this activity from a base in the U.S. The activity includes support for targeting Irish and Western European citizens. An attempt to murder Mr. Vilks, not being an Irish citizen, would not satisfy the criteria for extraterritorial jurisdiction of the State under this heading. Nothing in the facts alleged would amount to an attempt to murder, as distinct from a possible conspiracy, an Irish citizen. I am not satisfied therefore that a corresponding offence of attempt to commit the terrorist offence of the murder of Mr. Vilks has been made out.

3.6.16. The facts as set out above show Mr. Damache's alleged invitations to other persons. Based upon the extraterritorial nature of the offence as found above, I am quite satisfied that the facts alleged correspond to inviting a person to join a terrorist group contrary to s. 3 of the Act of 1976.

3.6.17. Finally, I am also quite satisfied on the facts alleged and for the reasons set out heretofore that there is correspondence with the offence of knowingly rendering direct or indirect assistance to a terrorist group contrary to s. 21A of the Act of 1939.

Count Two

3.6.18. The two offences put forward by the State in relation to possession or attempted possession of stolen property do not of course include the factual component of the offence, *i.e.* the facilitation of "an act of international terrorism". However, in light of the manner in which correspondence has been assessed in this jurisdiction, this is sufficient to make out correspondence. What is alleged against Mr. Damache in part is that he either transferred or attempted to transfer stolen property, depending on whether the document is limited to the active passport or includes all the documentation stolen from one K.G. That amounts to an offence here and there is clear correspondence.

3.6.19. Similarly, even if the factual basis for what Mr. Damache is alleged to have done is to conspire with Ms. LaRose, Mr. Khalid and others to steal the U.S. documentation, there is correspondence with the offence of conspiracy to commit theft in this jurisdiction.

3.6.20. I am of the view that there is no issue with extraterritoriality because even though the factual circumstances would be that Mr. Damache is a U.S. citizen living in the U.S., the documentation is stolen in this jurisdiction, *i.e.* it is an Irish passport taken from an Irish person in Ireland. The object of the conspiracy is to commit the theft here. Furthermore, even on the possession or attempted possession charges, Mr. Damache is an aider or abettor to the offence which is an offence carried out in Ireland on the basis of the transposed facts. Thus, correspondence or double criminality has been established.

3.7. Decision

3.7.1. I am satisfied that each of the offences identified by me above as a corresponding offence constituted an offence on the date that the acts concerned in the extradition request were alleged to have been committed in this State. That is the appropriate date for correspondence. In any event, the corresponding offences identified were also offences on the date on which the extradition request was made. The offences reach the minimum gravity requirements in this State as well as in the U.S.A.. In all the circumstances I am satisfied that correspondence has been made out on each of the two counts alleged against Mr. Damache with at least one offence in this jurisdiction.

4. Deficiencies in the Extradition Request

4.1. Under this heading, Mr. Damache claims that the extradition request lacks crucial detail and is defective in a fundamental respect.

4.2. Submissions

Submissions on behalf of Mr. Damache

4.2.1. Counsel on behalf of Mr. Damache claimed that, despite the indictment setting out a large number of purported overt acts and the alleged e-mails between conspirators, considerable uncertainty still surrounds the charges against Mr. Damache. Counsel submitted that Count One amounts to a participation in a conspiracy to provide material support to a conspiracy to murder. Counsel referred to the prosecution's proof, according to Ms. Williams, that "Damache knew or intended that the supporters' resources were to be used to carry out the terrorist activity."

4.2.2. The complaint by Mr. Damache is that none of the documentation demonstrates that Mr. Damache is alleged to have known about the plot to murder Mr. Vilks or that he supported it. Counsel submitted that much effort is spent demonstrating that Mr. Damache planned to set up a European terror cell and that he wanted to travel to Pakistan "to get the training".

4.2.3. Counsel submitted in respect of Count Two that considerable information has been provided in a supplemental affidavit by Ms. Williams in respect of what the alleged co-conspirators would say at trial to demonstrate Mr. Damache's complicity. In contrast, it is submitted that none of the alleged communications between the conspirators set out in the alleged overt acts referred to in the extradition request show any knowledge of the plot to murder Mr. Vilks on the part of anyone other than Ms. LaRose and CC#2.

4.2.4. Counsel submitted that there is no assertion that Ms. LaRose or anyone else will say at trial that Mr. Damache knew about or supported the alleged murder plot. The request says that "the government's evidence will establish that Damache conspired with LaRose, Ramirez, Khalid and others to create a terror cell capable of targeting both US and western European citizens."

4.2.5. Counsel for Mr. Damache stated that the plot alleged by the U.S. is to have been towards a particular end and yet they stated there is nothing to show that this was so. Therefore, they submitted the extradition request lacks crucial detail and is defective in a fundamental respect.

4.2.6. Counsel relied upon the decision of Peart J. in *Minister for Justice Equality and Law Reform v. Hamilton* [2008] 1 I.R. 60 concerning the detail to be contained in a European Arrest Warrant ("the EAW"). In that case, Peart J. stated that not only must a respondent be aware from the warrant as to why his extradition is requested, but that a court must be satisfied that there is an offence alleged in which the proposed respondent is implicated in some way. Peart J. indicated that this was not a question of the court concerning itself with the strength of the case. He held that there must be some detail from which the court can be satisfied that the person named had some involvement in the alleged offence.

4.2.7. Reliance was also placed on *Minister for Justice Equality and Law Reform v. Desjatinikovs* [2009] 1 I.R. 618. Denham J., as she then was, giving judgment on behalf of the Supreme Court held that the fact that there is a precise description of the facts is of importance. She said that this was important even though double criminality (or correspondence) was not required to be considered. The description of the facts also went to the entitlement of an arrested person to be informed of the reasons for his arrest and of any charge against him, but was also important with regard to the specialty rule.

4.2.8. In *Minister for Justice v. Stafford* [2009] IESC 83, the Supreme Court, again per Denham J., held at para. 15:-

"It is required that there be a description of the acts upon which the warrant is based. This is similar to the situation under the Extradition Act 1965, as amended, and indeed classically in extradition law. A description of the acts, or the acts alleged, are the facts upon which the executing judicial authority may apply the law. By describing the acts the facts are before the court and so a decision may be made as to whether there is, for example, double criminality. I am satisfied that the facts on the warrant in this case are sufficient to describe the circumstances in which alleged offences were committed."

4.2.9. Counsel for Mr. Damache submitted that Count Two was fundamentally lacking in respect of its necessary particulars. Counsel submitted that a fourth allegation had to be proved in order to convict Mr. Damache, namely that he attempted the passport transfer "to facilitate an act of international terrorism (for increased maximum penalties)". Counsel submitted that the actual act of terrorism is not described in the attached indictment; the indictment merely states that international terrorism is defined in a particular way in U.S. law.

4.2.10. Counsel pointed to Ms. Williams' claim at para. 33 of her grounding affidavit that "the government's evidence will establish that Damache conspired with LaRose, Khalid and others to steal the U.S. identity documents of K.G. for use by a co-conspirator located in Pakistan who the group believed to be a member of Al Qaeda." Counsel noted that Mr. Damache does not appear to be charged with conspiracy in respect of Count Two but posited whether that is the act of international terrorism which must be proved. Alternatively, they queried whether the alleged act of international terrorism is to be understood as the plot to murder Mr. Vilks. Or, is the conspiracy one to provide support for a plot to murder Mr. Vilks?

4.2.11. Therefore, counsel submitted, the factual basis grounding the request for surrender in Count Two was so unclear as to render the request fundamentally defective. It was submitted that if the act of international terrorism alleged against Mr. Damache is that provided in Count One, then the defects identified there also arise.

Submissions on behalf of the State

4.2.12. Counsel for the State replied that Mr. Damache misunderstood the purpose and role of the indictment for the purpose of the extradition application. They submitted that its purpose in the course of the extradition proceedings is to allow the Court to consider the issue of correspondence. The indictment, in conjunction with the other documentation grounding the request for extradition, should permit the Court to ascertain the underlying factual basis for the prosecution for the purpose of determining whether or not the same conduct might amount to an offence here.

4.2.13. Counsel pointed to the fact that the Extradition Act 1965 ("the Act of 1965") requires the warrant of arrest or other order having the same effect to be furnished as part of the extradition request. It was submitted that the superseding indictment would appear to have been furnished with the warrant of arrest as part of the request for extradition. Reference was made to the contents of a relatively detailed narrative of the evidence grounding the alleged offences set out in the indictment.

4.2.14. Counsel for the State characterised Mr. Damache's submissions as a suggestion that there is inadequate material in the indictment that would allow the prosecution to show that Mr. Damache committed the various acts intentionally. Counsel submitted that this misses the point entirely. With reference to *Hamilton*, it was submitted that it was more properly regarded as authority for the proposition that if the material before the court is sufficient to allow the court to carry out its function insofar as extradition is concerned, that is all that is required.

4.3. The Court's Analysis

4.3.1. I do not agree with the characterisation of Mr. Damache's submissions by counsel for the State. Counsel for Mr. Damache went further than merely suggesting that there was inadequate material in the indictment to allow the prosecution to show that Mr. Damache committed the acts intentionally. The submissions mainly centred on the allegation that there was nothing to show that he knew about or supported the murder plot. Mr. Damache's submission was also that little, if any, detail is provided in Count Two to explain the factual circumstances of the offence.

4.3.2. In extradition requests, there is no requirement for the U.S.A. to prove a *prima facie* case. Thus, there is no requirement that the extradition request provides evidence of reasonable grounds for believing that the offence has been committed (as there must be for a request emanating from Ireland to the U.S.A.). Furthermore, as stated in *Stafford*, the matter of guilt or innocence is for the tribunal of fact in the requesting state. *Stafford* was a case in which the precise manner in which the alleged offences of murder/sexual assault had been carried out was unknown because nobody had ever been found. The case was based on circumstantial evidence. The Supreme Court held that there was no bar to extradition as the details of the offences alleged had been set out by reference to the circumstantial evidence from which the inference of murder/sexual assault might be made.

4.3.3. *Stafford* concerned the European Arrest Warrant Act 2003, as amended ("the Act of 2003"). Section 25(1)(b) of the Act of 1965 requires a statement of each offence specifying as accurately as possible the time and place of commission. The Treaty on Extradition between this State and the U.S.A. ("the Washington Treaty") refers to "a statement of the pertinent facts, indicating as accurately as possible the time and place of commission of the offence." That language of the Washington Treaty reflects the language contained in the European Convention on Extradition. That Convention may in certain circumstances be used in the interpretation of the Act of 1965 (see *Bourke v. Attorney General* [1972] 1 I.R. 36). Without the necessity for considering if it should so be used to interpret s. 25(1)(b), I am of the view that the provisions of the Washington Treaty must apply. This is because the terms of s. 25(1)(e) requires the request to be supported by any other document required under the relevant extradition provisions. As the Washington Treaty requires a statement of the pertinent facts this is a document required under the Act of 1965.

4.3.4. Therefore, this extradition request must recite the "pertinent facts." But to what must the facts be pertinent? In my view, the pertinent facts must be those which are directed towards the extradition process in the requested state. The Supreme Court decisions in *Desjatnikovs* and *Stafford* indicate as much. In *Stafford*, it was said that the description of the acts, or the acts alleged, "are the facts upon which the executing judicial authority may apply the law." In that case, an example of the need for facts was given, i.e. double criminality, namely the assessment of double criminality. In the case of *Desjatnikovs*, double criminality was not at issue and the example was given of the rule of speciality.

4.3.5. However, the Supreme Court (Denham J, as she then was) in *Desjatnikovs* identified a further reason for the requirement to give a factual description of the acts at para.35:-

"[a]n arrested person is entitled to be informed of the reasons for his arrest and of any charge against him in plain language which he can understand."

This is a further example of the necessity for the pertinent facts to reflect the extradition process in the requested state. It is in the requested state that the requested person is arrested and he or she is entitled to know the reason for that arrest and charge. It is clear that Peart J. in *Hamilton* was also of the view that this was a requirement, as he made reference to the details being required "not simply" that the respondent might be aware of why his extradition is sought. This requirement reflects our own constitutional requirements and the provisions of Article 5(2) of the European Convention on Human Rights.

4.3.6. I am also of the view that the decisions in *Desjatnikovs* and *Stafford* did not intend to be an exhaustive list of the reasons why a description of the acts involved was required by the EAW or by extradition requests under the Act of 1965. The categories the Supreme Court referred to simply arose either on the facts of the particular case or were cited because they are the most obvious reasons for such a requirement.

4.3.7. There is a further category that springs to mind arising from the provisions of the Act of 2003. Section 29 of the Act of 2003 concerns the role of the High Court where two or more EAWs are received in the State. The High Court must, having regard to all the circumstances, decide in relation to which of the EAWs it will perform its functions under the Act. The High Court shall have regard to:-

- (a) *The seriousness of the offence specified;*
- (b) *The place where the offences were committed or alleged to have been committed;*
- (c) *The dates on which the EAW were issued;*
- (d) *Whether the person is sought for prosecution or execution of sentence; and,*
- (e) *All the circumstances.*

The issues of seriousness, the place of commission and all the circumstances require the EAWs to give the description of the acts which form the basis for the offences or the alleged offences.

4.3.8. Section 30 of the Act of 2003 as amended provides for the situation where an EAW has been received for a person and there is also a request from a third country for the extradition of that person. In those circumstances, the High Court is not to perform any functions under the Act of 2003 in relation to the EAW until the Minister informs the High Court that (a) the request for extradition is not being proceeded with or (b) that the EAW is to have precedence over the request for extradition.

4.3.9. Under s. 24 of the Act of 1965, if extradition is requested concurrently by more than one country, either for the same offence or for different offences, the Minister shall decide which, if any, of the concurrent extradition requests should be proceeded with under Part 2 of the Act of 1965. Regard must be had to all the circumstances and "especially the relative seriousness and place of

commission of the offences....” That section reflects Article 17 of the European Convention on Extradition.

4.3.10. The Washington Treaty as integrated with the EU/U.S. extradition agreement (“the integrated Washington Treaty”) now provides for a different mechanism for determining “multiple requests” (see Article XII). A wider list of “relevant factors” is set out including a new reference to “the nationality of the victim”. Under Article XII, the executive authority of the requested state shall determine to which state, if any, it will surrender on foot of concurrent requests.

4.3.11. Article XII para. 2 provides that if Ireland receives a request for surrender from the U.S.A. and a request for surrender pursuant to the EAW for the same person, “its High Court, or such other authority as it may subsequently designate”, shall determine to which State, if any, the person is to be surrendered. Ireland opted to subsequently designate the Minister to play this role. Ireland did so by way of insertion of the above referred provisions of s. 30 of the Act of 2003 by way of amendment to that original section by the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012. Originally, s. 30 had provided for the High Court to make the determination as to which request should take precedence.

4.3.12. Although it is the Minister who must make the decision as to which concurrent request will be proceeded with regardless of the origin of the request, that decision can only be made where relevant information is provided. It must be inferred that for the purpose of a request from the U.S.A., that information is set out in “the pertinent facts” as outlined in the same Treaty. Under the integrated Washington Treaty, the Minister is obliged to consider a wide variety of factors including the places where each of the offences was committed, the respective interests of the requesting states, the seriousness of the offences and the nationality of the victim.

4.3.13. Notwithstanding that, it is the Minister who makes the ultimate decision on concurrent requests. The pertinent facts must address those considerations. They are in aid of the extradition process in the requested state, Ireland. The requesting state, namely the U.S.A., cannot be sure in advance of a request being acted upon, that no concurrent request will be made, particularly in a situation where extraterritorial jurisdiction is being asserted. Therefore, the request must contain enough information to satisfy all the interests in the process of extradition in Ireland.

4.3.14. Furthermore, it should also be noted that both the Act of 1965 and the Act of 2003 require that a legal description of the offence for which extradition or surrender as applicable is sought. That legal description or statement of law is required for a purpose. That purpose must also be relevant to the extradition process in the requested country. While it is not for the requested country to interpret the law, it is for the requested country to assess whether the statement of facts in the warrant, even on a broad interpretation, reflects an allegation of an offence specified in the legal description provided. To take an extreme example, if the legal description of the offence is that of murder and the factual statement indicates that a theft is alleged, then the warrant will be deficient as the respondent, on the basis of such dissonance, could not be sure of the reason for his or her arrest and charge.

Count One

4.3.15. Count One, the conspiracy offence, alleges that Mr. Damache conspired with others to provide material support and resources including, but not limited to, logistical support; recruitment services; financial support; identification documents and personnel and to conceal and disguise the nature; location source and ownership of such material support and resources, knowing and intending that the material support and resources were to be used in preparation for and in carrying out a violation of that section of the U.S. Federal Criminal Code which prohibits conspiracy to kill in a foreign country. The factual basis of that material support to a conspiracy to kill essentially relates to travelling to South Asia for explosives training and returning to Europe to wage violent jihad, namely by targeting both U.S. and Western European citizens.

4.3.16. From just one of the e-mail contacts set out in the superseding indictment, it is alleged that CC#2 sent Mr. Damache an e-mail saying that he, CC#2, was with T and that he “also go [CS] with brothers of AQ...the exact specialisation of me and my other group is ‘explosive’”. Mr. Damache is alleged to have responded by stating that his own “plan and the plan of my brothers here is to get a good training and then come back to Europe to do some plays”. In the context of the papers grounding the extradition request as a whole, it is clear that this is a reference to the use of explosives.

4.3.17. The documents in the extradition request show that under Count One, Mr. Damache is alleged to have played a specific, identified role in a conspiracy, namely to provide material support and resources to kill others (U.S. and Western European citizens) in a foreign country. The factual allegations indicating that role are clearly set out in the documentation. The conspiracy to kill is also clearly indicated insofar as it relates to the objective to have Mr. Damache and others acquire training in explosives and to return to Europe where these trainings would be used to kill U.S. and Western European citizens.

4.3.18. There is sufficient detail in the entire request and supporting documentation to amount to a statement of the offence which specifies as accurately as possible, the time and place of its commission and the pertinent facts regarding the charge he is facing. I am satisfied that Mr. Damache cannot be lacking in information as to the reason for his arrest and charge under Count One.

4.3.19. As set out previously, there is sufficient information for correspondence to be established. Similarly, given the degree of particularity with which the charge has been laid, I am of the view that should specialty become an issue, there is sufficient detail to circumscribe the offence for which he has been indicted.

4.3.20. I have also considered whether the Minister has sufficient information to carry out her functions should that become necessary in the case of a concurrent request. In so far as this is an allegation of a conspiracy which was never completed, it might be argued that there is no victim and therefore no need for any factual detail on the identification of intended victims. Even if such an argument is correct, an intended or putative victim may surely come within the concept of “relevant factor” as indicated in the provisions of the integrated Washington Treaty. Therefore, it is necessary to identify, as far as is possible, the identity of any intended victims of the alleged offence. In so far as the act of terrorism for which material support was to be provided may include the murder of Mr. Vilks, if Sweden wished to seek extradition for an alleged offence arising out of any alleged conspiracy or attempt to carry out such an act against its citizen, that information is something that the Minister will be able to take into account.

4.3.21. In so far as there are other potential victims referred to as U.S. and Western European citizens, I take the view that there is no difficulty in the lack of identity as to specific nationality. In the same way as the *Stafford* case identified that a circumstantial case may quite properly be the subject matter of an arrest under the EAW system (i.e. it was not possible to identify place and date of commission of the alleged offence), there is no difficulty where the offence is an inchoate one which may be lacking in final detailed planning. The conspiracy here is clearly criminal and well-described even if it has not reached the final stages of identifying specific targets.

4.3.22. Therefore, there is no deficiency in the warrant in respect of Count One and I am satisfied that the request for extradition has been made properly under s. 25 of the Act of 1965.

Count Two

4.3.23. In relation to Count Two, the information as to what is alleged against Mr. Damache is sketchy. I have described the allegations in some detail previously. The superseding indictment does not set out what act of international terrorism is alleged. Ms. Williams defined Count Two in terms of a conspiracy to steal the U.S. identity documents for use by a co-conspirator located in Pakistan who the group believed to be a member of Al-Qaeda. In making my determination as to whether there are deficiencies in the warrant, I am taking into account all the references to Count Two in the documentation. I am prepared to accept that the affidavit of Ms. Williams, in which she set out the dealings with regard to the identity documents, is meant also to apply to Count Two.

4.3.24. The statement of the offence relating to Count Two contrasts remarkably with the statement of the offence relating to Count One. Over 12 pages are devoted to Count One while a single paragraph is devoted to Count Two. Ms. Williams sought to flesh out this information and what she said has been outlined in detail above.

4.3.25. As per my decision in part 3 of this judgment, I consider that there is sufficient detail to enable me to assess whether there has been correspondence. Part of the facts clearly amount to an offence related to possession or attempted possession of stolen property or a conspiracy to commit theft. The offence alleged in the U.S. is not, however, merely possession of or dealing with a stolen passport. It is an allegation that such possession of, or dealing with, the passport was to facilitate an act of international terrorism contrary to the U.S. criminal code. I note that in para. 6 of her affidavit of the 18th March, 2013, Ms. Williams set out that in the U.S.A., the statute with which an individual is charged with violating is generally cited at the end of each count in an indictment. She stated that on occasion, additional statutes are cited in the body of a count simply, as in this case, as a reference for a term or phrase used in the test of the count. Thus, she made clear that the phrase "international terrorism" refers to the term as contained in the relevant statute cited.

4.3.26. The issue is whether the documentation provides such statement of the offence, including the time and date of its commission and the pertinent facts of the offence, which informs Mr. Damache of the reason for his arrest and charge on this offence. I have referred above to a situation where there may be a dissonance between the legal description of the offence as one of murder but a factual allegation of theft. Perhaps a more relevant example is as follows; what if the U.S.A. sought extradition for what they called an offence of dangerous driving causing death, which on the basis of their own statement of law required proof of death caused by the dangerous driving, and a factual statement alleging the mere driving of a dangerously defective car without reference to death was all that was provided in the extradition documents. In that situation, a factual basis for the allegation would have to be included in the documentation, *i.e.* a mere statement that he drove a defective car would not be enough and it would have to outline that a person was killed by the dangerous driving. Otherwise the details would not be sufficient for the requested person to know the reason for his arrest and charge *for that offence* of dangerous driving causing death.

4.3.27. In the present case, the documentation reveals that Mr. Damache is sought on a warrant for transferring, attempting to transfer or aiding and abetting the transfer of a U.S. passport and that the offence was committed to "facilitate an act of international terrorism (as defined in 18 U.S.C. s. 2331(1))". That is, in effect, a statement of the U.S. offence but it is not a statement of the particulars of the offence. The superseding indictment does not identify the factual basis for the claim that the offence was committed to "facilitate the act of international terrorism".

4.3.28. Ms. Williams sought to identify that factual basis in her affidavit. What she said is that evidence will establish that Mr. Damache conspired with others to steal the U.S. passport for use "by a co-conspirator located in Pakistan who the group believed to be a member of Al Qaeda."

4.3.29. Count Two does not charge a conspiracy offence. The U.S. proofs as set out in Ms. Williams' affidavit of the 7th December, 2012, require transfer, attempt to transfer or aiding and abetting the transfer of the document to *facilitate an act of international terrorism*. While I have accepted that the facts alleged show an attempt (at a minimum) to transfer an identity document knowing it was stolen, there is no clarity on the requirement that the foregoing was done "to facilitate an act of international terrorism".

4.3.30. Section 2331 of the U.S. Federal Criminal Code defines "international terrorism". For the purposes of this case it is sufficient to paraphrase the section as follows: international terrorism means activities that (a) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of U.S.A. or any State thereof, or would be so if committed in the jurisdiction of the U.S.A. or of any State thereof (b) appears to be intended to i) intimidate or coerce a civilian population (ii) influence the policy of a government by intimidation or coercion or (iii) affect the conduct of a government by mass destruction, assassination or kidnapping and (c) occur primarily outside the U.S. territorial jurisdiction or transcend national boundaries in one of a variety of means.

4.3.31. That definition has some similarities with the definition of terrorist activity as set out in the Act of 2005. It is not a precise reflection, however. More importantly in my view, the phrase "international terrorism" is used to connote a specific legal meaning within the U.S. Federal Criminal Code as indeed "terrorist activity" is used in Irish law to identify specific prohibited activity. More importantly, the superseding indictment itself points out that the act of international terrorism is defined in s. 2331(1) of Title 18 of the U.S. Federal Criminal Code.

4.3.32. From all of the foregoing, it can be seen that the reference to international terrorism is not a statement like murder or stealing that can be taken to have an ordinary meaning in the English language that obviates the necessity for a further explanation. This is not a phrase which has a commonly understood meaning but, more importantly, its meaning in the indictment was delineated by reference to the specific U.S. Federal Criminal Code.

4.3.33. To the extent that Ms. Williams' identifies the factual allegation with respect to the facilitation of an act of international terrorism as being that the identity document was for use by a co-conspirator located in Pakistan who the group believed to be a member of Al-Qaeda, I am entitled to apply the common understanding of the group Al-Qaeda. I, therefore, accept that this is a group which comes within a commonly understood meaning of a terrorist organisation (although the precise legal definition of such an organisation may vary from country to country). That fact brings the matter a step further. However, the issue is whether the documents in the extradition request provide an understanding to Mr. Damache of the basis for his arrest and charge on the specific aspect of facilitating an act of international terrorism.

4.3.34. In accordance with established case-law regarding the consideration of offences set out in extradition warrants (e.g. *Minister for Justice, Equality and Law Reform v. Dolny* [2009] IESC 48), I have read the extradition documents as a whole. I have therefore taken into account what is said in respect of Count One and the alleged activities there. Primarily those activities amount to the

conspiracy to create in Europe a terror cell capable of targeting both U.S. and Western European citizens. It is clear that it was the U.S. and Irish members of the group that were to return to Europe having been trained for this purpose (see para. 24 of the superseding indictment).

4.3.35. The reference in the affidavit of Ms. Williams to the co-conspirator being located in Pakistan shows that this was separate to any European based conspiracy. At first glance it might be perceived to be straining an interpretation of the information provided in the extradition request beyond what it may bear to hold that the act of international terrorism that is alleged in Count Two is the same act or acts as set out in Count One, namely the killing of U.S. and Western European citizens in Europe. To do so would be to incorrectly assume that Count One only has a European dimension.

4.3.36. On the contrary, the superseding indictment identifies as part of the conspiracy that Mr. Damache, Mr. Khalid, Ms. LaRose and others "recruited men online to wage violent jihad in South Asia and Europe." Thus it is clear that the conspiracy goes beyond the committal of acts of violent jihad in Europe but extends to violent jihad in South Asia. Therefore, the reference to the co-conspirator being located in Pakistan is a reference back to South Asia.

4.3.37. There is comfort provided for my understanding of the offence in the evidence of the expert witness engaged on behalf of Mr. Damache. Mr. Dratel, an experienced attorney whose credentials are set out later in this judgment, in dealing with sentencing as regards Count Two refers immediately after a reference to "facilitate an act of terrorism" to "an act in furtherance of the conspiracy to provide material support detailed in Count One." The inference from that averment is that Mr. Dratel understands that the act of terrorism is an act in furtherance of the conspiracy in Count One. Mr. Dratel is a highly experienced defence attorney and he appears to have had no difficulty in understanding what this charge was about. Occasionally criminal charges against people may be so complex that it is only with the help of a lawyer that the precise nature of the charge can be identified e.g. a charge of conspiracy to defraud may give rise to such difficulties. On the basis of the understanding of, and acceptance of the link with, Count One, it appears that the act of international terrorism is the waging of violent jihad in South Asia. In addition to the location of the alleged offence the term "violent jihad" would appear to fit the criteria set out in the relevant U.S. statute.

4.3.38. I have however considered whether Ms. Williams' affidavit of 7th December, 2012, excludes the consideration of violent jihad in South Asia as part of the conspiracy in Count One. At para. 31 she says that "the government's evidence will establish that Damache conspired [with others] to create a terror cell in Europe capable of targeting both U.S. and Western European citizens." It seems to me that Ms. Williams is thereby outlining a feature of the conspiracy was the creation of the cell in Europe which was to have the particular capabilities. The reach of the conspiracy is alleged to go beyond Europe as is clear from the superseding indictment itself. Her reference to co-conspirators in her explanation as to the offence under Count Two, can only be to the co-conspirators on Count One. That identification between co-conspirators makes the connection with South Asia violent jihad patent. That is the act of international terrorism at issue in Count Two.

4.4. Conclusion

4.4.1. In all the circumstances, I am not satisfied that there is a deficiency in the request for extradition and the supporting documentation in respect of either Count One or Count Two.

5. The Role of the Irish Human Rights and Equality Commission

5.1. Its Role as Amicus Curiae

5.1.1. On the 14th October, 2014, the Irish Human Rights and Equality Commission ("the IHREC") was granted permission to join the extradition proceedings as an *amicus curiae*. This order was made on consent of both parties. On the 25th November, 2014, a similar order was made in respect of the judicial review proceedings. Again, that order was made on consent.

5.1.2. In the extradition proceedings, neither the State nor Mr. Damache produced written submissions prior to the commencement of the case. The State's submissions were produced at an early stage in the course of the proceedings, although further submissions on particular points were submitted at a late stage in the initial hearing. Mr. Damache filed his submissions in two parts, together with a speaking note. Time was given to the IHREC to file written submissions and they did so on the 9th December, 2014. Counsel for the IHREC commenced his oral submissions on the 10th December, 2014.

5.1.3. Towards the end of the initial hearing of these proceedings in December 2014, counsel for the State sought, and was granted, leave to file written submissions in reply to the submissions of the IHREC. The first issue raised by the State in those submissions was the role of the *amicus curiae*. The submissions stated that "it is a feature of the written submissions made by the IHREC that certain assumptions and conclusions as to factual matters are made particularly so far as the issue of solitary confinement is concerned."

5.1.4. The State's submissions quoted extensively from the judgment of Clarke J. in *Fitzpatrick v. F.K.* [2006] IEHC 392, [2007] 2 I.R. 406. In that case, Clarke J. stated that an *amicus curiae* was more likely to be readily joined at the stage of a final appellant court as it was at that stage that the facts will be decided. Clarke J. observed that it was obvious therefore that an *amicus curiae* should not be permitted to involve itself in the specific facts of an individual case. Clarke J. said he was not persuaded that there was an absolute bar to parties being joined as *amicus curiae* at trial level. He expressed the view that the circumstances in which it would be appropriate to do so would ordinarily be confined to cases where there was no significant likelihood that the facts of an individual case are likely to be controversial or to have a significant affect on determining what issues of general importance may require to be determined.

5.1.5. The State complained that in circumstances where an *amicus curiae* seeks to become involved in proceedings at first instance, it should take care to avoid becoming embroiled in matters of fact. They complained that the IHREC commented liberally on the evidence and the conclusions to be drawn in relation to same. They submitted that the IHREC has very significantly overstepped the mark in terms of involving itself in such matters of fact.

5.1.6. In her affidavit grounding the motion for permission to appear as *amicus curiae*, Emily Logan, President of the IHREC, stated that the IHREC views its role as limited to assisting the Court with legal issues and so will not involve itself in factual disputes on the proceedings and will abstain from this aspect of the hearing. The Commission was of the view that the case raised important issues of human rights. One of those issues was whether there was a real risk that he would be subjected to inhuman and degrading treatment on the basis of the risk of incarceration at the U.S. Federal Prison known as Administrative Maximum, Florence, Colorado ("the ADX"), also known as a supermax prison.

5.1.7. At para. 27 of their written submissions, the *amicus curiae* made respectful observations on the facts of the case while also mindful of its undertaking not to entrench upon matters of factual dispute. The *amicus curiae* proceeded to outline nine facts which "do not appear to be contentious". It has to be said that those facts do seem wholly uncontested in any of the voluminous

documentation filed on both sides of this case. To the extent that the *amicus curiae* referred to at least a possibility that Mr. Damache would be imprisoned in the ADX, it is difficult to see how the State could quibble with that in circumstances where even on their own evidence, the U.S. officials accept that that is a decision that would be made after he is sentenced (if convicted). Nowhere in the State's case is it stated that there is no possibility that he will be sent to the ADX. The other matters are ones that are entirely agreed between the deponents of affidavits on both sides. The *amicus curiae* clearly says that the question of whether the evidence in fact satisfies the relevant constitutional or European Convention on Human Rights ("the ECHR") standards of proof is a matter for the Court. The *amicus curiae* does not put forward any recommended conclusion in that regard.

5.1.8. The *amicus curiae* went on to make further reference to affidavits and to posit some views on the facts outside those non-contentious issues. This, for example, occurred where the *amicus curiae* referred to the issue of whether there is an individualised assessment of the necessity for solitary confinement in each particular case.

5.1.9. The lateness of the complaint by the State in this regard is difficult to fathom. The written submissions were filed the day before counsel for the *amicus curiae* made his oral submissions. There was plenty of time to object in the course of the hearing to any perceived entrenchment upon issues of fact. It is the usual practice and indeed the appropriate practice to object in open court to the admissibility of evidence. Similarly, it is the usual practice and the appropriate practice to object in open court to submissions that stray beyond the pleadings or beyond the limited standing that a party may have in a particular case. I include here an *amicus curiae* within the concept of party. If such an approach had been adopted by the State, it would have allowed the Court to receive submissions from the *amicus curiae* as to how it could justify the reference to the facts in the case which went beyond what may be termed non-contentious ones. Furthermore, if I had ruled against the *amicus curiae*, the written submissions could have been withdrawn and re-drafted. Furthermore, the oral submissions could have been more focused.

5.1.10. It is also of relevance that the State consented to the IHREC becoming an *amicus curiae*. That order joining the *amicus curiae* was granted about six weeks before the trial at a time when many of the issues had crystallised between the parties. Those issues included the factual disputes between them. There was no objection at that time to the joining of the *amicus curiae*. It is therefore curious that at a late stage, the State relied upon the decision of Clarke J. to say that ordinarily an *amicus curiae* should only be joined where there is no significant likelihood that the facts of an individual case are likely to be controversial.

5.1.11. In my view, the reality was that in consenting to the joining of the *amicus curiae*, there was an acknowledgment by the State that most, if not all, of the facts would not give rise to significant controversy. Furthermore, the role for the Court would be to apply the appropriate law to those findings of facts. It is necessary for every party as regards a contentious issue to focus its points of law on the facts of the case. This also applies to an *amicus curiae*. It is simply unrealistic to suggest that submissions of law can take place in a factual vacuum.

5.1.12. Primarily, the State has complained about the role of the *amicus curiae* with respect to the issue of solitary confinement. As will be seen later in this judgment, the State relied on the decision of the European Court of Human Rights ("the ECtHR") in *Babar Ahmad & Ors v. The United Kingdom* (Applications Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April, 2012) (2013) 56 E.H.R.R. 1, [2012] E.C.H.R. 609 to say that those conditions do not violate Mr. Damache's constitutional rights or his rights under the ECHR to be protected from inhuman and degrading treatment. According to the ECtHR, at para. 209 of its decision, the question of whether prolonged removal from association with others falls within the ambit of Article 3 of the ECHR depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned. Thus, the State urged on the Court a test as regards a potential violation of the prohibition on inhuman and degrading treatment which required a consideration of a variety of factual circumstances of imprisonment. In those circumstances, it is wholly appropriate that the *amicus curiae* is free to comment on such facts as appear uncontroverted so as to assist the Court in its decision as to whether such facts as are, or may be, established amount to a breach of constitutional and ECHR rights.

5.1.13. Ultimately, it is for the Court to determine the facts, which, as will be demonstrated, must include a determination as to whether there are substantial grounds for believing that there is a real risk that Mr. Damache will be subjected to the impugned prison conditions. Based upon those findings of fact, the Court will then make a determination whether that imprisonment in those conditions would be a violation of constitutional and ECHR rights. Any finding of whether such detention is or is not a violation of constitutional and ECHR rights is by its nature a mixed finding of fact and law. A party dissatisfied with such ruling may seek to appeal it, and if so, will undoubtedly argue that the finding on the breach or non-breach of constitutional and ECHR rights, based upon the facts as found by this Court, is an appropriate matter for appeal.

5.1.14. In all those circumstances, it is wholly unreal to complain about the IHREC's commentary on the facts as are either agreed between the parties or may be so found. I therefore reject the criticism by the State of the IHREC's submissions. I will also observe that the State may need to give earlier consideration to both its decision to consent to the joining of an *amicus curiae* at a trial stage and to any objections that it may have to the subsequent submissions of that *amicus curiae*.

6. Federal Guidelines and Disproportionate Disregard for Character of the Accused

6.1. Issue

6.1.1. Under this heading, Mr. Damache objects to his surrender on the basis that if convicted, he would be subject to an unlawful and unconstitutional sentencing regime. In particular, he claims that the sentencing process mandated by the U.S. Federal Sentencing Guidelines ("the Sentencing Guidelines") lacks *de facto* judicial discretion and does not have regard to principles of proportionality and thus would amount to a flagrant denial of justice.

6.2. Evidence

6.2.1. Mr. Damache relies primarily upon expert evidence given in the affidavit of Mr. Joshua L. Dratel, an attorney licensed to practise law in New York State as well as a number of U.S. Federal District Courts, Circuits of Appeal and the United States Supreme Court. Mr. Dratel co-authored the 2003 Supplement of *Practice Under the Federal Sentencing Guidelines*, 4/e (Aspen Law & Business/Panel Publishers, 2003), and has lectured for the U.S. Administrative Office of the Courts (which supervises legal aid and appointed defence attorneys in the federal courts) on sentencing advocacy and the Sentencing Guidelines.

6.2.2. Mr. Damache also relied upon the evidence of Professor Laura Rovner. She is a graduate of Cornell Law School and has a Master of Laws degree from Georgetown University Law Center. She is the Ronald V. Yegge Clinical Director and Associate Professor of Law at the University of Denver Sturm College of Law and the founder and director of the Civil Rights Clinic clinical legal education programme in which she supervises law students who are representing clients in civil rights cases primarily in the areas of prisoners' rights. In that context in collaboration with private law firms she has represented several prisoners incarcerated at the U.S. Administrative Maximum Penitentiary, Florence, Colorado.

6.2.3. The affidavits presented in this case were voluminous. An understanding of the case being made necessitates the recital in some detail of what they contain. What is set out in this judgment is in effect a synopsis of the most relevant content of each affidavit. Much of the evidence set out in this part of the judgment is also relevant to other parts.

6.2.4 Mr. Dratel stated that if Mr. Damache is convicted in the U.S., he will be sentenced pursuant to federal law. The U.S. federal sentencing regime is determinate, in other words the sentences imposed are precise and discrete figures. Sentences in federal court are imposed by the judge (with the exception of capital cases), who possesses discretion, narrowed by certain processes and principles, to impose any sentence at or between the minimum and maximum prescribed by the applicable statute. Appellate review of federal sentences is exercised pursuant to a "reasonable" standard.

6.2.5. Mr. Dratel outlined how within the past three decades, U.S. federal sentencing has evolved from a purely discretionary, essentially un-reviewable process, to a rigid grid system with little elasticity, and then onto its current incarnation as a hybrid of both extremes in which discretion exists to a degree, but in which the Sentencing Guidelines remain the driving force behind the majority of sentences imposed, despite their advisory role. Prior to 1st November, 1987, sentencing courts, i.e. the District Courts of the U.S., possessed unguided discretion to impose a sentence anywhere between the minimum and maximum term available. Sentences were not appealable at all by the government and a defendant's appellate rights were limited to patent constitutional violations.

6.2.6. In November 1987, that system was replaced by the Sentencing Guidelines which attempted uniformity and "truth in sentencing" by assigning numerical values to "offense conduct" and a variety of other factors that would either increase or reduce the ultimate numerical offence level applicable to a particular defendant. As Mr. Dratel explained in his affidavit, the total offence level computed from the calculation operates on a vertical axis. A corresponding horizontal axis is the defendant's criminal history category (divided into six sections). At the intersection of the two axes is a range that expresses the applicable range for a Sentencing Guideline sentence. For example, a person at offence level 34 with criminal history 1 would correspond to a sentence in the range of 151 – 188 months. The sentencing court imposes a particular number within that range, e.g. in the above example, it could impose 160 months, which would constitute the defendant's sentence.

6.2.7. The U.S. Sentencing Commission promulgated these Sentencing Guidelines. This is an independent agency which is technically within the judicial branch of government. It was created and empowered to review and rationalise the federal sentencing process. The Sentencing Guidelines had the effect of law. They substantially limited sentencing discretion. Originally, the Sentencing Guidelines were criticised for their inflexibility. In a case called *United States v. Booker* 543 U.S. 220 (2005), the Sentencing Guidelines were challenged because they required judges to enhance sentences based on factors that the Sixth Amendment reserved for juries to decide. The U.S. Supreme Court agreed and thereby invalidated the mandatory nature of the Sentencing Guidelines. The court ruled that the Sentencing Guidelines would henceforth be advisory only and sentencing would be governed by the entirety of the relevant statute which enumerated seven factors for a sentencing court to consider in each case. Those factors include the nature and circumstances of the offence and the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentence disparities among defendants guilty of similar conduct and the need to provide restitution to victims.

6.2.8. Mr. Dratel stated that although the relevant section does not create a hierarchy among its seven factors, in fact and in practice the Sentencing Guidelines are treated as first among equals. He said this may be explained in large part because of the rigidly controlling nature of the Sentencing Guidelines during the extended period in which they were mandatory, and because the tenure of the vast majority of federal judges does not extend to the pre-Sentencing Guidelines' period of wholly discretionary sentencing (and makes that vast majority familiar only with sentencing within the Sentencing Guidelines). He also stated that the U.S. government often cites in its sentencing submissions that the U.S. Supreme Court has noted that:-

"a District Court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."

6.2.9. The U.S. Supreme Court has also held that sentences imposed within the Sentencing Guidelines may be afforded a presumption of reasonableness on appeal. Mr. Dratel stated that any sentences outside the Sentencing Guidelines are routinely described as variances. He stated that non-Sentencing Guidelines' sentences must be supported by objective, articulable criteria as a sentencing court "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. "

6.2.10. Statistics show that 51.2% of sentences are imposed within the prescribed Sentencing Guidelines' range. Mr. Dratel stated in his opinion, based on his expertise and experience and supported by the statistics, Mr. Damache would most likely if convicted receive a sentence within his applicable Sentencing Guidelines' range. Such a sentence would survive on appeal. The likelihood of a sentence imposed upon Mr. Damache within the Sentencing Guidelines is enhanced by the nature of the offences charged and the nature of the applicable Sentencing Guidelines. In relation to terrorism-related offences, the Sentencing Guidelines' ranges are aggravated by Guideline enhancements and often the Sentencing Guidelines' ranges exceed the statutory maximums for any individual offence charged.

6.2.11. Mr. Dratel averred that the statutory sentencing maximums for multiple counts of conviction can be aggravated and imposed consecutively to approach or be within the Sentencing Guidelines' range. Thus, he averred that Mr. Damache, charged in two counts, faces an aggregate forty-five years as a potential maximum total sentence, any or all of which can be imposed consecutively to conform with the Sentencing Guidelines' sentence.

6.2.12. Under Count One, charging conspiracy to provide material support to terrorists, the underlying offence sets the Sentencing Guidelines to be followed. Thus, conspiracy to kill in a foreign country is the relevant offence for the purpose of assessing the Sentencing Guidelines' sentence. The calculation of a sentence under the Sentencing Guidelines is a multi-step process but the same steps are followed methodically in each case. The steps are set out in detail but essentially Mr. Dratel stated that underlying the concept is an acknowledgement that judges have wide ranging authority to consider all relevant information, including information underlying acquitted offences and uncharged conduct and relevant conduct by a co-defendant or co-conspirator. Those issues will be dealt with in more detail later in this judgment.

6.2.13. With regard to the steps to be taken, the first step is to select the offence Guideline. The next step is to determine the base offence level. This is the minimum offence level applicable to a particular offence. One then goes on to specific offence characteristics and to how they contribute to the adjusted offence level. An example of this is the role played by a defendant, e.g. whether he was an organiser, leader, manager or supervisor in any criminal activity. The specific offence characteristics relevant to a

particular Sentencing Guideline are limited to only those characteristics specifically referred to within that Guideline for that offence. In addition, some Sentencing Guidelines also contain a section on cross references and special instructions that can alter the calculation of the offence level.

6.2.14. In relation to Mr. Damache's criminal history category, Mr. Dratel averred that foreign convictions would not count towards his criminal history category. However, since Count One qualifies as a felony that involved or was intended to promote a federal crime of terrorism, Mr. Damache's criminal history category would automatically be increased to category 6 without reference to his actual prior criminal record. This means that even a defendant without any prior criminal record would be treated as if he had the most extensive criminal history possible.

6.2.15. Mr. Dratel indicated that under U.S. law, each of the counts on the indictment are grouped together because the counts involve "the same victim and two or more acts or transactions connected to a common criminal objective or constituting part of a common scheme or plan." He averred that the combined offence level will be the highest offence level for any of the counts in the indictment.

6.2.16. Mr. Dratel put that level at 45 for Count One, not taking into account acceptance of responsibility. This is the highest offence level of the counts when grouped. He stated that this includes the 12 level enhancement for an offence involving or intending to promote terrorism, but does not include a leadership role enhancement which could increase this offence level by up to four points. A 45 level amounts to life imprisonment.

6.2.17. He stated in relation to Count Two that Mr. Damache's base offence level is 16 because, although the offence was committed other than for profit, it is then increased by 8 levels because the offence involved a U.S. passport and Mr. Damache is alleged to have known that the passport would be used to "facilitate the commission of a felony offence". In addition, as noted *ante*, because the offence was committed "to facilitate an act of international terrorism", an adjustment will apply to Count Two as well. He stated that because the 12 level additional to the base offence level of 16 results in an offence level of only 28 and a minimum offence level of 32 is prescribed in the Sentencing Guidelines, the offence level is automatically increased to 32. However, as it is a grouped offence, the offence level is that for the most serious offence, *i.e.* 45.

6.2.18. Thus, Mr. Dratel averred that within the resulting Sentencing Guideline range, assuming a conviction after trial and based on a mandated criminal history category of 6, the range is life in prison. He stated that even if Mr. Damache pleaded guilty and received a 3 point reduction for acceptance of responsibility, his offence level would be 42 corresponding to a Sentencing Guidelines range of 30 years to life.

6.2.19. The sentencing calculation for Mr. Damache would not be complete because both counts in the indictment indicate statutory maximum prison terms which fall below the prescribed Sentencing Guidelines' range of 30 years to life. Mr. Dratel averred the Court would be restricted to imposing a 15 year maximum sentence for conviction on Count One and a 30 year maximum sentence for conviction on Count Two but it would not be obliged to run the sentences concurrently.

6.2.20. He stated that the Court has discretion to decide whether concurrent or consecutive sentences are appropriate in a given situation. He said that part of the decision to run sentences consecutively reflects the seriousness or heinous nature of a crime or a strong risk of recidivism by the defendant. He averred that Mr. Damache's sentence could total as many as 45 years without either exceeding the statutory maximums or falling outside his recommended Sentencing Guidelines' range. He also stated that the majority of sentences are imposed within the applicable Sentencing Guidelines' range especially with regard to terrorist offences, making it unlikely that he would be sentenced to anything less than the 30 year floor of his Sentencing Guidelines' range. He stated that is reinforced by the sentencing court's ability to consider matters like the uncharged conduct such as the conspiracy to murder that is not among his charges but was alleged against certain of his co-conspirators.

Initial Affidavit of Ms. Williams

6.2.21. Ms. Williams in her replying affidavit took issue with some of Mr. Dratel's observations regarding the sentence procedure. Of relevance to the actual grounds ultimately relied upon by Mr. Damache, she averred that the Sentencing Guidelines are not arbitrary, they are based on sentencing practices from around the U.S. and therefore codify existing sentencing practices. Furthermore, the Sentencing Guidelines do not interfere with judicial independence but instead simply inform a sentencing court about how other judges have sentenced similar defendants for committing similar crimes. The sentencing judge in each case must then make an independent decision regarding the appropriate sentence to give in that particular case.

6.2.22. Ms. Williams continued in her affidavit to say that sentencing in the U.S. is far from a purely arithmetic exercise and that any argument to the contrary is outdated. Indeed, she notes that ever since the U.S. Supreme Court declared the Sentencing Guidelines to be "effectively advisory" in the *Booker* case of 2005, sentencing courts in the U.S. must consider the totality of circumstances when fashioning a sentence, with the Sentencing Guidelines being just one of the multiple factors that must be taken into account. Other factors include the defendant's own unique background, his/her specific criminal activity, the impact of same on any victims and whether the defendant would benefit from any particular medical or educational support. Ms. Williams quoted from the case of *US v. Tomko*, 562 F.3d 558 (3rd Cir. 2009) which states:-

"Our substantive review requires us not to focus on one or two factors, but on the totality of the circumstances... Indeed, one cannot presume that a sentence is unreasonable simply because it falls outside the advisory Guidelines range."

Replying Affidavit of Mr. Dratel

6.2.23. In reply, Mr. Dratel further said that he did not describe the development of the Sentencing Guidelines as being arbitrary but rather that the Guidelines' inflexible and formulaic application has not been significantly ameliorated by the mandate in *Booker* that the Sentencing Guidelines are merely advisory. Mr. Dratel went even further and stated that Ms. Williams avoid the point that it is the promotion of the Sentencing Guidelines' calculation over the other statutorily prescribed sentencing factors that results in a lack of differentiation between defendants convicted of similar offences with similar criminal histories. In this regard, Mr. Dratel referred to the case of *US v. Goff*, 501 F.3d 250, 253-57 (3d Cir. 2007) which involved a remanding for re-sentencing because the sentencing court afforded the Sentencing Guidelines "short shrift", by failing to consider the "seriousness of the offences," and disregarding "the need to avoid unwarranted sentence disparities," when it imposed a non-Sentencing Guidelines' sentence based on the conclusions of the defendant's psychiatrist, support letters from family and friends, his lack of criminal history and his previously "exemplary" life.

6.2.24. Mr. Dratel claimed that Ms. Williams assertion that the Sentencing Guidelines are used simply to inform a sentencing court

about how other judges have sentenced similar defendants for similar crimes and is one of the many factors taken into account is both inaccurate and disingenuous. It is inaccurate in that Mr. Dratel stated that the Sentencing Guidelines generally, and those applicable to terrorism offences specifically, are not based on sentencing data, either currently or historically. Rather than reflect prior or independent practice, the Sentencing Guidelines have dictated sentences in federal courts for nearly three decades. From 1987 to 2005, the Sentencing Guidelines were mandatory. As a result, current sentencing ranges are a function of the Sentencing Guidelines themselves, and not any independent source of sentencing authority or doctrine. He referred to what he said previously about the U.S. Supreme Court views and also referred to *US v. Langford* 516 F.3d 205, 212 (3d Cir. 2008), where it was stated "a correct calculation [of the Sentencing Guidelines], therefore, is crucial to the sentencing process and result."

6.2.25. Mr. Dratel further noted that absent a defendant's co-operation or some other formal agreement such as voluntary deportation, the U.S. government's position at sentencing has customarily been that a Sentencing Guidelines' sentence is the appropriate punishment for any convicted defendant regardless of personal history and background, medical or mental health condition, relative culpability for the offence, prior criminal record or lack thereof, family or employment circumstances, or any other potentially mitigating factor. Therefore, in Mr. Dratel's opinion, the U.S. Department of Justice's routine practice completely repudiates Ms. Williams's contentions.

6.2.26. Indeed, Mr. Dratel stated that in terrorism cases in particular, the defendant's personal background and character or particular circumstances are routinely overshadowed by the offence itself and referred to the case of *US v. Abu Ali*, 528 F.3d 210, 243-44 (4th Cir. 2008) which was appealed by the government and where the Fourth Circuit vacated the sentence and remanded for re-sentencing, remarking that:-

"...having given each rationale its "due deference" and viewing the entire decision as "a whole", we believe the additional reasons provided by the district court do not sufficiently "justify the extent of the variance"..."

Upon remand, Mr. Abu Ali was sentenced to life imprisonment without parole.

6.2.27. Mr. Dratel also referred to the case of *US v. Lynne Stewart* 590 F.3d 93 (2nd Cir. 2009), where the defendant received an increased sentence of ten years after a successful appeal against the original sentence. The appellate court repudiated the sentencing court's reliance on the fact that no violent acts occurred as a result of Ms. Stewart's conduct, and that no terrorist plots by others were consummated, instead, contrary to centuries of criminal jurisprudence, eliminating in terrorism cases any distinction between inchoate and completed crimes.

6.2.28. Mr. Dratel contended that in a similar fashion in other cases, even the practical impossibility of a completed terrorist act has not ameliorated severe sentences. He referred to a case involving a young, uneducated, unsophisticated defendant, unable to establish a link with any terrorist organisation or formulate any terrorist plot, who received a sentence of 27 years imprisonment. He referred to another case involving an offence solicited by a government informant, where even though the sentencing court stated that the offence would not have even been contemplated without the informant's inducement of the defendants which did not rise to the level of entrapment, the court was constrained to impose 25-year mandatory minimum prison terms.

6.2.29. Mr. Dratel viewed the above-mentioned cases and others like them, in which sentences in terrorism cases have been vacated as too lenient, as demonstrating that the ordinary rules applicable to sentencing in the U.S. do not necessarily apply in terrorism cases. Mr. Dratel went on to state that the Sentencing Guidelines' central role in determining an offender's sentence is further demonstrated by the fact that sentences within the applicable Sentencing Guidelines' range are granted a "presumption of reasonableness" on appeal and that sentences falling outside the Sentencing Guidelines' range are referred to as "variances" that must be sufficiently justified by objective, articulable criteria.

6.2.30. Mr. Dratel made reference to his statistics outlined in his initial affidavit and stated that these make clear that in practice, the range calculated from the Sentencing Guidelines is a dependable nationwide predictor of the sentence imposed on a particular defendant and that Sentencing Commission's own published data reaffirms this. In this regard, 53.3% of federal sentences imposed are within the applicable Sentencing Guidelines' range. Of those sentences outside the range, 2.4% were above the range, while 23.9% were accompanied by a government motion for downward departure, either for cooperation pursuant to §5K1.1 (7.6%), or pursuant to an early disposition program (linked to deportation) under §5K3.1 (10.4%), or some other government-sponsored downward departure ground (5.8%).

6.2.31. Mr. Dratel averred that in the Eastern District of Pennsylvania where Mr. Damache will be prosecuted if extradited, despite the percentage of sentences within the Sentencing Guidelines for Third Quarter 2014 being just 27.6%, 42.4% of sentences – the largest proportion in the entire U.S. – were below the Sentencing Guidelines only because the government moved for such relief due to the defendant's "substantial assistance" to the government, i.e. cooperation. Indeed, in this same district, only 26.1% of sentences were below the Sentencing Guidelines for reasons independent of a government motion. Mr. Dratel believed that this large proportion of below-Guidelines' sentences in this district attributable to a government motion in return for a defendant's cooperation explains the below-Guidelines' sentences imposed on Mr. Damache's co-conspirators, each of whom have provided substantial assistance to the government. Therefore, Mr. Dratel contended that Ms. Williams' assertion that the District Court would decline to impose consecutive sentences on Mr. Damache, as well, has no foundation and is misleading.

6.2.32. In relation to safeguards at sentencing, Mr. Dratel indicated that the federal rules of evidence are not applicable at sentencing, which allows for hearsay and other derivative evidence that would not be admissible at trial. Further on, Mr. Dratel, in referring to the conspiracy allegations against Mr. Damache, stated that the sentencing court could base such a finding on a variety of secondary evidence, such as trial testimony (and it need not even be from Mr. Damache's trial), and/or other hearsay. Evidentiary hearings with live testimony and cross-examination are rare even where there exist factual disputes that the sentencing court must resolve. In fact, the sentencing court is afforded ample discretion in determining the means of resolving such factual disagreements.

6.2.33. In particular, Mr. Dratel stated that the heightened risk of consecutive sentences in Mr. Damache's case arises from the fact that the prescribed Sentencing Guidelines' range is higher than the maximum sentence permitted under the statutes. He stated that if he were to be convicted, the District Court would be permitted, *if not compelled* by the presumption that a sentence within the Sentencing Guidelines' range would be appropriate, to impose the sentences consecutively in order to bring his sentence as close to the Guidelines' range as is statutorily permitted. In that regard, he refers to USSG §5G1.2 to the effect that:-

"if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall, run consecutively....to the extent necessary to produce a combined sentence equal to the total punishment."

6.2.34. It is unnecessary to detail the evidence given by Professor Rovner under this heading. In essence, she gave further examples of the practice within the federal system as regard to the use of the Sentencing Guidelines in sentencing thereby generally confirming Mr. Dratel's evidence.

Supplemental Affidavit of Ms. Williams

6.2.35. Ms. Williams commented mostly on the nature of uncharged and acquitted conduct sentencing in this replying affidavit but she noted in her final paragraph that a court has discretion to consider all relevant facts at sentencing, including the nature and circumstances of the offence, the background of the defendant, the need to deter future criminal conduct and protect the public, and the need to provide the defendant with educational or vocational training or other correctional treatment as was set out in the decision of *US v. Battles*, 745 F.3d 436, 461 (10th Cir.), cert. denied, 135 S. Ct. 355 (2014).

6.3. Submissions

Submissions on behalf of Mr. Damache

6.3.1. Counsel submitted that his client is almost certain to be convicted if extradited. Counsel submitted that a major concern of Mr. Damache relates to his potential treatment in the U.S. upon sentence and, in particular, to the lack of proportionality in federal sentencing practice. It is submitted that accused persons convicted of Muslim terrorist offences receive sentences that fail to properly reflect mitigation and that deny any nuance in terms of their level of culpability or personal characteristics. Despite the denials of Ms. Williams, current sentencing practice, as opposed to theory, appears to be a crude arithmetic process, lacking in any proper analysis of an offender's personal characteristics.

6.3.2. In essence, Mr. Damache pointed to the evidence that while the law may require that no limitation shall be placed upon the information concerning the background, character and conduct of the defendant, in practice there are limits on the extent to which the courts will consider these factors. Although the Sentencing Guidelines are merely advisory, it is submitted that in practice most District Courts consider the Sentencing Guidelines paramount almost to the exclusion of other factors. Counsel relied upon the U.S. Supreme Court view that the District Court should begin all sentencing proceedings by correctly calculating the applicable Sentencing Guidelines' range. The Sentencing Guidelines should be the starting point and benchmark.

6.3.3. It is therefore clear that there is a bias in favour of applying the rigid Guidelines in federal sentencing practice generally. Mr. Dratel is in a position to go further and give his own expert opinion in respect of the likelihood of such a sentence being applied in Mr. Damache's case. He described it as "rather unlikely" that he would receive less than the Sentencing Guideline-level sentence.

6.3.4. The U.S. government's position at sentencing in terrorism cases has been that a Sentencing Guidelines' sentence is the appropriate punishment for any convicted defendant regardless of personal history and background, medical conditions, culpability for the offence, criminal record, family or employment circumstances, or any other potentially mitigating factor.

6.3.5. Counsel for Mr. Damache submitted that while the State herein may argue that any small sample of cases could be used to substantiate such claims, it is worth noting that Ms. Williams has not sought to provide the Court with a single example of a terrorism prosecution where a below-Guideline sentence was given in the absence of a government motion for same. It was submitted that this is a telling omission.

6.3.6. Counsel for Mr. Damache urged that the point at issue is not that someone convicted of offences, such as those at issue, could receive a lengthy sentence, but it is the manner in which such a sentence is reached. It was contended that the inevitable approach to sentencing in his case would be irrational, unfair, disproportionate and an insufficient protection of his right to due process.

6.3.7. It was submitted that one matter of particular concern is the fact that the Sentencing Guidelines do not allow for consideration of any offender-related characteristics, apart from their previous criminal record. The apparent justification for this narrow approach is that other offender characteristics are not an accurate indicator of recidivism and should therefore be excluded from consideration. While questionable as a principle in and of itself, the treatment of terrorist offenders compounds any unfairness; as such an offender is automatically treated as having the worst possible criminal record. This leads to a higher points total and, inevitably, a higher sentence.

6.3.8. Counsel for Mr. Damache asked rhetorically whether such a procedure would pass a proportionality test if it was replicated in the sentencing practices of our own jurisdiction. This sentencing procedure amounts, it was submitted, to a flagrant denial of justice and a negation of our own core principles of sentencing. While there may be scope for the sentencing judge, in theory, to take into account the personal circumstances of the accused outside of the Sentencing Guidelines' calculation, in practice, the sentencing judge calculates the Sentencing Guidelines' sentence first in contested terrorism cases and does not deviate from it.

6.3.9. Similarly, counsel for Mr. Damache asserted that there appears to be no capacity for nuance in the manner in which the offence itself is characterised. Further sentence enhancements would be mandated, for example, (after a balance of probability finding) because there are five or more conspirators and Mr. Damache is alleged to be the leader (the "Damache-led group"). Counsel posed the question of whether it would matter if the plotters had been incompetent, unsophisticated, Walter-Mitty types or just doomed to fail; if they had been tracked by law enforcement at every stage; if their plotting had been encouraged by an *agent provocateur* on-line; and/or if some of the plotters would likely have pulled out before the objects of the plotting became a reality? In light of the multiple examples given by Mr. Dratel, the answer would appear to be no. Mr. Damache would be sentenced based on the type of offence and its applicable Sentencing Guidelines, rather than on the reality of that offence and his role in it.

6.3.10. Counsel also submitted that it is necessary to contrast the U.S. sentencing practice with our own clearly delineated and constitutionally-grounded law on sentencing. The key concept under our own sentencing law is proportionality. Proportionality is also a core principle in the Strasbourg jurisprudence. The essence of this principle in our own case-law can be found in the judgment of the Court of Criminal Appeal in *People (DPP) v. McCormack* [2000] 4 I.R. 356 at p.359:-

"[e]ach case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused."

6.3.11. Counsel pointed to the route of this principle as constitutional in origin, as opposed to merely legal. In *State (Healy) v.*

Donoghue [1976] I.R. 325, Henchy J. said at p. 353 that the constitutional guarantee of due process, fundamental rights and personal liberty:-

"...necessarily implies, at the very least, a guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner, or in circumstances, calculated to shut him out from a reasonable opportunity of establishing his innocence; or, where guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances."

6.3.12. Mr. Damache relied upon Professor Tom O'Malley, leading expert on Irish sentencing law, who, after commending our own discretionary sentencing practices in notes at para. 3-07 of his book, *Sentencing Law and Practice*, 2nd ed., (Thomson Round Hall, 2006), that:-

"[s]ome of the strategies introduced in other countries to structure judicial sentencing discretion need not be considered in any detail here as they would be generally unacceptable and possibly unconstitutional in Ireland. This is true of many of the guideline systems introduced in the United States...the circumstances in which a Judge can depart from this range are very limited, and downward departures are liable to be appealed by the prosecution. Few would deny that these guidelines have generated considerable consistency, even to the point of uniformity, in sentencing, but they have done so at a cost. Courts are severely limited in their capacity to take offender circumstances, especially socio-economic circumstances, into account. The result has been that many federal offenders now receive heavier sentences than in pre-guidelines days. Prosecutors now enjoy more discretion than ever. In deciding on the charges to be preferred they are, for all practical purposes, predetermining the ultimate sentence."

6.3.13. Counsel submitted that it seems clear from Mr. Dratel's review of sentencing in terrorism cases that proportionality is not a guiding consideration in federal law. This would accord with O'Malley's own treatment of U.S. sentencing law, where he notes on p. 82 that the courts of the U.S.A.:-

"have relied on a statement in Justice Kennedy's plurality opinion [in Harmelin v. Michigan (1991)] that the Eight Amendment does not require strict proportionality between crime and punishment; all it forbids are extreme sentences that are grossly disproportionate to the crime."

Professor O'Malley goes on to comment that the Eight Amendment, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted", is largely ineffective in securing proportionate punishment in non-capital cases.

6.3.14. Counsel submitted that the absence of proportionality in federal sentencing, certainly at the level of practice in terrorism cases if not at the level of theory also, amounts to a clear breach of Articles 38.1, 40.3.1 and 40.3.2 of our Constitution. Moreover, Articles 3, 5 & 6 of the European Convention on Human Rights ("the ECHR") would also be breached by the application of such sentencing provisions. Arising from the affidavits of laws before the Court, there is clear evidence that such principles are likely to be applied in Mr. Damache's case. Counsel submitted that the differences in sentencing regimes went beyond mere difference but instead was a fundamental departure amounting to a flagrant denial of justice.

Submissions on behalf of the State

6.3.15. The State submitted that the argument made by Mr. Damache under this heading is an argument of degree and is one which applies throughout the scale of seriousness of criminal offences, i.e. that the accused is entitled to have his character taken account of for the purpose of both serious and minor offences. Moreover, it would appear to be common case that in fact, the Sentencing Guidelines do allow account to be taken of the personal circumstances of the specific accused, albeit to a lesser degree than might be customary in this jurisdiction.

6.3.16. In those circumstances, the State submitted that it is not capable to regard the situation which may arise under the Sentencing Guidelines as a flagrant denial of justice or an egregious breach.

6.3.17. The State also submitted that perhaps, more importantly, it would seem to follow from the argument made that if it is correct, then any mandatory sentence of any sort is objectionable. Specifically, the imposition of a mandatory life sentence for murder in this jurisdiction does not take any account of the offender's personal circumstances. The fact that this may be to some degree ameliorated by the availability of temporary release or release on licence is entirely beside the point.

6.3.18. Counsel referred also to the presumptive and ultimately mandatory (in the case of a second or subsequent conviction) sentence of 10 years for an offence contrary to s. 15A of the Misuse of Drugs Act 1977 ("the Act of 1977"). Counsel observed that it is quite extraordinary that these sentencing provisions have not been the subject of a constitutional or ECHR challenge since their introduction into law if, they amount to the egregious breach of constitutional principle and a flagrant denial of justice that Mr. Damache suggests.

6.3.19. The State also submitted that the argument advanced is largely decoupled from the evidence. Even Mr. Damache's own deponents acknowledged that a substantial proportion of sentences are imposed outside the Sentencing Guidelines. As such, the apprehension of an arithmetically derived sentence which takes no account of the circumstances of the case is more imagined than real. Counsel observed that a person facing the prospect of the Sentencing Guidelines has better grounds for optimism than an accused facing a second or subsequent s. 15A conviction here.

6.3.20. It is also relevant that Mr. Damache suggested that the argument is not about the possibility of a very heavy sentence being imposed – rather it is the manner in which it is imposed that is of concern. In truth, the Court is not asked to consider the impropriety of the ultimate result but rather the impropriety attaching to the process. It is submitted that this is to misconceive the nature of an extradition hearing. What Mr. Damache would have the Court engage in is more in the nature of what might be expected on an appeal against a sentence – a sentence that has not as yet been imposed.

6.3.21. Finally, under this heading, it is submitted that reference might usefully be made to the decision of the European Court of Human Rights ("the ECtHR") in *Vinter and Others v. United Kingdom* (Application Nos. 66069/09, 130/10 and 3896/10, 9th July, 2013) (2012) 55 E.H.R.R. 34, [2012] E.C.H.R. 61 and in particular para. 105 of same. The court specifically noted that countries enjoyed a wide margin insofar as the imposition of sentence is concerned:-

"105. In addition, as the Court of Appeal observed in R v. Oakes (see paragraph 50 above), issues relating to just and

proportionate punishment are the subject of rational debate and civilised disagreement. Accordingly, Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court (see T. v. the United Kingdom [GC], no. 24724/94, § 117, 16 December 1999; V. v. the United Kingdom [GC], no. 24888/94, § 118, ECHR 1999-IX; and Sawoniuk v. the United Kingdom (dec.), no. 63716/00, ECHR 2001-VI)."

6.3.22. It is submitted that no egregious breach or flagrant denial of justice can be regarded as arising here in circumstances where the Sentencing Guidelines clearly fall within the wide margin to be accorded to friendly nations.

6.3.23. The *amicus curiae* made no submissions under this particular heading but did assist the Court generally with the test to be applied when the Court is considering an apprehended breach of fundamental rights.

6.4. The Court's Analysis

The Test to be Applied to an Apprehended Breach of Fundamental Rights

6.4.1. Taking an overview of the entire case presented on behalf of Mr. Damache, it is possible to divide his objections into two separate headings. He objects to his surrender on the basis (a) that he will be subjected to inhuman and degrading treatment or (b) he will be subjected to violations of other fundamental rights. Protection from inhuman and degrading treatment is viewed as an absolute right, a right to a fair trial is fundamental but different legal systems may give rise to inherently different concepts of fair trial, while freedom to manifest religion may be subject to certain defined limitations. The difference between the nature of the rights has implications for the manner and extent to which they are protected in the context of an apprehended breach as a result of extradition.

6.4.2. The points of objection filed by Mr. Damache under this heading made the simple claim that there was a significant risk that he would, if surrendered and convicted, be subject to an unlawful and unconstitutional sentencing regime, not in accordance with the constitutional imperatives in this jurisdiction. His written submissions focused on the difference between U.S. and Irish constitutional guarantees regarding sentencing. It was only at the oral stage that reference, albeit brief, was made to the actual test required to prohibit extradition on the basis of an alleged breach of fair trial rights. That test, as the case-law demonstrates, is an exacting one.

6.4.3. In submissions concerning the issue of practice of religious rights, counsel for the *amicus curiae* helpfully brought the attention of the Court to the case *R. (B) v. Secretary of State for the Home Department* [2014] 1 W.L.R. 4188 which dealt, in an asylum law context, with the issue of removal to another European Union Member State where it was claimed there would be a denial of religious rights. The Court of Appeal of England and Wales stated at para. 19 that:-

"The courts have drawn a distinction between (i) alleged violations of Articles 2 and 3 (which require 'real risk' of violation) and (ii) alleged violations of other Convention rights (which require a 'flagrant' violation)."

6.4.4. That quote captures the distinction between the tests to be applied to different claims of violations of rights in extradition cases also. The European Court of Human Rights ("the ECtHR") held in *Othman (Abu Qatada) v. United Kingdom* (Application No. 8139/09, 17th January, 2012) (2012) 55 E.H.R.R. 1, [2012] E.C.H.R. 56 that Article 6 only required a refusal to extradite where there would be a flagrant denial of justice in the requesting state. The term "flagrant denial of justice" is synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. In the view of the ECtHR, a stringent test of unfairness requires a breach of the Article 6 fair trial guarantees which is so fundamental as to amount to a nullification or destruction of the very essence of the right guaranteed by that Article. While that case refers to violations of ECHR rights, it will be seen that the distinction applies in the case of claims of violation of constitutional rights.

6.4.5. The language of flagrant violation mirrors that in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 24. The Supreme Court (Murray C.J.) held that it would take egregious circumstances, "such as a clearly established and fundamental defect in the system of justice of a requesting state", for surrender under the European Arrest Warrant Act 2003 ("the Act of 2003") to be refused on the basis of a breach of fundamental criminal justice rights. That test in *Brennan* is the test which must apply to considerations of whether extradition or surrender will constitute a breach of constitutional rights. Certain rights enshrined in our Constitution specifically address rights that arise in our own system for the administration of justice. An example is our constitutional imperative of trial by jury for non-minor offences. There is no constitutional right subsisting in a requested person to have the same rights and procedures applied to him or her in the requesting state as would be applied to him or her if facing trial in this jurisdiction. The constitutional right is not to be extradited to a jurisdiction where there will be a flagrant violation of the right to a fair trial.

6.4.6. The High Court (Edwards J.) in *Minister for Justice v. Nolan* [2012] IEHC 249 analysed the approach the Court should take to the protection of constitutional rights when faced with a request for surrender under the European Arrest Warrant ("the EAW") system. Relying upon the decision of the Supreme Court (O'Donnell J.) in *Nottinghamshire County Council v. B & Ors.* [2011] IESC 48, Edwards J. identified, at paras. 104-113, the following six principles when considering whether a return would breach the obligation to protect constitutional rights:-

"1....[t]he focus of the court's enquiry should be on the act of surrender itself. In this regard, it must be asked whether (to paraphrase O'Donnell J.) what is apprehended as being likely to happen in the issuing State is something which would depart so markedly from the essential scheme an order envisaged by the Constitution and be such a direct consequence of the court's order that surrender is not permitted by the Constitution.

2...[t]he constitutional rights at issue must be precisely identified.

3...[b]efore the court proceeds to measure the particular provision of the law of the foreign state at issue against the standards and norms required by the Constitution of Ireland for the purpose of judging whether that law, either in its terms or in its effect, meets those standards, consideration must be given to the focus of application of the constitutional provision or provisions relied upon. Are they primarily intended to apply to the situation of persons who are within the jurisdiction of Ireland and its courts (i.e. to what occurs in Ireland) or are they truly fundamental in the sense of being regarded as of universal application?

4...[s]ufficient proximity is required to be demonstrated between the proposed surrender and the apprehended harm that will or may arise from the circumstance complained of as being egregious.

5...[r]egard may be had to the nature and degree of the differences between the law of the requesting state and the law which it is asserted the Irish Constitution would permit or require in this jurisdiction, bearing in mind that it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland...

6...[t]he Court may also consider and have regard to whether what is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances."

6.4.7. Therefore, Mr. Damache must go further than a mere demonstration that the system of justice in the U.S.A. would be unconstitutional if an attempt was made to operate such a system here. He must demonstrate that the precise constitutional right to which he lays claim is truly fundamental in the sense of being of universal application and that he must establish an egregious circumstance within the system of justice of which he complains amounting to a flagrant denial of justice. Where an absolute right is involved, such as protection from inhuman and degrading treatment, Mr. Damache would not have to establish a flagrant violation.

The Standard of Proof

6.4.8. In the first test outlined in Nolan above, Edwards J. referred to "what is apprehended as being likely to happen in the issuing State." He concluded that the respondent satisfied the contention that what was apprehended as likely to happen would be such a marked departure from the essential scheme and order of the Constitution as to prohibit his surrender. A question arises therefore as to whether this lays down a standard of proof of the balance of probabilities in respect of establishing an apprehended breach of rights. The standard of proof has been directly addressed in the context of the prohibition on inhuman and degrading treatment. It is beneficial to consider that standard as a starting point for the consideration of apprehended breaches of fundamental rights generally.

The Standard of Proof for Establishing Apprehended Inhuman and Degrading Treatment

6.4.9. The *amicus curiae*, at the request of the Court, addressed the appropriate test concerning extradition (as distinct from surrender under the EAW system) and an apprehended breach of fundamental rights and in particular fundamental constitutional rights. As regards a prospective breach of constitutional rights, the *amicus curiae* submitted that no rigid formula was applicable, although probability has been applied as a standard of proof in *Finucane v. McMahon* [1990] 1 I.R. 165 and *Russell v. Fanning* [1988] 1 I.R. 505. In *Finucane*, Finlay C.J. stated at pp. 203-204 as follows:-

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

I am satisfied that Finlay C.J. was not pointing to the balance of probability as the standard of proof for all apprehended breaches of constitutional rights, but that the nature of the proof required would depend on the various circumstances he outlined.

6.4.10. The *amicus curiae* also points to the standard posited by McCarthy J. in *Finucane* where there is an allegation of risk of ill-treatment in the requesting state. McCarthy J. observed that it may be impossible to prove the probability of ill-treatment despite there being a very real danger of such. He held at p. 226:-

"[i]n my view, the courts charged with the protection of the Constitution and of the citizens whose fundamental rights are thereby guaranteed defence and vindication would fail in their duty if, being satisfied that there is a real danger that a citizen delivered out of the jurisdiction will be ill-treated, did not refuse to permit such delivery. In the light of that, the courts must look at the circumstances of each case."

6.4.11. Counsel for the *amicus curiae* pointed out that this formulation of the relevant standard resonates closely with the standard of proof identified subsequently by the Supreme Court in *Minister for Justice Equality and Law Reform v. Rettinger* [2010] IESC 45 [2010] 3 I.R. 785.

6.4.12. Throughout the submissions of all counsel in the present case, repeated reference was made to the principles set out in *Rettinger*. That case concerned an objection to surrender on foot of an EAW on the basis of an anticipated breach of the prohibition on inhuman and degrading treatment arising from prison conditions in Poland. Two judgments were given and the third judge in the case agreed with both judgments. The most frequently quoted test is that set out by Denham J., as she then was, at paras. 31 and 32 as follows:-

"31. Thus I would apply the following principles:-

(i) a court should consider all the material before it, and if necessary material obtained of its own motion;

(ii) a court should examine whether there is a real risk, in a rigorous examination;

(iii) the burden rests upon a respondent, such as the respondent in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention;

(iv) it is open to a requesting state to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting state with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting state may present evidence which would, or would not, dispel the view of the court;

(v) the court should examine the foreseeable consequences of sending a person to the requesting state;

(vi) the court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America.

(vii) the mere possibility of ill-treatment is not sufficient to establish a respondent's case;

(viii) the relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary;

32. The above test should be applied in an application such as this".

Denham J. focused on a breach of Article 3 of the ECHR. The context for that is set out earlier in her judgment where she referred to the requirement under s. 37(1)(a) of the Act of 2003 to refuse surrender if it would be incompatible with the State's obligations under the ECHR or its protocols.

6.4.13. On the other hand, Fennelly J. in his judgment in *Rettinger* referred to the provisions of s.37(1)(c)(iii)(II) of the Act of 2003. The relevant provisions are as follows:-

"S37(1) A person shall not be surrendered under this Act if-

(c)there are reasonable grounds for believing that –
(iii) were the person to be surrendered to the issuing state –

(II) he or she would be tortured or subject to other inhuman or degrading treatment."

Fennelly J. noted that the subsection referred to reasonable grounds for believing that the person would be subjected to inhuman or degrading treatment. He noted that the ECtHR spoke of substantial grounds for believing that the requested person would face a real risk of being subjected to torture or inhuman or degrading punishment. Fennelly J held, at para. 74:-

"[t]he subject matter of the enquiry is the level of danger to which the person is exposed. There is no discernible difference between 'reasonable grounds' and 'substantial grounds'. It is equally clear that it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a 'real risk'... It is appropriate to the seriousness of the subject matter. It would be absurd to require a person threatened with expulsion to a state where he may be exposed to inhuman or degrading treatment, not to mention torture, to prove that he would probably suffer such treatment. It must be sufficient to establish 'real risk'."

Ultimately he held that it was enough for a requested person "to establish reasonable or substantial grounds for believing that there would be a real risk" of inhuman or degrading treatment. Fennelly J. went on to say that a judge may regard the silence and failure to respond to specific allegations as significant and may persuade a person of the truth of the allegations, but that this is a question of assessment of the plausibility and weight of the evidence. In particular, evidence of the mere possibility of ill-treatment is not enough but evidence should be related to the specific situation of the person opposing surrender.

6.4.14. The State, in written submissions, said that there would appear to be little dispute but that the appropriate test to be applied in relation to objections grounded on concerns as to inhuman and degrading treatment are as identified in *Rettinger*. The submissions note that s. 11 of the Extradition Act 1965 ("the Act of 1965") seems to anticipate precisely such a test:-

"(1) Extradition shall not be granted for an offence which is a political offence or an offence connected with political offence.

(2) The same rule shall apply if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that the person's position may be prejudiced for any of these reasons.

(2A) The same rule shall apply if there are substantial grounds for believing that if the request for extradition is granted the person claimed maybe subjected to torture."

That latter subsection was inserted by the Criminal Justice (United Nations Convention Against Torture) Act 2000 ("the Act of 2000"). Torture under the Act of 1965 has the meaning assigned to it in the Act of 2000. That definition extends beyond matters that are inhuman and degrading treatment.

6.4.15. The submissions of the *amicus curiae* drew the attention of the Court to *Attorney General v. Piotrowski* [2014] IEHC 540 in which the High Court (Edwards J.) refused an extradition to the Ukraine on the basis of prison conditions, stating that the *Rettinger* principles apply in an extradition as well as an EAW context. Edwards J. stated at para. 95:-

"[a]s regards to the substantive issue, it is accepted by both sides that the law is as laid down by the Supreme Court in *Minister for Justice Equality and Law Reform v. Rettinger* [2010] 3 IR 783, suitably adapted to the extradition context."

6.4.16. One other matter worthy of consideration is that the *Rettinger* test was adopted in the context of the Framework Decision on the European Arrest Warrant and the Act of 2003 which assumed and presumed respectively that the issuing Member State will "respect human rights and fundamental rights and fundamental freedoms". There is, as the High Court (Edwards J.) held in *Attorney General v. O'Gara* [2012] IEHC 179, also a presumption that arises in extradition cases under the Act of 1965 that the requesting country will act in good faith and that it will respect the fundamental rights of the requested person. This is a weaker presumption and more easily rebutted than the presumption under the Act of 2003. Rebuttal of the presumption does not of itself establish the existence of a real risk but it puts the court on enquiry as to whether there is a real risk.

6.4.17. The test as set out by Denham J. in *Rettinger* is designed to protect one of the most fundamental rights of all, i.e. the right to be protected from inhuman and degrading treatment. It is not contested that, at a minimum, the constitutional guarantee of protection of the person prohibits inhuman and degrading treatment. In those circumstances, the vindication of the constitutional right of protection of the person requires a similar test, i.e. substantial grounds for believing that there is a real risk of being subjected to treatment prohibited by the Constitution. Thus, it is not necessary to go as far as proving that ill-treatment is probable. In my view, the logic of the decision in *Rettinger* combined with the decision in *Piotrowski* demands this approach to the protection of absolute constitutional rights and not simply in relation to ECHR rights. I use the words "substantial grounds" as this accords with the tests identified in *Rettinger*, as set out by the ECtHR and as specified in the Act of 1965 as far as torture is concerned. The reference to "reasonable grounds" forms part of the statutory test in s. 37 of the Act of 2003 and has been identified as not being discernibly

different from “substantial grounds”.

6.4.18. Therefore, the standard of proof for a breach of the prohibition on inhuman and degrading treatment, whether under the Constitution or under the ECHR, is that the requested person must establish substantial grounds for believing that there is a real risk of being subjected to such prohibited treatment in the requesting state.

The Standard of Proof for Other Apprehended Breaches of Fundamental Rights

6.4.19. I have identified above what may appear to be nuanced differences in the standard of proof for other apprehended breaches of fundamental rights. The *Nolan* case and the *Othman* case may suggest a difference between the treatment of an apprehended breach of the constitutional right to fair trial and a breach of ECHR Article 6 fair trial rights. In the written submissions of the State, it was expressly stated that it would appear that a *Rettinger* test “applies so far as anticipated breaches of Article 6 of the Convention are concerned.” The ECtHR held in *Othman* at para. 261 that in so far as assessing whether the test of “*flagrant denial of justice*” had been met “*the same standard and burden of proof should apply as in Article 3 expulsion cases.*” I am satisfied that the State are correct in their submissions regarding the test to apply to an apprehended breach of an Article 6 right. Therefore the respondent must “adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from [this State], he would be exposed to a real risk of being subjected to a flagrant denial of justice.”

6.4.20. In terms of an apprehended breach of the constitutional right to a fair trial. I do not believe that Edwards J. in *Nolan* sought to lay down a higher standard of proof than that which applies to Article 3 save of course that it is a flagrant denial of justice which must be established. I consider that the Supreme Court in *Nottinghamshire County Council v. B & Ors.*, a child abduction case, did not attempt to set the standard of proof for extradition cases. That judgment is focused upon how the issue of a perceived breach of constitutional rights is to be resolved in the context of the constitutional position that Ireland gives to its international relations.

6.4.21. It is difficult to find any objective reason for a difference in standard of proof between apprehended breaches of constitutional rights and ECHR rights. Indeed any difference would be entirely illogical. Therefore, I am not satisfied that there is any justification for imposing a higher standard of proof on a respondent who claims an apprehended breach of a constitutional right to a fair trial than that of establishing on substantial grounds a real risk that he will be subjected to a flagrant violation of those rights. That is, to borrow the words of the ECtHR “*a stringent test of unfairness*”. I, therefore, determine the same standard applies.

6.4.22. Therefore, a respondent in dealing with an anticipated breach of a fair trial right will be required to establish the flagrant denial of justice and that there are substantial grounds for believing that he or she is at real risk of being subjected to such flagrant denial if extradited.

6.4.23 The State submitted that a *Rettinger* test did not apply to the question of a breach of religious rights (whether under the Constitution or the ECHR). I will deal with this specifically at Part 11 of this judgment concerning prison conditions in the ADX and the practice of religion.

Has a Flagrant Denial of Justice Been Established?

6.4.24. At the outset, it must be observed that this is an argument that centres on the sentencing regime that Mr. Damache is likely to face. Sentencing issues will only come into play if he is convicted. In the context of the particular submissions regarding sentencing procedures, this Court is of the view that there are certainly substantial grounds for believing that Mr. Damache is at real risk of being convicted and therefore subjected to a sentencing process. The fact of being the subject matter of an extradition request itself establishes the substantial ground that there is a real risk of being convicted of the offence. It would be inconceivable that a country would call in aid the system of extradition where there no real risk that the requested person would be convicted.

6.4.25. In engaging with these issues of sentence, there may be a perception, albeit a clearly incorrect one, that this Court is trespassing on the entitlement of Mr. Damache to be presumed innocent. For the avoidance of any doubt, this Court makes clear that he is entitled to be presumed innocent and the Court at all times treats him as such. However, the Court is obliged to deal with questions of fundamental rights and that necessarily entails an assessment of the risk to him should he be convicted. It is in that context that issues of sentencing and indeed conditions of incarceration on conviction must be addressed.

6.4.26. Despite the wording of the points of objection, counsel for Mr. Damache asserted that the sentencing procedures outlined above would amount to a flagrant denial of justice. In doing so, he relied upon the Irish courts requirement of proportionality within sentencing and submitted that the ECtHR also requires proportionality. With respect to the latter proposition, no specific case was relied upon by him to demonstrate that the type of sentencing procedure adopted by the U.S. would be prohibited under the ECHR. The U.S. sentencing process for these offences, as set out on the evidence adduced on behalf of Mr. Damache, is not mandatory. The process does permit, albeit in a limited fashion, some recourse to the individual circumstances of the offender as well as the circumstances of the offence. Even if it only remains at the level of possibility, nonetheless individual circumstances may be taken into account.

6.4.27. Most importantly, nothing has been produced to me that shows that the provision of a mandatory sentence (as in murder) or a presumptive mandatory minimum (as in s.15A of the Act of 1977), which clearly reflect a focus on the offence and not the offender, is unconstitutional or contrary to the ECHR. Indeed, those legislative provisions are presumed constitutional. If there is an apparent conflict between those provisions and the statements by the Superior Courts that sentencing must require proportionality between the offence and the offender, that conflict is quickly resolved by a reminder that some offences are so serious that they may simply outweigh individual consideration of an offender's particular circumstances.

6.4.28. From the evidence of Mr. Dratel, which as regards its details is unchallenged, the sentencing procedure in the U.S. follows Sentencing Guidelines which indicate an initial numerical approach to the calculation of an appropriate sentence based upon a calculation of offence level and the criminal history of the offender (albeit certain offences, gives high points under this latter heading even in the absence of convictions). Those Sentencing Guidelines provide, *inter alia*, for a reduction in the case of a plea of guilty and enhancement for leadership or management role in the offending behaviour. Importantly, the Sentencing Guidelines are not mandatory and can be departed from on a reasoned basis.

6.4.29. Leaving aside issues as to enhancement of sentence for relevant or other conduct, Mr. Dratel's evidence as to the manner in which the Sentencing Guideline sentences would be calculated in Mr. Damache's situation was unchallenged in any material aspect. His opinion that these calculations would result in particular Sentencing Guideline sentences was not challenged. What was challenged by the U.S. authorities was the inevitability of those sentences being imposed primarily on the basis that it was not possible to predict sentences in advance and that the Sentencing Guidelines were not the entire basis for the imposition of sentence. On the

basis of the totality of the evidence put before me as to why the Sentencing Guideline sentences will take precedence in this case over other considerations, I accept that the sentencing provisions are far more likely than not to result in a sentence in accordance with the Sentencing Guidelines. That is clear from the evidence regarding the terrorist nature of these alleged offences which leads to the particular range which is in excess of the statutory maximum, the lack of any particular reason as to why the sentenced might be reduced to below guideline, the fact that sentences which are below the Sentencing Guidelines are usually as a result of a government motion and the fact that terrorist offences in particular usually result in a within Sentencing Guidelines range.

6.4.30 Yet the acceptance of that fact does not establish a flagrant denial of justice in a system which determines that this type of offending behaviour should usually, or even almost invariably, attract a sentence at the very highest reach of the maximum possible set down by law. Even the increased points on the horizontal axis (criminal history) that would be accorded to Mr. Damache are far from amounting to an egregious breach of his rights. In light of the designated nature of the offences as international terrorism, it is on the contrary recognition that this type of offending may, in the view of the requesting state, merit a sentence at the highest end of their permissible sentencing scale.

6.4.31. Although I refer to "this type of offending", it is recognised that a difference in sentence parameters between states would not of itself amount to a flagrant denial of justice. I would, however, leave open the possibility that in exceptional circumstances, a particularly extreme sentencing provision might amount to a flagrant denial of justice where it was to be imposed for the most trivial of offences. Alternatively, it may be open to establishing that such a penalty violates the prohibition on inhuman and degrading treatment. In this case, an Article 3 issue was raised under the heading of irreducible sentence on the basis of a *de facto* life sentence. That is dealt with in Part 9 of this judgment. I will observe that while an apprehended breach of an Article 5 right to liberty issue was raised, this was never really pursued beyond a mere statement of its breach and in all the circumstances, it too must be rejected.

6.4.32. The Sentencing Guidelines provide for a transparent, detailed, but not mandatory system of calculation of sentence. Establishing that the sentencing procedures may lead to what may be perceived by Irish standards as harsh sentences that have little or no regard to the circumstances of an offence, does not establish on the facts herein that Mr. Damache is at a real risk of a flagrant denial of justice. Under this heading Mr. Damache sought to distinguish the sentencing procedure from the sentencing outcome, by focusing on the issue of a perceived lack of proportionality. In doing so he attempts to make a general complaint about U.S. sentencing procedures without dealing with the reality of the actual circumstances in which he finds himself. His submission does not address the undoubted fact that even our own system of justice can weigh the gravity of certain offences above the circumstances of an individual. The offences allegedly committed by Mr. Damache are undoubtedly grave and the Sentencing Guidelines reflect that view. Even then it has been established that the Sentencing Guideline sentence can be departed from on a reasoned basis. No flagrant denial of justice is apparent in the circumstances of this case.

6.5. Decision

6.5.1. In light of the particular facts of this case and for the reasons set out above, it has not been established that there is a flagrant denial of justice in the sentencing procedures of the U.S. federal courts as they will apply to Mr. Damache. I therefore reject Mr. Damache's objections to his extradition under this heading.

7. Specialty

7.1. The rule of specialty, which is a feature of extradition law, provides that where an accused is extradited to a requesting state either to stand trial or to serve a sentence for certain criminal offences, he or she may be tried or imprisoned only for those offences and not for any other pre-extradition offences. The Court must consider in the current case if Mr. Damache is extradited to the U.S.A., whether there is a real risk of the rule of specialty being breached in his case.

7.2. Mr. Damache provided evidence through Mr. Dratel that under the U.S. Federal Sentencing Guidelines ("the Sentencing Guidelines"), a sentencing court can consider uncharged or acquitted conduct in sentencing him on these offences. In her replying affidavit, Ms. Williams stated that while:-

"it is true that a sentencing court may consider uncharged, or even acquitted conduct...the sentencing court in Mr. Damache's case may only consider uncharged or acquitted conduct only if such conduct is shown to be more likely true than not true."

7.3. The next succeeding part of this judgment will deal with the issue of whether the power to sentence for uncharged or acquitted conduct is itself a breach of rights to a fair trial to such an extent as to bar extradition. This part of the judgment only deals with the issue of whether such a provision is a breach of the rule of specialty as set out in the Extradition Act 1965 as amended ("the Act of 1965").

7.4. Submissions

7.4.1. Section 20 of the Act of 1965, in so far as is relevant, provides:-

"Subject to Subsection (1A), extradition shall not be granted unless provision is made by the law of the requesting country or by the extradition agreement -

(a) that the person claimed shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, or otherwise restricted in his personal freedom, for any offence committed prior to his surrender other than that for which his extradition is requested, except in the following cases...[not applicable]."

7.4.2. The written submissions for Mr. Damache relied upon the Supreme Court decision in *Attorney General v. Burns* [2004] IESC 99 and the doctrine of *stare decisis* and asked the Court to distinguish the decision of the High Court (Peart J.) in *Attorney General v. Russell* [2006] IEHC 164. In brief, the Supreme Court in *Burns*, in the particular circumstances of that case, had allowed an appeal based upon the law of specialty. Counsel for Mr. Damache argued that the subsequent decision of Peart J. in *Russell*, which rejected this point on specialty, should not be followed as the High Court in *Russell* had considered a different bank of evidence and the conclusions reached did not sufficiently take into account the clarity of the Supreme Court's ruling in *Burns*.

7.4.3. The written submissions for the State dealt with those arguments and relied extensively on the decision of Peart J. in *Russell*. In the course of the hearing, the Court raised the question of whether specialty had been dealt with by the Supreme Court on appeal in *Russell*. The State made further enquiries and was then in a position to access the Supreme Court decision, which was delivered *ex tempore*.

7.4.4. In *Russell*, the Supreme Court rejected the argument relating to specialty based upon the same Sentencing Guidelines. In his reply, counsel for Mr. Damache made no substantive response to the Supreme Court decision in *Russell*. Nonetheless, this point of objection was not withdrawn and the Court is required to rule upon it.

7.5. The Court's Decision on Specialty

7.5.1. The case of *Burns*, relied upon by Mr. Damache, was unusual in so far as it was a case stated. In the course of the case stated, the District Court had referred to the facts adduced before it. It had been adduced in the trial court that the rule of specialty would not apply in Mr. Burns case.

7.5.2. The Supreme Court held at para. 7 under the heading Decision as follows:-

"I am not satisfied on the facts adduced in the District Court that the rule of specialty will apply to the appellant. It is a contravention of the rule for him to be subject to a penalty for an offence other than that for which he is extradited....The Treaty on Extradition between Ireland and the United State[s] of America specifically excludes extradition for a person to be 'sentenced, punished, detained or otherwise restricted in his or her personal freedom' in the United States of America for an offence other than that for which extradition has been granted. Thus the decision in this case is specific to and based on the facts of this case as found in the District Court and may not be of precedential value in other cases."

7.5.3. The above quote shows that the Supreme Court were acutely aware that their finding was limited to the facts of that case as adduced in the District Court and was possibly not of precedential value on that account.

7.5.4. In the case of *Russell*, Peart J. at p. 9 duly noted the doubts expressed by Denham J. in *Burns* as set out above. The learned judge concluded in his judgment at pp. 18-19 that the taking into account of uncharged and acquitted conduct under equivalent state level sentencing guidelines did not amount to a breach of the rule of specialty.

7.5.5. On appeal Murray C.J. delivered the judgment of the Supreme Court *ex tempore* as follows:-

"The first essential point relied upon by Dr. Forde is related to the use of the term 'punished' in Article 11.1 of the Extradition Treaty. He says this has a special meaning and means that a Court sending a person who is duly convicted for offences for which he or she has been properly extradited, may not take into account conduct not part of the essential ingredients of the offence or part of the offence. Otherwise there would be punishment for offences for which he or she had not been extradited. This, it is argued, would be contrary to the rule of specialty. I do not agree with that view. I do not think it is a logical view of the Article which must be read in the context of the Treaty as a whole and in particular in the context of the particular paragraph in which it occurs. It refers to 'sentenced, punished, detained for an offence other than that for which the extradition has been granted.' It is not in issue that the respondent will not actually be prosecuted for, charged with an offence or sentenced for an offence other than that for which the extradition has been ordered by the High Court."

7.5.6. Furthermore, the Supreme Court went on to say that it was not in dispute that the character and conduct of an accused may be taken into account when that is germane to the actual offence for the purpose of determining the appropriate sentence for the offence. The Supreme Court observed that taking into account previous convictions when imposing a sentence was not punishment once again for those offences. The Supreme Court said that on the findings of fact in that case and the material before the court, the sentencing of that appellant, should he be convicted, would take place within the parameters of the appropriate sentence or punishment applicable to the particular offence for which he may be convicted and not more.

7.5.7. The decision of the Supreme Court in *Russell* clearly disposes of any argument that Mr. Damache may have had under this section. He will not be sentenced, punished or detained for an offence other than that for which the extradition has been granted. The uncharged conduct complained of will be considered in the context of the sentencing for the offence for which he is to be extradited. Therefore, I reject Mr. Damache's arguments under this heading.

8. Sentencing Provisions: Sentencing for the Relevant Conduct of Co-Conspirators and for Uncharged and Acquitted Conduct on the Basis of the Preponderance of the Evidence

8.1. The Issue

8.1.1. According to the U.S. Federal Sentencing Guidelines ("the Sentencing Guidelines"), a sentence can take into account the relevant conduct of co-conspirators. Relevant conduct includes, in the context of a conspiracy offence, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of that offence or in the course of attempting to avoid detection for it.

8.1.2. The Sentencing Guidelines also permit the sentencing court to consider uncharged or even acquitted conduct in fashioning the length of the sentence.

8.1.3. The burden of proof required at sentencing hearings is "a preponderance of the evidence". Thus, a person can have a sentence enhanced on the basis of a finding made of relevant conduct, uncharged or even acquitted conduct on a standard of proof which is by "a preponderance of the evidence".

8.1.4. Mr. Damache contended that such a sentencing regime will breach his constitutional rights to a fair trial and fair procedures and also his rights under the European Convention of Human Rights ("the ECHR") and, on that ground, extradition ought to be refused.

8.2. The Evidence

Affidavit of Mr. Dratel

8.2.1. Mr. Dratel's evidence as regards the multi-step process for sentencing in U.S. federal courts has been set forth at Part 6 of this judgment. Importantly, he said, underlying this process, is the longstanding acknowledgment of judicial consideration of "relevant conduct" during sentencing, particularly "judges' wide-ranging authority to consider all relevant information...including information underlying acquitted offences and uncharged conduct" as stated in Gerald Leonard and Christine Dieter, "Punishment Without Conviction: Controlling the Use of Unconvicted Conduct in Federal Sentencing" (Fall 2012) 17 Berkeley J. Crim. L. 260, p. 268; see also U.S.S.G. §1B1.3.

8.2.2. In determining the applicability of the adjustments, the sentencing court must take into account all relevant conduct. In *United*

States v. Gibbs, 190 F.3d 188, 215-216 (3d Cir. 1999) regarding upholding sentencing enhancement based on relevant conduct), it was stated that:-

"Relevant conduct," as defined in U.S.S.G. §1B1.3, includes, in relevant part, all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant; and. . . in the case of a jointly undertaken criminal activity . . . , all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; . . . all harm that resulted from the acts or omissions specified . . . above, and all harm that was the object of such acts and omissions; and . . . any other information specified in the applicable guideline."

8.2.3. Thus, a defendant is responsible for the entirety of conspiratorial conduct regardless of his personal involvement, as long as that conspiratorial conduct was foreseeable. Mr. Dratel mentioned the case of *United States v. Scott*, 434 Fed. Appx. 155, 156-57 (3d Cir. 2011) which stated that relevant conduct includes all reasonably foreseeable acts of co-conspirators, and is thus attributable to the defendant when calculating the base offence level. He also referred to *United States v. Egbert*, 562 F.3d 1092 (10th Cir. 2009) where reasonably foreseeable relevant conduct included an assault committed by co-conspirators because the assault followed the same pattern as the assault committed by defendants, and defendants were in the company of the co-conspirators earlier during the night of the second assault. Similarly, in *United States v. Seiler*, 348 F. 3d 265 (D.C. Cir. 2003), although the defendant was a mere "dime bag seller on the street," the court assigned to the defendant, who pleaded guilty to distributing two vials of crack cocaine he purchased from a co-defendant, an offence level based upon the 586 vials of crack cocaine possessed by the co-defendant because there was sufficient evidence that the defendant was "ready, willing, and able" to sell as many dime bags as the co-defendant could supply.

8.2.4. Moreover, as already mentioned above, a sentence in the U.S. federal system can be based not only on the conduct of co-conspirators, but a court can consider uncharged or even acquitted conduct in fashioning the sentence. The burden of proof at sentencing is by "a preponderance of the evidence," enabling a sentencing court to find liability even though a jury has failed to find the evidence sufficient "beyond a reasonable doubt".

Initial Replying Affidavit of Ms. Williams

8.2.5. Although Ms. Williams takes issue with Mr. Dratel's observations on some aspects, in many essentials she does not disagree at all. Ms. Williams averred that it is true that a sentencing court can consider uncharged and/or acquitted conduct, but that such conduct must be proven by "a preponderance of the evidence" as illustrated in cases such as *US v. Fisher*, 502 F.3d 293 (3d Cir. 2007) and *US v. Villareal-Amarillas*, 562 F.3d 892 (8th Cir. 2009). The "preponderance of the evidence" standard is met if the proposition or allegation is more likely to be true than not true. Therefore, the sentencing court in Mr. Damache's case will only consider uncharged or acquitted conduct if such conduct is shown to be more likely true than not true.

8.2.6. It is the opinion of Ms. Williams that Mr. Dratel cannot credibly opine as to what sentence Mr. Damache will receive. The Sentencing Guidelines are merely advisory, and a sentencing court must consider a totality of the unique circumstances in each individual case. It is true that the sentencing ranges under the Sentencing Guidelines do sometimes exceed the statutory maximum possible sentence in a case. However, according to Ms. Williams, this can in fact work to the advantage of the defendant because a court absolutely may not sentence the defendant above the statutory maximum. Therefore, if Mr. Damache were convicted of the charges in this case, the Court would be restricted to imposing a 15 year maximum sentence for conviction on Count One and a 30 year maximum sentence for conviction on Count Two. She averred that sentences imposed at the same time "run concurrently unless the court orders".

8.2.7. She goes on to state that the sentencing court would also have discretion to sentence Mr. Damache to a period of incarceration far less than the statutory maximum sentence.

8.2.8. In the course of her affidavit, Ms. Williams does not directly address the issue of relevant conduct. What she does do is point to the sentences of imprisonment imposed on the co-conspirators, namely 10 years for Ms. LaRose, 7 years for Ms. Ramirez and 5 years for Mr. Khalid. Ms. Williams averred that it appears that the worst case scenario described for Mr. Damache, whilst it is possible, is inherently speculative. The predicted measures are a very narrow exception but not the rule and Ms. Williams was surprised at the fact that Mr. Damache's legal submissions seem to be predicated on certain assumptions that he will be subject to a particular punishment and a particular regime in circumstances where this is not true of his co-conspirators.

Replying Affidavit of Mr. Dratel

Relevant Conduct and Uncharged Conduct

8.2.9. Mr. Dratel makes reference to the fact that the Sentencing Guidelines for terrorism-related cases are so high that they often eclipse the statutory minimum, particularly if actual violence is alleged as part of the conspiratorial conduct, or is "relevant conduct" which is foreseeable and part of the course of criminal conduct. Therefore, terrorism cases threaten higher sentences.

8.2.10. Mr. Dratel contended that notwithstanding Ms. Williams's comment that "no predictions can be made" in relation to Mr. Damache's possible sentence, the indisputable fact remains that his sentencing exposure in the U.S. is substantial, and that a sentence within the Sentencing Guidelines' range – the predominant sentence for those who do not cooperate – is likely.

8.2.11. In relation to the sentences imposed on Mr. Damache's co-defendants, Mr. Dratel stated that it is imperative that any comparison between Mr. Damache and the three co-conspirators already sentenced in this case, take into account that cooperating witnesses, because of the substantial assistance they have provided the prosecution, almost always receive sentences well-below the prescribed Sentencing Guidelines' range. Therefore, Mr. Dratel contended that the sentences imposed on cooperating witnesses are entirely irrelevant, as they involve substantial discounts for cooperation, and often include government recommendations not only for leniency but also for specific sentences well-below the Sentencing Guidelines' range. Also, because Mr. Damache's co-conspirators have been convicted and sentenced already, it is unlikely that Mr. Damache's cooperation would have any value to the government at this stage, thereby precluding him from gaining any such advantage. Contrary to Ms. Williams' assertion regarding the sentences of Mr. Damache's co-conspirators, Mr. Dratel concluded that their sentences are completely unreliable indicators of the sentence a non-cooperating co-conspirator like Mr. Damache might receive in the U.S. if convicted.

8.2.12. Specifically with respect to Mr. Damache, the conspiracy to provide material support and resources is alleged to have been provided in furtherance of the conspiracy to kill in a foreign country. Therefore, according to U.S. law, the prosecution would have to

prove at trial only that Mr. Damache participated in a conspiracy knowingly to provide material support and resources with the intent to further the conspiracy to kill Mr. Vilks, and not that Mr. Damache participated in the conspiracy to kill Mr. Vilks.

8.2.13. Under U.S. federal law, a defendant is liable for the entire range of conspiratorial conduct that is reasonably foreseeable. Consequently, a defendant involved in only one aspect of a multi-object conspiracy would nevertheless be liable for other, distinct conspiratorial conduct in furtherance of a different conspiratorial objective, as long as that conduct was reasonably foreseeable. Nor can a defendant disclaim responsibility for such conduct by co-conspirators unless the defendant affirmatively, through explicit communications or action, withdraws from the conspiracy.

8.2.14. Thus, the scope of the conspiracy to provide material support alone, without direct participation in the conspiracy itself (to kill Mr. Vilks), would be sufficient to provide a basis to enhance Mr. Damache's sentence under the Sentencing Guidelines. Nor, under U.S. law, would the prosecution have to identify specific members of the conspiracy to kill Mr. Vilks, or define the contours of that conspiracy, as in *US v. Abdunafi*, 301 F.App'x 146 (3d Cir. 2008).

Acquitted Conduct

8.2.15. Moreover, Mr. Dratel says, even if Mr. Damache were acquitted of that conspiracy to provide material support to the conspiracy to kill Mr. Vilks, in the event Mr. Damache were convicted of any of the charges against him, the sentencing court would be authorised to consider that acquitted conduct, regardless of the jury's verdict in Mr. Damache's favour. The sentencing court could do so if it found the conduct proved by only a preponderance of the evidence.

8.2.16. He also said that the rules of evidence do not apply thereby permitting hearsay, documentary evidence and evidence not subject to cross-examination to form the basis for enhancements.

8.2.17. According to Mr. Dratel, the prospect of a sentence enhanced on the basis of acquitted conduct is not remote, referring to two of his most recent trials involving split verdicts where when preparing for sentencing for each, he will have to address the applicability of the acquitted conduct at sentencing, which in both cases was more serious than the conduct for which the jury convicted.

8.2.18. Mr. Dratel further contended that the seriousness of the acquitted conduct plays a significant role in whether it is used to enhance a sentence. Therefore, allegations of violence, even if resulting in acquittal, often result in an increased sentence for the non-violent offence of conviction. Consequently, the plot to kill Mr. Vilks could very well have an effect on Mr. Damache's sentence regardless of whether he is convicted of any offence encompassing that conduct, and notwithstanding an acquittal for such conduct.

Subsequent Replying Affidavit of Ms. Williams

8.2.19. With specific regard to consideration of acquitted and/or uncharged conduct, Ms. Williams referred to §5K2.21 of the U.S. Sentencing Commission Guidelines Manual and stated that the:-

"court may depart upward to reflect the actual seriousness of the offence based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or any other reason and (2) that did not enter into the determination of the applicable guideline range (emphasis added). A sentencing court may consider uncharged conduct, or even acquitted conduct; however, such conduct must ultimately be proven by a "preponderance of the evidence"."

She referred again to the above U.S. cases as authority.

8.2.20. Ms. Williams confirmed that this conduct may only affect the length of the sentence imposed by the court within the statutory limits. In other words, in considering uncharged and/or acquitted conduct, the Court may not sentence Mr. Damache beyond the maximum sentence imposed by statute for the offences in question, i.e. the maximum sentences for which extradition is being sought.

8.2.21. Ms. Williams finally noted that a court has discretion to consider all relevant facts at sentencing, including the nature and circumstances of the offence, the background of the defendant, the need to deter future criminal conduct and protect the public, and the need to provide the defendant with educational or vocational training or other correctional treatment as was set out in the decision of *US v. Battles* (2014).

8.3. Submissions

Submissions on behalf of Mr. Damache

8.3.1. Counsel for Mr. Damache submitted that in practice, the treatment of conspiracy offences in the U.S.A. differs markedly to our own. Counsel relied upon the uncontested evidence of Mr. Dratel that once a person has been convicted of a conspiracy offence, he/she can then have his/her sentence enhanced based on the conduct of his/her co-conspirators, as long as this conduct was reasonably foreseeable.

8.3.2. It was submitted that the examples given demonstrate the irrational, arbitrary and unfair way that sentencing for conspiracy offences proceeds in the U.S.A.. Counsel submitted that it could not be suggested that such sentencing practices would pass constitutional muster in our own jurisdiction. Nor can it be plausibly suggested that the U.S. approach amounts to a mere procedural difference between the two jurisdictions as per the test in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] IESC 24, i.e. egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting state. It is submitted that the interpretation of foreseeability in federal sentencing is grossly unfair to the accused. This is why it would not be engaged in by an Irish Court.

8.3.3. In counsel's submission, the U.S. approach seeks to fix the accused with a mens rea that he or she does not possess, and for offending behaviour that could not be described as "foreseeable" in the sense in which that term is understood in this jurisdiction. In the example of the "dime-bag seller", it is submitted that that amounted to sentencing for an offence that was hypothetical in nature and extremely improbable given the lowly position of the accused in the alleged conspiracy. Counsel submitted that, similarly, improbable or remote possibilities may be utilised by the U.S. prosecution in seeking an enhanced sentence in the case of Mr. Damache.

8.3.4. Counsel for Mr. Damache also submitted that sentencing for relevant conduct is not just confined to the foreseeable acts of

co-conspirators. Reference was made to Mr. Dratel's initial affidavit in submitting that the conspiracy to murder that is not among his charges but alleged against his co-conspirators, could be considered by the sentencing court.

8.3.5. Counsel for Mr. Damache submitted that the standard of a preponderance of the evidence is the agreed standard applicable to uncharged conduct in the U.S.A.. There is a flagrant unfairness of applying such a standard of proof to a sentence and this will be addressed further below. However, they noted that Ms. Williams has made no effort to allay the fears of Mr. Damache in respect of how sentencing might proceed if he is convicted, and as to whether the conspiracy to murder would be offered by the U.S. government as relevant conduct. Counsel submitted that Ms. Williams is the lead prosecutor in this case and it is she who would decide what evidence to lead at the sentence hearing.

8.3.6. Counsel referred to Mr. Dratel's explanation of the principle of sentencing for uncharged and/or acquitted conduct and how the facts set out in the superseding indictment appear to relate to a broad and multi-faceted terrorist plot, much of which would not need to be proven at trial in order to ground a conviction for the material support offence. In this regard, evidence relating to the conduct and intentions of the other alleged plotters might be rejected by the jury, but they may still proceed to convict in respect of the core allegation. The question then arises as to what ancillary conduct could be taken into account by the judge in passing sentence.

8.3.7. Counsel for Mr. Damache submitted that it should be kept in mind that, in assessing uncharged conduct, acquitted conduct or conduct of co-conspirators, the standard the sentencing judge would be applying is the balance of probabilities standard. Ordinary rules of evidence would not apply. The judge could even proceed to sentence without hearing further evidence, on the basis that he was satisfied that the information he had already heard at trial and contained in the trial transcript satisfied him that Mr. Damache was more likely guilty than not guilty or that an aggravating state of affairs (such as a co-conspirator's own criminal conduct) was more likely to have occurred than not.

8.3.8. Counsel submitted that there was a lack of clarity in respect of the subject-matter of the two Counts against Mr. Damache. Furthermore, the indictment offers only a partial précis of the U.S. prosecution's theory of the case. As a result, it is difficult to know the full scope of unlawful conduct that the U.S. prosecution would allege against Mr. Damache at trial. Nevertheless, it is clear that under the Sentencing Guidelines that allow for acquitted and uncharged conduct to be taken into account, the following scenarios appear to be distinctly possible. All are taken from a consideration of the information in the indictment and the extradition request.

Conviction on Count One

8.3.9. Mr. Damache is convicted of Count One, relating to material assistance and support of a terrorist plot. At sentencing, it is urged upon the trial judge that Mr. Damache should be treated as being actively engaged in the Lars Vilks plot, as a principal, and sentenced accordingly. Ms. Williams has made no attempt to deny this prospect, despite it being averted to three times in pleadings filed on behalf of Mr. Damache.

Conviction on Count One, Acquittal on Count Two

8.3.10. Mr. Damache is convicted on Count One, but is acquitted on Count Two. At sentencing, it is urged upon the trial judge that Mr. Damache should nonetheless be treated as having committed the offence of attempted transfer of the U.S. passport. The trial judge proceeds to do so without calling witnesses, and based upon the information he has already heard during the trial.

Conviction on Count Two, Acquittal on Count One

8.3.11. Mr. Damache is convicted on Count Two, but is acquitted on Count One. At trial, it was contended that it was an ingredient of Count Two that Mr. Damache has materially assisted and supported a terrorist plot. At sentencing, however, it is urged upon the trial judge that Mr. Damache should be treated as having been involved as a principal in the plot to murder Mr. Vilks or that since his co-conspirators were so involved, he too can be treated as having been involved.

Conviction on Count Two, Acquittal on Count One

8.3.12. Mr. Damache is convicted on Count Two, but is acquitted on Count One. At trial, it was contended that it was an ingredient of Count Two that Mr. Damache attempted to possess the stolen passport to further an act of terrorism, to transfer to an Al-Qaeda terrorist in Pakistan. At sentencing, it is urged upon the trial judge that Mr. Damache should be treated as having also been engaged in the creation of "a European terror cell", had recruited female Jihadis, had conspired to raise money for terrorists and had supported a plot to murder Mr. Vilks. All these contentions are proved through the judge's prior knowledge of the acquitted conduct on Count One; or through reading the witness statements of Mr. Khalid or Ms. LaRose.

Conviction of Count One and/or Count Two (version 1)

8.3.13. Mr. Damache is convicted of Count One and/or Count Two. At sentencing, it is urged upon the trial judge that his co-conspirators in the "material assistance" plot were also engaged in other "reasonably foreseeable" conduct and Mr. Damache should have his sentence enhanced as a result. In the case of Ms. LaRose, there is, inter alia, the actual preparation to travel to Sweden to murder Mr. Vilks, the attempted recruitment of an Eastern European man as a jihadist, an attempt to send funds to terrorists in Somalia and to Al-Qaeda. In the case of Mr. Khalid, there is, inter alia, the attempted recruitment of multiple female jihadists, the solicitation for funds for terrorism, and attempts to frustrate an F.B.I investigation.

Conviction of Count One and/or Count Two (version 2)

8.3.14. Mr. Damache is convicted of Count One and/or Count Two. At sentencing, it is urged upon the trial judge that one of his co-conspirators in the "material assistance" plot was involved in insurgency in Afghanistan and Pakistan. CC#2 was a resident of Pakistan and a member of the Taliban and Al-Qaeda. This co-conspirator had explosives training. At sentencing, the judge is told that Mr. Damache confessed that he had engaged in terrorist activity prior to the indicted conduct. He had tried twice to be a martyr, but was not successful. Mr. Damache also had been training Ms. Ramirez's minor male child "in the ways of violent jihad". Mr. Damache wanted to train "either with AQIM or ISI". AQIM stands for "Al Qaeda in the Islamic Maghreb", an Islamist militant organisation which aims to overthrow the Algerian government and institute an Islamic state. ISI might refer to the Pakistani intelligence service, which has links to Al-Qaeda and the Taliban. It might alternatively refer to the insurgent group now more commonly known as ISIS or ISIL, notorious for beheading U.S. hostages in Syria and whose symbol is the black flag.

8.3.15. Mr. Dratel averred that in calculating Mr. Damache's Guideline sentence, it is alleged by the U.S. prosecution that he was the

leader of the alleged plot to provide material support, referred to as "the Damache-led group". It is also alleged by the U.S. authorities that the conspiracy involved multiple members. It is submitted that both factors would lead to a higher points total in the calculation of the Guideline sentence. As Mr. Dratel pointed out in his first affidavit, the factual basis for such enhancements is to be established by the trial judge "on a preponderance of the evidence".

The Relevance of the Above Submission in Light of Evidence of the Likely Sentence to be Imposed

8.3.16. In the course of the oral submissions, the Court raised a question as to whether Mr. Damache could maintain the uncharged conduct/acquitted conduct point, in circumstances where Mr. Dratel contended that Mr. Damache would receive the maximum available sentence of 45 years, based on the Sentencing Guidelines' calculation he has made prior to consideration of relevant, uncharged or acquitted conduct.

8.3.17. The Court suggested that Mr. Dratel appears to have come to this conclusion based on his assessment of the likely Sentencing Guidelines' calculation, and then stated that his conclusion was "reinforced" by the prospect of unindicted/acquitted conduct being taken into account in sentencing. Thus, it was suggested that on Mr. Dratel's own account, the maximum sentence would be imposed irrespective of possible uncharged conduct being taken into account.

8.3.18. Counsel for Mr. Damache submitted that this was a misreading of the evidence given by Mr. Dratel. The latter did not assert that Mr. Damache will definitely receive 45 years, in any or all of the possible scenarios. In fact, the conclusion that is "reinforced" by the risk of uncharged conduct being considered is that Mr. Damache would receive an overall sentence which is, at a minimum, within the range between the "30 year-floor" of his Guideline range of 30 years to life imprisonment, as per para. 65 of Mr. Dratel's initial affidavit.

8.3.19. Counsel further referred to the first affidavit of Mr. Dratel where he indicated that the relevant Guideline range would be "30 years to life" if Mr. Damache pleaded guilty, and life imprisonment if Mr. Damache was convicted on both counts after trial (constrained, obviously, by the fact that the maximum sentence is 45 years in this case).

8.3.20. It was submitted that Mr. Dratel contends that accused persons in terrorism cases tend to receive the Guideline-level sentence. Therefore, there is a real risk that the maximum of 45 years or close to it could be imposed after a contest. This is reinforced by the sentencing provision which states that the Court shall impose sentences consecutively to the extent necessary to produce a combined sentence equal to the total punishment. Mr. Dratel did not state, however, that this is a certainty.

8.3.21. It was further submitted, therefore, that the scenario where the Guideline sentence would be imposed irrespective of uncharged conduct being taken into account only applies where Mr. Damache is convicted on both counts after a contested case. If Mr. Damache pleads guilty to both counts, he could receive less than the maximum sentence of 45 years which would have reflected the life sentence that the Sentencing Guidelines prescribe as the appropriate sentence after a contest. Instead, the appropriate sentence would be "30 years to life" and the sentence imposed could therefore be less than the 45 years which are available to the sentencing judge. In those circumstances, there is a real risk that the uncharged/acquitted conduct could then be used to enlarge Mr. Damache's sentence from the "floor" of his sentencing Guidelines' range of 30 years up to 45 years.

8.3.22. Further, counsel contended that Mr. Damache might be convicted on Count Two alone (which carries 30 years) and this does not carry the 45 point level that Count One carries. Instead, the applicable Guideline range would be 32. No corresponding sentence was suggested by Mr. Dratel for Count Two alone, but counsel submitted that it was clear that it was less than the "30 years to life" that corresponded to the Guideline level of 42 which applies for a guilty plea on Count One alone, or a guilty plea on Count One and Two if they are being grouped together.

8.3.23. Mr. Dratel repeatedly stated that there was a risk of Mr. Damache's sentence being enhanced by the taking into account of uncharged conduct. It was submitted that he would not be raising that possibility if he believed that Mr. Damache was going to receive a 45 year sentence anyway.

8.3.24. Mr. Dratel addressed a number of possible scenarios and the likely sentence in those scenarios. At a very minimum, he asserted, 30 years would be imposed if Mr. Damache were convicted on both counts after pleading guilty. He implied that more is likely in this scenario, having regard to the risk of uncharged conduct being considered. If Mr. Damache contested the case, then the maximum sentence of 45 years could well be imposed, or close to it. There is a real risk of this, but he does not, nor could he, state that it categorically will be imposed on Mr. Damache.

Submissions on behalf of the State

8.3.25. According to counsel for the State, the point made by Mr. Damache in relation to relevant conduct would appear to be to the effect that he may be sentenced for the actions of co-conspirators which were foreseeable as part of the conspiracy. In circumstances where it is plain from the indictment that the conspiracy was not actually carried through, it was submitted that the point raised here is of little more than academic interest.

8.3.26. Counsel for the State submitted that even though the U.S. Courts can take into account evidence regarding uncharged and/or acquitted conduct in their imposition of a sentence, they cannot, however, exceed the maximum applicable penalty in any given case. Therefore, in such a situation, Mr. Damache would still only receive a sentence for that which he is convicted. Thus, counsel did not see how this issue of sentencing for uncharged and/or acquitted conduct impacts Mr. Damache as Mr. Dratel on his behalf has put forward that Mr. Damache will likely receive the maximum sentence in the event of conviction after trial.

8.3.27. They further criticised the repeated reference to Irish constitutional norms by counsel for Mr. Damache and their submissions in relation to the implicit territorial limitations of Article 38 of the Constitution. Counsel for the State submitted that Mr. Damache must point to a flagrant denial of justice as envisaged by the ECtHR in *Othman (Abu Qatada) v. United Kingdom* (Application No. 8139/09, 17th January, 2012) (2012) 55 E.H.R.R. 1, [2012] E.C.H.R. 56 or an egregious breach as envisaged in the case of *Brennan* and that in the absence of universally acknowledged norms governing the conduct of fact-finding in sentencing, it is difficult to see how such a conclusion arises.

8.3.28. Counsel for the State made further submissions to the effect that there is no universally acknowledged or accepted rule that uncharged or acquitted conduct cannot be taken account of as part of the sentencing process. They proffered that the fact-finding function of any sentencing court arises in circumstances where the presumption of innocence has been removed and reference Tom O'Malley's publication, *Sentencing Law and Practice*, 2nd ed., (Thomson Round Hall, 2006) where at para. 31-12 he notes the differences of approach in terms of standard and burden of proof in relation to fact finding during the sentencing process. Their

submissions then went on to deal with the burden of proof.

Submissions of the Amicus Curiae

8.3.29. In taking into account the evidence submitted by the parties in the form of the Dratel and Williams affidavits respectively, and also considering the mitigating factor that a sentence must not exceed the maximum limit for a given offence, the *amicus curiae* considered that the imposition of a criminal sanction in the form of an increased prison sentence based on factual findings made on the balance of probabilities, violates a fundamental requirement of a criminal trial and is contrary to international norms. Their submissions related primarily to the fact that one could have a sentence enhanced despite an acquittal and also to the lesser burden of proof, even regarding acquitted conduct, in the sentencing hearing in the U.S. federal court system.

8.3.30. Those submissions were responded to by the State in later written submissions and Mr. Damache also filed subsequent written submissions to those on behalf of the State. Ultimately, because of the finding I make under this heading, it is unnecessary to deal with those submissions.

8.4. The Court's Analysis

8.4.1. Under this heading, Mr. Damache must establish that there are substantial grounds for believing that he is at real risk of being exposed to a flagrant denial of justice should he be extradited to the U.S.A..

8.4.2. Mr. Damache has put forward a large amount of evidence in the form of affidavit evidence from the legal expert Mr. Dratel to show that relevant conduct of co-conspirators and uncharged/acquitted conduct can, on the basis of a preponderance of evidence standard, be taken into account to enhance his sentence subject to the maximum permitted sentence. Even if it were established that such procedure amounted to a flagrant denial of justice, I consider that he must first establish on substantial grounds that he is at real risk of having his sentence enhanced on the basis of any of the impugned categories of relevant, uncharged or acquitted conduct.

Relevant Conduct

8.4.3. Undoubtedly, there may always be an element of speculation about what course a sentencing hearing may take in a particular case. That does not mean that a court cannot or should not address the risk of certain things happening. The court in doing so must bear in mind that the test requires a requested person to go beyond mere speculation and to address whether a real risk exists on substantial grounds. Addressing generally the issue of the ability to consider relevant conduct does not establish the real risk, however. Each case must be fact specific.

8.4.4. Mr. Damache's claim here is that he may be sentenced for the actions of co-conspirators which were foreseeable as part of the conspiracy that Mr. Damache entered into. The conspiracy at issue in either alleged count is clearly a conspiracy that did not come to fruition. There is simply nothing in the allegations that points towards completed offences by any of the co-conspirators. The specific case examples given by Mr. Dratel are of an entirely different type to the present situation. They involve other alleged completed offences or acts by co-conspirators. That is not the case here. It is highly speculative to suggest that relevant conduct of other co-conspirators will be taken into account in the circumstances that exist here. .

8.4.5. In those circumstances, I am not satisfied on the basis of the evidence provided in this case that there are substantial grounds for believing that there is a real risk that relevant conduct of other co-conspirators will be used at the sentence hearing.

Uncharged Conduct

8.4.6. Counsel for Mr. Damache acknowledged that it is difficult to know the full scope of the uncharged conduct that would be alleged against Mr. Damache. It was asserted that this is a matter that is in the knowledge of the prosecution, the U.S. government. However, Mr. Damache put forward a number of possible scenarios. The major one appears to be based upon the distinction between Mr. Damache's knowing participation in the material support conspiracy with intent to further the conspiracy to kill Mr. Vilks and that other co-conspirators were involved in the actual conspiracy to kill. Mr. Dratel referred to the fact that Mr. Damache might have his sentence enhanced because of the uncharged conduct of actually being involved in the conspiracy to kill as distinct from the conspiracy to provide material support for that conspiracy. However, despite referring to numerous examples from cases in practice, Mr. Dratel did not provide any evidence that such a fine distinction has been used to enhance other such sentences. I view this proposition as merely speculative.

8.4.7. Moreover, Mr. Dratel gave evidence that the sentence on Count One will be enhanced under the Sentencing Guidelines because of the underlying offence, namely the conspiracy to kill. I understand Ms. Williams' evidence from her affidavit, sworn later in time than both of Mr. Dratel's and in answer to his affidavits, as meaning that conduct already used to enhance a Guideline sentence cannot be taken into account to further enhance the sentence for uncharged or acquitted conduct. I understand this to mean that the conduct enhancing the sentence under the Sentencing Guidelines, namely the conspiracy to kill, could not thereafter be used to enhance the sentence. Thus, irrespective of the involvement in the conspiracy to kill by Mr. Damache, the conspiracy to kill is conduct which cannot be used to enhance the sentence a second time.

8.4.8. In any event on the totality of the evidence, I view it as highly speculative that a distinction would be made between participation in the conspiracy to provide material support to the conspiracy to kill and participation in the conspiracy itself for the purpose of enhancing this sentence on the basis of uncharged conduct.

8.4.9. In those circumstances, I am not satisfied that it has been established on substantial grounds that there is a real risk that uncharged conduct will be used to enhance the sentence of Mr. Damache.

Acquitted Conduct

8.4.10. If a sentence is to be enhanced on the basis of relevant conduct, uncharged conduct or acquitted conduct, the sentence must be capable of being enhanced on any of those bases. If a maximum sentence is to be imposed for other reasons, no amount of relevant, uncharged or acquitted conduct can enhance the sentence beyond the maximum statutorily permitted sentence. I have dismissed the real risk of any enhancements for relevant or uncharged conduct for other reasons but some of what I say here may also have relevance to those issues.

8.4.11. It must be remembered that the question of being sentenced for acquitted conduct will only arise if Mr. Damache is acquitted on one or other count. Mr. Dratel's evidence demonstrated that the Guideline sentence in Count One is one of life. This is based upon

an offence level of 45. If there is a plea of guilty, the Guideline sentence is within the range of 30 years to life. The maximum sentence on Count One is 15 years so therefore he is facing a maximum of 15 years in prison for this offence. There might be a possibility of some reduction for other factors such as cooperation. However, there is no substantial evidence establishing that risk, as Mr. Damache has given no indication of cooperation and, in any event, Mr. Dratel said that possibility does not arise due to the previous cooperation of his co-defendants.

8.4.12. Mr. Dratel gave various formulations about his view on sentencing. He said it is rather unlikely that Mr. Damache will receive less than the 30 year floor of his Guideline sentence (on Count One this would mean 15 years). In another part of his affidavit, he said that a sentence within the Sentencing Guidelines' range is likely. He also said that the range calculated from the Sentencing Guidelines is a dependable nationwide predictor of the sentence imposed on a particular defendant.

8.4.13. All that Mr. Damache has to establish is that there are substantial grounds for believing he is at real risk of facing an enhanced sentence due to acquitted conduct in order to get over his first hurdle. The standard of real risk is a less onerous one than the balance of probabilities. It is necessary however to show more than the possibility that he would be exposed to this type of sentencing regime. I do accept that establishing the likelihood of one sentence being imposed may leave open a real risk that another will in fact be imposed. It is necessary for me therefore to consider whether in the circumstances of this case there is a real risk of a sentence less than then statutory maximum being imposed.

8.4.14. In my view, the overall import of the evidence from Mr. Dratel, set out in detail in this part of the judgment and indeed in Part 6 dealing with the Sentencing Guidelines, is that the sentence indicated in those Guidelines is overwhelmingly the sentence likely to be imposed. Mr. Dratel went to great lengths, and in my view succeeded, in nullifying the real risk of any other sentence being imposed on Count One other than the statutory maximum. I therefore do not consider that the evidence establishes substantial grounds to believe that there is a real risk that he will be sentenced to less than the statutory maximum.

8.4.15. In so far as Count Two is concerned, the evidence establishes that if he was convicted on Count One, the Guideline sentence on Count Two would be either life or 30 years to life due to the grouping of the offence. That would result in a 30 year sentence as it is the statutory maximum. If convicted solely on Count Two, no precise evidence has been placed before me as to what the Guideline sentence on this matter alone would be. This is unsatisfactory in the context of the case that Mr. Damache is making. Piecing together the information contained in the affidavit and exhibits, I have attempted to calculate the Guideline sentence. Mr. Dratel said the offence level for Count Two is 32. Applying the same legal factors as Mr. Dratel said applied to Count One, namely this is a felony that involved or was intended to involve a federal crime of terrorism, it appears that his criminal history category would be increased automatically to Category VI. Using the Sentencing Guidelines sheet at exhibit 2 of Mr. Dratel's affidavit, it appears the Guideline range is 210-262 months. This translates to a range of 17.5 years to 21.83 years. This is below the maximum of 30 years imprisonment.

8.4.16. On that basis, has it been established on substantial or reasonable grounds that there is a real risk that the acquitted conduct in Count One will be used to enhance this sentence up to the 30 year maximum? The scenarios outlined on behalf of Mr. Damache refer to the following acquitted conduct on Count One that may be taken into account: that he was engaged in the creation of a European terror cell, recruited female jihadis, that he conspired to raise money for terrorists and that he supported a plot to murder Mr. Vilks.

8.4.17. I accept that it is possible that such matters may be taken into account, but as I have already stated the proof required of Mr. Damache is more than possibility. I have considered the affidavits filed on behalf of Mr. Damache with great care. Mr. Dratel referred to the use of acquitted conduct in sentencing hearings and stated that in two of his own recent cases where there were split verdicts, he will have to consider acquitted conduct at the sentence hearing. He also relies upon the case of *US v. Jones* 574 US 1 (2014) where the U.S. Supreme Court declined to hear a case primarily addressed to the permissibility of considering uncharged and acquitted conduct at sentencing.

8.4.18. With reference to acquitted conducted, he said at para. 34 of his second affidavit:-

"[i]ndeed, in my experience the seriousness of the acquitted conduct plays a role in whether it is used to enhance the sentence. Thus, allegations of violence, even if resulting in acquittal, often result in an increased sentence for the non-violent offense of conviction. As a result, the plot to kill Mr. Vilks could very well have an effect on Mr. Damache's sentence regardless whether he is convicted of any offense encompassing that conduct, and notwithstanding an acquittal for such conduct."

8.4.19. In the case of *Jones*, the sentence was enhanced in circumstances where the applicants were acquitted of the more serious offence and convicted of the lesser offence. That is consistent with the situation outlined by Mr. Dratel at para. 34. An acquittal on a serious offence has the ability to affect the sentence on conviction for a much less serious offence. Nowhere does Mr. Dratel point to a situation where a serious offence will be increased because of acquitted conduct relating to an offence which carried a lesser sentence.

8.4.20. In this case, if Mr. Damache were to be convicted of, *inter alia*, transferring a document to facilitate an act of international terrorism, it would be a conviction for an extremely serious offence. It has a statutory maximum double that in Count One (albeit a Guideline sentence of less). Undoubtedly, an act committed for the facilitation of an act of international terrorism is a matter of huge consequence.

8.4.21. Furthermore, the allegations contained in each Count are linked. Mr. Dratel accepted this when he indicated that they would be grouped for the purpose of sentencing. The allegations concerning the circumstances of the taking of the identity documents, the transfer of those documents and the purpose for which it was intended to be used, *i.e.* transfer to a co-conspirator, are all set out in either the superseding indictment or in the supporting affidavits of Ms. Williams, especially that of 18th March, 2013. In reality, the evidence that the government points to is the same under either count in so far as the passport is involved. That, however, is a substantive part of the proof of Count One, Count One being one of the overt acts committed in furtherance of the conspiracy. Furthermore, from the affidavits placed before the Court, it is undoubtedly the case that the co-operating witnesses and the evidence of e-mail traffic will be common evidence in both cases and will require evaluation by a jury. In those circumstances, it is speculative to suggest that a jury will convict on Count One and not on Count Two.

8.4.22. I have had regard to the totality of the evidence in this case. There has been a failure to demonstrate that the sentence for a particularly serious charge will be enhanced by the acquitted conduct on what is an apparently less serious charge. Furthermore, the reality is that the two counts faced by Mr. Damache are interlinked. From the affidavit evidence of Ms. Williams outlined in Parts 3 and 4 of this Judgment, which I accept in this regard, it is established that Count One and Count Two are interlinked. In particular the

evidence to prove the facts in Count Two regarding the taking and transfer of the passport, is the same evidence to be used to prove a significant part of Count One. It is entering into a realm of true speculation rather than substantially grounded risk to suggest a real risk of conviction on Count Two in the face of an acquittal on Count One.

8.4.23. In all the circumstances I am not satisfied on the evidence before me that there are substantial grounds for believing that there is a real risk, that if extradited to the U.S.A., Mr. Damache would be exposed to being subjected to the enhanced sentence for acquitted conduct that he claims is a flagrant denial of his right to a fair trial.

8.5. Decision

8.5.1. For the reasons outlined above, Mr. Damache has not established on substantial grounds that he is at real risk of being exposed to a process of having his sentence enhanced for relevant, uncharged or acquitted conduct. In those circumstances the issue of whether such enhancement may amount to a flagrant denial of justice is unnecessary to adjudicate upon.

9. De Facto Life Sentence and Irreducible Life Sentence

9.1. Issue

9.1.1. A *de facto* life sentence is a term used to describe a life sentence for a criminal offence or a number of offences which in reality and practice becomes an actual life sentence to the accused due to its length as well as more practical factors such as the age of the accused. Mr. Damache's date of birth is 21st March, 1965, and so has recently turned 50 years old. Mr. Damache claimed that his age and the length of sentence he is likely to receive will have the effect of him dying in prison, thereby creating an actual or *de facto* life sentence.

9.1.2. It is claimed that such a *de facto* life sentence will be irreducible due to the particular nature of the offence(s) committed, a lack of/restricted parole process, and lack of commutation, clemency, and compassionate release. The issue is whether Mr. Damache has established on substantial grounds that he is at real risk of being subjected to such a *de facto* life sentence and whether such an irreducible *de facto* life sentence amounts to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights (the ECHR).

9.2. Evidence

9.2.1. It should first be observed that this objection on behalf of Mr. Damache is premised upon the evidence of Mr. Dratel as to the likely sentence that he will receive, namely the statutory maximum consecutive sentence of 45 years. In part 8 of this judgment I accepted that the evidence overwhelmingly supported the contention that his Guideline sentence is that which is likely to be imposed. Therefore I accept that he has established on substantial grounds a real risk that he will be sentenced to a term of 45 years imprisonment.

9.2.2. Much of the factual information as regards the sentencing has been dealt with already. The remaining evidence from Mr. Dratel was to the effect that as parole has been eliminated in the U.S. federal system, Mr. Damache would serve 85% of any sentence imposed, with the remaining 15% attributable to "good time" credits earned during the term of incarceration. Mr. Damache may also be transferred to a "halfway house" for as much as the last six months of a sentence. Otherwise, there is no provision for early release other than via commutation, clemency, or compassionate release, each of which possesses an infinitesimal chance of success (and in a terrorism case, those chances are for practical purposes reduced to zero). Consequently, aggregation of the statutory maximums to meet the Sentencing Guidelines' range would, in effect, constitute a *de facto* life sentence for Mr. Damache, and therefore implicate the Article 3 prohibition on inhuman and degrading treatment. This last statement of Mr. Dratel is clearly not one on which he should comment; in the first place he has no apparent expertise on European Human Rights law and, furthermore, as the application of ECHR rights is ultimately a matter for this Court.

Initial Affidavit of Ms. Williams

9.2.3. As referred to previously, Ms. Williams asserted that it is not possible to opine as to what sentence Mr. Damache will receive. She did confirm that parole has been abolished from the federal system in the U.S.A. for all criminal convictions, not just for terrorism cases. However, she stated that if convicted, early release would still be possible for Mr. Damache if he complies with the behavioural rules in prison. Under U.S. law, a federal prisoner sentenced to more than one year in prison may receive up to fifty-four days of "good time" credit towards his sentence for each year served in prison.

Replying Affidavit of Mr. Dratel

9.2.4. Mr. Dratel averred that because parole has been eliminated from the U.S. federal system since 1984, "good time" credit is the only means through which the amount of time served by a defendant may be reduced, and by up to 15%, if the Bureau of Prisons ("the BoP") has determined by year end that the inmate has "displayed exemplary compliance with institutional disciplinary regulations". The BoP method of calculating good time credit has been approved by the U.S. Supreme Court in *Barber v. Thomas*, 560 U.S. 474 (2010) and is assessed based on the time actually served by the offender, rather than the sentence imposed when receiving the maximum allowable good conduct credit, and thus an offender will serve about 87% of the sentence imposed with maximum good time credit.

9.2.5. Mr. Dratel contended that, aside from good time credit, the prospect of compassionate release is zero. It is granted upon motion by the director of the BoP only in extraordinary or compelling circumstances that could not have been foreseen by the court at the time of sentencing. Pursuant to federal law which deals with reduction in a term of imprisonment as a result of a motion by the director, one of the grounds for release is a:-

"permanent mental condition...that substantially diminishes the ability of a defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement."

9.2.6. In practical terms, Mr. Dratel stated that the bar for compassionate release is extremely high. The BoP does not keep statistics and he refers to a 2012 Human Rights Watch report entitled *See the Answer is No: Too Little Compassionate Release in US Federal Prisons*, in which in that year, 37 motions for compassionate release were made to the courts and since 1992, an average of 24 motions have been granted annually. Applications for compassionate release, according to the BoP internal rules and regulations, are rarely approved without any grave medical issues involving either the inmate or the sole available caretaker of the inmate's children.

9.2.7. Mr. Dratel also referred to *Pham v. Federal Bureau of Prisons*, 2007 WL 1536853, at *1 (S.D. Ind. 2007) which held to be eligible for compassionate release, an inmate must generally be able to demonstrate that he will die within a year or is unable to provide self-care. Also, according to the 2013 U.S. Department of Justice ("the DoJ") report on *The Federal Bureau of Prisons'*

Compassionate Release Program (April 2013), the BoP has adhered to its policy of limiting eligibility to those prisoners who are "terminally ill...with a life expectancy of 1 year or less or those who are incapacitated and unable to perform their daily activities." Mr. Dratel further added that mental health cases are often classified as non-medical requests and gives the example illustrated in the 2013 DoJ report of "an inmate who had diminished mental status" to the point of being unaware that he was being punished, as making a non-medical request. The report also indicated that only 24 non-terminal medical requests made between 2006 and 2011 were approved by the BoP director and that the only two non-medical requests forwarded to the director for determination were subsequently denied. Mr. Dratel also indicated that a number of courts have held that a decision by the director of the BoP not to make a motion for compassionate release is judicially unreviewable.

9.2.8. In addition, after a request for compassionate release has been filed, the process for approval can prove so lengthy as to make irrelevant the purpose of the request. The length of the process can indeed also be determinative in that 13% of inmates who had made requests between 2006 and 2011, died before a decision was made. As such, the process has been criticised as being poorly managed and not implemented consistently. Probably most importantly, only 24 prisoners or 0.1% of the federal prison population were released pursuant to the compassionate release program each year between 2006 and 2011. Mr. Dratel concluded that any claim Mr. Damache may make for compassionate release is purely semantic and illusory.

9.3. Submissions

Submissions on behalf of Mr. Damache

The Developing Jurisprudence on Irreducible Sentences

9.3.1. Counsel for Mr. Damache stated that a sentence, whether of life imprisonment or for a fixed term, can be described as irreducible if there is no effective mechanism by which the sentence can be reviewed during its currency and no realistic possibility of early release of the prisoner. It was submitted that a finding by this Court that his life sentence is irreducible would mean his extradition is prohibited. Mr. Damache relied upon the emerging jurisprudence from the European Court of Human Rights ("the ECtHR"). Counsel referred to *Kafkaris v. Cyprus* (Application No. 21906/04, 12th February, 2008) (2009) 49 E.H.R.R. 35, [2008] E.C.H.R. 143 where the ECtHR decided that an irreducible life sentence would breach Article 3 of the European Convention on Human Rights ("the ECHR") if it was irreducible *de jure* and *de facto*. *De jure* refers to the remedies in place that would allow for the possibility of early release. *De facto* refers to whether, in practice, such sentences are ever reduced by the reason of the remedies relied on as offering *de jure* reducibility.

9.3.2. Thus, in *Kafkaris* and in subsequent cases, the possibility of the termination of a life sentence was deemed sufficient to fulfil the requirements of Article 3, even where there was only a vague hope of release and such a decision was at the discretion of the head of state or through some other form of executive clemency granted in exceptional cases. The application of the *Kafkaris* principles in the context of extradition to the requesting state can be seen in decisions like *R (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72; *Harkins & Edwards v. United Kingdom* (Application. Nos. 9146/07 and 32650/07) [2012] E.C.H.R. 45; and *Babar Ahmad v. United Kingdom* (Application. nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April, 2012) (2013) 56 E.H.R.R. 1, [2012] E.C.H.R. 609. It can be seen that considerable deference was given to a state's claim of reducibility of its life sentences.

9.3.3. Counsel submitted that in *Vinter and Others v. United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10, 9th July, 2013) [2013] E.C.H.R. 645, however, the Grand Chamber of the ECtHR re-examined the problem of how to determine whether, in a given case, a life sentence could be regarded as reducible. With reference to a principle already set out in the *Kafkaris* judgment, the ECtHR noted that a life sentence was to be regarded as reducible if it was subject to a review which allowed the authorities to consider whether such progress towards rehabilitation had been made that continued detention could no longer be justified on legitimate penological grounds. Significantly, the Court elaborated on its findings in *Kafkaris* and held that a life prisoner was entitled to know at the outset of his sentence what he must do to be considered for release and under what conditions, including when he could apply for a review. Where domestic law did not provide any mechanism or possibility for such review, Article 3 was breached.

9.3.4. According to counsel, the ECtHR decision in *Vinter* constitutes a considerable advance on previous ECHR law concerning irreducible sentences and Article 3. There must now be a real prospect of release in the light of progress during a detention, as well as a review mechanism which must satisfy a number of basic conditions as to certainty, clarity and the tests to be applied for release.

9.3.5. It was submitted that in the context of *very lengthy imprisonment or life imprisonment*, an irreducible sentence will amount to an affront to the dignity of the person, and to inhuman and degrading treatment as it repudiates the possibility of change and rehabilitation, extinguishes all hope with the sentenced person's life becoming just one long wait for infirmity or death. Therefore, it is proffered that an irreducible sentence will be an abuse to the dignity of the person, and be deemed as inhuman and degrading treatment. As Judge Power-Forde noted in her concurring judgment in *Vinter*:-

"[h]ope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading."

9.3.6. Counsel submitted that the sentence that would be imposed on Mr. Damache if he is extradited and convicted would match or exceed the natural lifespan of a person. In considering whether a particular sentence breaches Article 3, it is necessary to assess whether the lack of effective review is inhuman and degrading in the context of that particular sentence. It was emphasised that Mr. Damache's argument is not that it is unconscionable that he or anyone else should die in prison. It was argued that there exists a real risk that Mr. Damache will die in prison after serving thirty to forty years of a sentence and without any prospect of release during that time, no matter what he does to demonstrate his rehabilitation.

9.3.7. It was submitted with reference to the case-law of the ECtHR that a mechanism of review has emerged as a principle, where very lengthy sentences of imprisonment should be reviewed at an appropriate time to determine whether there is still a justification for the continued detention of the sentenced person and which mechanism may provide the opportunity of an early release. There has been recognition that the penological justifications which applied at the time of sentencing can be eroded over time, through the personal growth of the sentenced person. Crucially, the ECtHR has held that the only way to determine whether this applies in a given case is to have such effective review mechanism which provides for the possibility of early release.

9.3.8. Counsel relied upon the following passage from *Vinter*:-

"111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes - to paraphrase Lord Justice Laws in Wellington - a poor guarantee of just and proportionate punishment (see paragraph 54 above).

113. Furthermore, as the German Federal Constitutional Court recognised in the Life Imprisonment case (see paragraph 69 above), it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. Indeed, the Constitutional Court went on to make clear in the subsequent War Criminal case that this applied to all life prisoners, whatever the nature of their crimes, and that release only for those who were infirm or close to death was not sufficient (see paragraph 70 above).

Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity (see, inter alia , Pretty v. the United Kingdom , no. 2346/02, § 65, ECHR 2002-III; and V.C. v. Slovakia , no. 18968/07, § 105, ECHR 2011 (extracts)).

114. Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

115. The Court has already had occasion to note that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence."

Application of requirement for reducibility to non-life sentence

9.3.9. Counsel addressed the issue of whether a determinate sentence which may extend beyond the lifespan of the prisoner is covered by the principles set out in *Vinter* and *Kafkaris*. Counsel submitted that the *Vinter* principles were intended to apply to sentences such as the one which might be imposed in the present case. In fact, the aim which is sought to be achieved - of rehabilitation - and the manner through which it can best be secured - an effective review mechanism - are meant to apply in respect of all sentences of imprisonment. This is not to say that a sentence of three years would automatically breach Article 3 of the ECHR if there was no effective review mechanism.

9.3.10. Reference was made to the international instruments relating to the rehabilitation of long-term and life sentence prisoners discussed in *Vinter*. The ECtHR noted that since 1976, the Council of Europe adopted a series of resolutions and recommendations on long-term and life sentence prisoners. The first was the Committee of Ministers Resolution 76(2) on the Treatment of Long Term Prisoners, which recommended that Member States:-

"1. pursue a criminal policy under which long-term sentences are imposed only if they are necessary for the protection of society;

2. take the necessary legislative and administrative measures in order to promote appropriate treatment during the enforcement of [long-term] sentences;

...

9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;

10. grant the prisoner conditional release, subject to the statutory requirements relating to time served, as soon as a favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release."

9.3.11. It was claimed that the principles set out in *Vinter* bring to realisation the recommendation first made by the Council of Europe in 1976. Counsel submitted it was worth noting that the Council followed up with a further Recommendation 2003(23), which relates to the management of life sentence and long-term prisoners. Para. 2 of the Recommendation states the aims of the management of life sentence and other long-term prisoners should be:-

"- to ensure that prisons are safe and secure places for these prisoners and for all those who work with or visit them;

- to counteract the damaging effects of life and long-term imprisonment;

- to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release."

Para. 33 provides:-

"[i]n order to enable life sentence and other long-term prisoners to overcome the particular problem of moving from lengthy incarceration to a law-abiding life in the community, their release should be prepared well in advance ..."

9.3.12. Para. 34 goes on to provide that the granting and implementation of conditional release for life sentence and other long-term prisoners should be guided by the principles set out in Recommendation (2003)22 on conditional release. The report accompanying the Recommendation states, at para. 131:-

"Recommendation (2003)23 contains the principle that conditional release should be possible for all prisoners except those serving extremely short sentences. This principle is applicable, under the terms of the Recommendation, even to life prisoners. Note, however, that it is the possibility of granting conditional release to life prisoners that is recommended, not that they should always be granted conditional release."

This summary encapsulates the later findings of the Grand Chamber in *Vinter*. Similar considerations are reflected in the Council of Europe's Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Rule 107.2 (on release of sentenced prisoners) of which provides that, in the case of those prisoners with longer sentences, steps shall be taken to ensure a gradual return to life in free society.

9.3.13. And so, counsel submitted that it can be seen that identical considerations were deemed by the Council of Europe to apply in respect of both life imprisonment and long-term imprisonment: vindicating the dignity of the individual by acknowledging the capacity for change within them; protecting the prisoner from the damaging effects of removing their hope and motivation; supporting the overarching goal of reintegration; and, rehabilitation. These are the same considerations that the Court in *Vinter* was also seeking to uphold and protect.

9.3.14. Counsel submitted, for different reasons, that the imposition of a significant sentence on an elderly person will not automatically breach Article 3 by reason of the mere fact that they are likely die in prison. The elderly prisoner may work towards rehabilitation and change, but it will be hard to achieve it with the time left to them. It would obviously be important, however, that there would be effective mechanisms of review for such a sentence, even if the prospect of release is remote.

9.3.15. However, it was submitted that inhuman and degrading treatment that would engage Article 3 undoubtedly reaches the required level of intensity in the circumstances of a very long sentence which is not capable of being reduced. The principle applies *a fortiori* to a sentence which will result in a person spending thirty to forty years in custody or to a sentence which amounts to a *de facto* life sentence.

Review of Prison Sentences under Irish Law

9.3.16. From a consideration of the various sentencing regimes considered in *Vinter* at para. 68, counsel submitted it was possible to discern an emerging consensus in respect of the maximum length of time that should expire before a life sentence is reviewed. Most European countries provide for definite review after 20-25 years at the latest. Thus, even in respect of our own minimum sentence of 40 years for capital murder, the Supreme Court has held in *Noel Callan v. Ireland* [2013] IESC 35, that one-third remission will still apply so that the minimum sentence can be reduced (to 26 years and 8 months).

9.3.17. As noted in *Vinter* in respect of non-capital life sentences in this country, there is the possibility of review after seven years. It is worth noting that in the case of *Lynch and Whelan v. Ireland* (Application Nos. 70495/10 and 74565/10, 18th June, 2013), the ECtHR considered whether Ireland's life sentence was reducible in the sense outlined in *Kafkaris* and held, at para. 31, that:-

"...the nature of the life sentences at issue in the present and the Kafkaris cases are similar: indeed the evidence of regular review and of early release of life prisoners in Ireland indicates that the present applicants have a greater likelihood of being released than had Mr Kafkaris and, indeed, than had the applicants in Babar Ahmad and Others v. The United Kingdom... While the average release time of life prisoners in Ireland appears to have increased somewhat since the mid-2000s, the applicants' sentences are de facto and de jure reducible and, as such, not incompatible with Article 3 of the Convention."

9.3.18. So it was submitted that our own jurisdiction complies with the *Kafkaris* and *Vinter* principles in so far as they relate to life sentences. It would also appear that Ireland is now broadly compliant with the Council of Europe instruments referred to in *Vinter*, relating to effective review of all sentences of imprisonment.

9.3.19. Following the recent spate of "enhanced remission" cases, the prospect of effective review and early release for sentenced prisoners has been improved further. It is worth noting the comments of Peart J. at para. 26 in *Keogh v. Governor of Mountjoy Prison* [2014] IEHC 402, which highlighted the practical importance of having effective review mechanisms such as enhanced remission:-

"In my view, consideration ought to be given to revising the Prison Rules in this regard so as to provide clarity by incorporating a specified procedure, including by stating whether an application must be made by the prisoner, when any such application should be made, to whom such an application should be made, in what manner such an application should be made, and specifying with more clarity than now the criteria which will apply, and the basis on which a decision will be made. Additional remission is an important feature of a prison's regime. It assists in the maintaining of good order within the prison and also prisoner safety and welfare. All the more reason for there to be complete clarity and detail around the regime, and transparency as to how it operates, and what factors will be taken into account in the Minister's decision."

9.3.20. Barrett J. has noted in the case of *Ryan v. Governor of Midlands Prison* [2014] IEHC, at para. 5, that the policy behind Prison Rule 59(2) on enhanced remission was

"...to incentivise and reward engagement by prisoners in a pro-active manner in authorised, structured, voluntary activity, with a view both to reducing the risk of recidivism, and enhancing the potential for full and proper re-integration of a prisoner into the general community, following release."

This finding was adopted by O'Malley J. in the recent decision of *Ryan v. Minister for Justice* [2014] IEHC 523, at para. 9.4, where she also noted that the concerns expressed by Peart J. in *Keogh* had been alleviated by the introduction of the amended version of Rule 59(2).

The Nature of the Sentence Likely to be Imposed on Mr. Damache and its Irreducibility

9.3.21. It was contended on behalf of Mr. Damache that even if he obtains the maximum remission of 13%, this would amount to a 39 year sentence. It was submitted that this Court could conclude that such a sentence would probably result in Mr. Damache dying in prison. Even if a lesser sentence were imposed, it is still likely to surpass the average period of review for life sentences by a decade.

9.3.22. It was submitted that all of the aspects of an irreducible whole life sentence that were condemned in *Vinter* apply to the sentence under consideration in the present case. Someone in the position of Mr. Damache, in commencing their sentence, would be resigned to dying in prison or at least leaving it as a very old person. Hence, during the currency of the sentence, they would have no motivation to rehabilitate and no hope of release. If they did change fundamentally and seek to atone for their guilt, this would be irrelevant in practical terms since there would be no mechanism to demonstrate this change or to achieve reintegration or rehabilitation.

9.3.23. Counsel for Mr. Damache posed the question of how such a sentence could be compatible with Article 3 of the ECHR and with the aims sought to be achieved in *Vinter* and in the Council of Europe instruments. The only difference with a life sentence would appear to be the remote chance that a prisoner serving a determinate sentence might be released when in extreme old age. Such release would hardly negate the harm done by the incarceration of a prisoner who has been rehabilitated for the previous thirty years. During those years, the prisoner would have no idea if they will live long enough to experience freedom again. Counsel further asked whether such a sentence does not extinguish hope and deny dignity in exactly the same way that a life sentence does.

9.3.24. The principles in *Vinter* are meant to foster the prospect of rehabilitation and reintegration and to protect dignity, by affording the prisoner the chance to change and by acknowledging this when it occurs. A remote prospect of release at a point when reintegration is no longer a realistic possibility could not be described as compatible with these principles. It is submitted on behalf of Mr. Damache, therefore, that the prospect of release in old age is not a sufficient basis on which to distinguish the facts of the instant case from those in *Vinter*.

9.3.25. Counsel referred to the evidence as set out above with regard to the non-availability of compassionate release. It was submitted that the availability of 13% remission does not amount to an effective review mechanism capable of reducing the Mr. Damache's sentence in the sense identified in *Vinter*. This point is considered further below in the context of *Trabelsi v. Belgium* (Application No. 140/10, 4th September, 2014). Counsel submitted that the sentence was, in reality, irreducible.

Extradition is Barred on Article 3 Grounds due to the Irreducibility of the Sentence

9.3.26. Counsel for Mr. Damache proposed that the final question to be determined is whether the prospect of the sentence that is likely to be imposed by the Respondent State must lead to the refusal of his extradition under Article 3 of the ECHR. The answer to this question can be found in the recent decision of the ECtHR in *Trabelsi*.

9.3.27. Mr. Trabelsi was extradited to the U.S.A. in respect of terrorism charges, prior to the hearing of his appeal by the ECtHR (resulting in a significant fine for the Belgian authorities). The Belgian government submitted that since the applicant had not yet been convicted, it was impossible to determine whether the point at which his incarceration would no longer serve an objectively valid purpose would ever come, or to speculate on the manner in which the U.S. authorities would implement the available mechanisms at that time.

9.3.28. The ECtHR rejected this argument because it would negate the preventive aim of Article 3. The Court indicated that it must assess the risk incurred under Article 3 *ex ante* in Mr. Trabelsi's case before his possible conviction in the U.S.A., and not *ex post facto*, as suggested by the government. The *ratio* of the case is contained in the following paragraphs:-

"133. The applicant submitted that his only 'hope of release' lay in the prospects of success, which were de facto non-existent in the aftermath of the 11 September 2001 terrorist attacks, of an application for a Presidential pardon or commutation of sentence. This possibility, which was completely at the discretion of the executive, was no guarantee and was based on no predefined criterion. That being the case, the discretionary life sentence which he might incur could not be considered reducible de jure and de facto within the meaning of the Court's Vinter and Others judgment.

...

136. The Court now comes to the central issue in the present case, which involves establishing whether, over and above the assurances provided, the provisions of US legislation governing the possibilities for reduction of life sentences and Presidential pardons fulfil the criteria which it has laid down for assessing the reducibility of a life sentence and its conformity with Article 3 of the Convention.

137. No lengthy disquisitions are required to answer this question: the Court needs simply note that while the said provisions point to the existence of a 'prospect of release' within the meaning of the Kafkaris judgment – even if doubts might be expressed as to the reality of such a prospect in practice – none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds (see paragraph 115 above).

138. Under these conditions, the Court considers that the life sentence liable to be imposed on the applicant cannot be described as reducible for the purposes of Article 3 of the Convention within the meaning of the Vinter and Others judgment. By exposing the applicant to the risk of treatment contrary to this provision the Government engaged the respondent State's responsibility under the Convention.

139. The Court accordingly concludes that the applicant's extradition to the United States of America amounted to a violation of Article 3 of the Convention."

9.3.29. It was submitted that *Trabelsi* cannot be distinguished on the basis that it related to a discretionary life sentence as opposed to an extremely lengthy but determinate sentence which is likely to extend beyond the natural life of the prisoner. This is a distinction without a difference. In both cases, the prisoner must serve the sentence without hope, and this is degrading.

Submissions on behalf of the State

9.3.30. In reply, counsel for the State identified an initial problem with Mr. Damache's argument of a *de facto* life sentence, in that

the ECtHR case-law relied upon by him is solely concerned with the imposition of an irreducible life sentence and makes no reference to the issue of any *de facto* life sentence. Counsel contended that the ECtHR considered the rather unique penological nature of a whole life sentence and conducted a detailed and exhaustive analysis of international practice. It was noteworthy that the court in *Vinter* confined its observations to life sentences as opposed to lengthy determinate sentences. It was submitted that a life sentence is fundamentally characterised by the fact that the length of the sentence actually served is essentially arbitrary as it relates not to any legitimate penological interest, but is more precisely measured in the life span of the prisoner.

9.3.31. This latter fact has been remarked upon in the UK case of *R. (Wellington) v. Secretary of State for the Home Department* [2008] UKHL 72 where, at para. 6, Lord Hoffmann quotes Laws L.J.'s statement at para. 39(iv) of the Divisional Court decision of this same case:-

"The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war; but retributive punishment is never enough to justify it. Yet a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is lex talionis. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the lex talionis) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate—the very vice which is condemned on Article 3 grounds—unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it."

9.3.32. Counsel therefore submitted that there exists a causal break between the offence and the life sentence. This is not an issue which actually arises in the case of a determinative sentence where it is the sentencing court that imposes what may well be an extremely lengthy sentence for a legitimate penological reason. The fact that the prisoner may well die in prison and never actually be released is simply a consequence of such a lengthy sentence. Counsel submitted that Mr. Damache's argument that if extradited and sentenced, he will inevitably die in prison, is entirely speculative and missing the point by conflating two different issues, namely in equating a whole life sentence with death in prison in the course of a determinate sentence.

9.3.33. Counsel submitted that the logic underpinning *Vinter*, namely the arbitrary determination of the length of the sentence by reference to the prisoner's lifespan, simply does not arise. Reference is made to the concurring judgment of Mahoney J. in *Vinter*, in which, at para. 11, he cites approvingly from the case of *R. v. Bieber* [2008] EWCA Crim. 1601 as follows:-

"It seems to us that the Court [in Kafkaris] considered that an irreducible life sentence raises an issue under Article 3 in circumstances where it may result in an offender being detained beyond the term that is justified by the legitimate objects of imprisonment. This is implicit in the fact that no issue under Article 3 appears to arise provided that there is, in law and in practice, a possibility of the offender being released, even though it remains possible, or even likely, that no release will be granted in his lifetime. The essential requirement appears to be the possibility of a review that will determine whether imprisonment remains justified".

Therefore, counsel submitted that the probability of a prisoner living long enough to achieve release is simply not relevant to the existence of an Article 3 breach. The fact that release is possible is sufficient.

9.3.34. Counsel concluded, therefore, that the argument being advanced would appear to run contrary to the principles outlined in the ECtHR cases of *Vinter* and *Trabelsi*, or at the very least it would require a very considerable development of the existing case-law to apply the same logic to determinate cases. As regards the latter, it was submitted that it is neither appropriate nor permissible for the Irish courts to undertake such an exercise and counsel relied on the Supreme Court decision in *J. McD. v. P.L. & Anor.* [2009] IESC 81, [2010] 2 I.R. 199 where it was held that in interpreting ECHR rights, the Irish courts ought not go beyond the interpretation of the right identified by the ECtHR.

9.3.35. Finally, the State submitted that a finding in favour of Mr. Damache on this issue would be truly radical. As the argument advanced proceeds on the contention that a determinate sentence which is unlikely to be completed before the death of the prisoner is inhuman and degrading, it is not difficult to imagine circumstances in which an adverse finding must follow. They referred to the situation where a court feels obliged to impose a determinate sentence on a very elderly person or where somebody with a terminal illness is subjected to a mandatory or presumptive sentence.

Submissions of the Amicus Curiae

9.3.36. In the *Vinter* case, the Grand Chamber of the ECtHR held that the type of life sentences imposed on the applicants in that case was in breach of Article 3 of the ECHR because of their irreducible nature. The applicants could only be released at the discretion of the Secretary of State for the Home Department on compassionate grounds where the prisoner became terminally ill or seriously incapacitated. The amicus curiae submitted that the main focus of the decision was on the role that rehabilitation should play in the criminal justice system. The ECtHR commented at para. 114:-

"there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

The sentences in *Vinter* were found to be in breach of Article 3 because they failed to provide for:-

"a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds." (Para. 119)

The amicus curiae therefore disagreed with counsel for the State's submission that the *Vinter* judgment focused on the "arbitrary" nature of a sentence, given that its duration will depend on the age of the person at the time of sentencing.

9.3.37. The amicus curiae also referred to a decision of the ECtHR in *Ocalan v. Turkey (No. 2)* (Application Nos. 24069/03, 197/04,

6201/06 and 10464/07, 18th March 2014), where a death sentence originally imposed was commuted to an "aggravated life sentence" which did not permit any possibility of conditional release. The court found that such a sentence, because of its irreducible nature, amounted to a violation of Article 3. Further discussion of the issue is to be found at para. 264 of *Harachiev and Tolumov v. Bulgaria* (Application Nos. 15018/11 and 61199/12, 8th July, 2014), where it was stated at para. 264:-

"While the Convention does not guarantee, as such, a right to rehabilitation, and while its Article 3 cannot be construed as imposing on the authorities an absolute duty to provide prisoners with rehabilitation or reintegration programmes and activities, such as courses or counselling, it does require the authorities to give life prisoners a change, however remote, to someday regain their freedom."

9.3.38. The *amicus curiae* also referred to the *Trabelsi* case where the existence of the possibility of a presidential pardon was found not to constitute an adequate review for the purposes of irreducibility. In the view of the *amicus curiae*, it was suggested that this Court should focus on the issue of rehabilitation, and what provision is made in the U.S. system to provide effective access for prisoners to rehabilitate. This was particularly important in light of Mr. Damache's age and the possibility of a sentence which would be, in practical terms, in place for the remainder of his life. The *amicus curiae* respectfully submitted that, on the evidence, it does not seem that the U.S. system provides for rehabilitation for prisoners who are convicted of terrorism offences in the manner set out in *Vinter*. If this Court was to find on the evidence that Mr. Damache is at real risk of facing a *de facto* life sentence, without an effective system of review based on access to rehabilitation, then the *amicus curiae* submitted that the *Vinter* and *Trabelsi* principles apply such as to put in issue whether extradition would violate Article 3.

Submissions by the State in Reply to the Submissions of the Amicus Curiae

9.3.39. Counsel for the State contended that the submission advanced by the *amicus curiae* failed to take account of the fact that a determinate sentence imposed by a judge, however lengthy, permits of the possibility of rehabilitation. Indeed, it was to be presumed that rehabilitation is built in to such a sentence. This is a pointed and relevant distinction so far as indeterminate sentences are concerned.

9.3.40. According to counsel, another further point of distinction not noticed by the *amicus curiae* is the fact that remission, whether substantial or modest, is available in relation to a determinate sentence in a way that is not in relation to an indeterminate sentence. As such, a determinate sentence which is subject to remission has built into it, in addition to the rehabilitation considerations reflected in the length of the sentence judicially imposed, a further possibility of obtaining a defined and structured form of early release by way of remission. Thus, determinate sentences are amenable to rehabilitative considerations in a way that indeterminate sentences simply are not. Notably, remission is a feature of the U.S. penal system.

9.3.41. In noting the absence of any Strasbourg jurisprudence in relation to irreducibility in relation to determinate sentences, counsel submitted this is striking given that lengthy determinate sentences are inherently more common than the imposition of life sentences. If the same principles apply, then it is surprising that issues concerning same have not apparently been agitated before that Court.

9.3.42. It was further submitted that a necessary corollary of the position articulated by the *amicus curiae* is that any penal system requires that, in addition to a judge taking account of rehabilitation at the point of imposition of sentence, there should also be an additional opportunity or process whereby the prisoner can seek early release. In other words, there should be the possibility of a second bite as it were. Whatever the merits and demerits of such an argument might be, it is not a proposition that is to be found in the body of authority emanating from the ECtHR. As such, the argument advanced by the *amicus curiae* is wholly novel and represents a very substantial expansion of the jurisprudence as it has been understood and applied heretofore.

Submissions on behalf of Mr. Damache in Reply to the State's Reply to the Submissions of the Amicus Curiae

9.3.43. Counsel for Mr. Damache submitted that the State's argument that a determinate sentence had a rehabilitative aspect was specious. A sentence of several decades, which will exceed the natural lifespan of the prisoner and which is not capable of being reduced during the currency of that sentence, cannot have rehabilitation as either its object or its effect. Such a term is practically indistinguishable from a life sentence and it therefore engages the Article 3 grounds identified in *Vinter* and *Trabelsi*.

9.3.44. It was submitted that in terms of remission, Mr. Damache is likely to have a sentence of almost 40 years imposed. Thus, what the State euphemistically calls "modest" remission could not have any practical benefit. It is not offender-specific and it amounts merely to a mechanism to incentivise good order within the prison system. One can usefully contrast this remission with our own "enhanced" and offender-specific remission, which could motivate an offender serving a sentence of 40 years to rehabilitate and to atone for their crime, and which would offer them the hope of release within a time-frame when reintegration into society would still be possible.

9.3.45. With reference to the absence from ECHR jurisprudence relating to irreducibility in relation to determinate sentences and the State's submission that lengthy determinate sentences are inherently more common than the imposition of life sentences, counsel emphasised that there was no evidence put forward before this Court by the State as to whether any of the signatories to the ECHR routinely impose very lengthy and irreducible determinate sentences. Indeed, applying the logic of the State, the absence of case-law on this issue could suggest that all of the signatory States are *Vinter* compliant.

9.4. The Court's Analysis

Determinate Long-Term Sentences

9.4.1. The submissions have been set out in some detail so that the legal basis for Mr. Damache's argument on this ground can be fully understood. Fundamentally, this is an argument based upon a claim that he will receive a *de facto* life sentence and that this type of sentence was irreducible and therefore contrary to Article 3 of the ECHR. It is noteworthy that all of the arguments were based upon Article 3 rights and despite the reference to the Irish cases set out above, there was little focus on it as an issue of constitutional rights.

9.4.2. The format of the written submissions shows that the focus of the claim regarding irreducibility was on the basis that Mr. Damache was facing a *de facto* life sentence. The written submissions in the extradition proceedings were divided into sections entitled A to K. Section H of those submissions were devoted entirely to the subject matter of its heading "[t]he Likelihood of a *de Facto* Life Sentence". Section I then was headed "[t]he Respondent faces an irreducible Life Sentence." The only reasonable inference to draw is that section I was based upon a positive determination under section H.

9.4.3. Although at para. 143 of Mr. Damache's written submissions there was reference to a sentence "whether of life imprisonment or

for a fixed term” and at para. 146 to “very lengthy sentences of imprisonment”, from the foregoing it is perfectly clear that the submissions made on behalf of Mr. Damache were primarily directed towards establishing that he was facing “a life sentence.” As an example I refer to Mr. Damache’s contention that the likely term of imprisonment “would amount to a *de facto* life sentence” is a factually accurate one. Counsel also submitted that the only difference in this case from *Vinter* was “the remote chance that a prisoner serving a determinate sentence might be released when in extreme old age.” Although there was reference to very lengthy imprisonment, it was submitted in the context of the link and similarity with the life sentence in *Vinter* and the claim of irreducibility therefore amounting to a breach of fundamental rights.

9.4.4. Every ECtHR case on which reliance is placed by Mr. Damache dealt with the issue of a life sentence. Reference is made in some of those cases to principles of rehabilitation as relevant to all sentences. There was also reference to the Council of Europe resolutions and recommendations as regards long-term and life sentence prisoners. Those formed part of the written submissions of Mr. Damache. Notwithstanding that, there was simply no real focus as to how those developments within the European penological system were to be raised to the status that failure to abide by them in the context of a determinate sentence amounted to inhuman and degrading treatment. The Irish cases relied upon referred to the practical importance of having effective review mechanisms rather than seeking to advance any particular finding as regard the requirement for such review mechanisms.

9.4.5. At a late stage in the case, namely their written replying submissions to the State’s reply to the *amicus curiae*, Mr. Damache specifically addressed the absence in the ECtHR jurisprudence of findings with regard to determinate sentence and irreducibility. In doing so, counsel referred to a lack of evidence from the State as to the practices in other ECHR countries. For the Court to place that burden on the State would be to misapply the test in *Rettinger*. Although the extent to which *Vinter* applies to determinate sentences is a legal rather than a factual issue, it is for a respondent to prove to the Court, to the standard required in *Rettinger*, that an Article 3 violation is properly apprehended. It is for a respondent to show that the principles set out in the case-law actually apply to the particular circumstances in which he or she finds his or herself. I am of the view, therefore, that the issue of whether a determinate long-term sentence on its own, not amounting to a *de facto* life sentence, was not addressed sufficiently before the Court to discharge the burden of proof that rests with Mr. Damache to show substantial grounds for believing that he is at real risk of being subjected to treatment contrary to Article 3 or indeed contrary to the Constitution.

9.4.6. In so finding, I am also conscious that the Supreme Court in *J. McD v. P.L.* pointed out at para. 327 that “[i]t is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence.” The *ratio decidendi* of *Vinter* and *Trebelci*, applies to the life sentences that were at issue in those cases. I am not satisfied on the evidence and the submissions before me in this case that the principles identified therein apply to determinate sentences.

De Facto Life Sentence

9.4.7. The primary contention that Mr. Damache made was that he came under the *Vinter* line of authority because he is facing what he claims is, in reality, a life sentence. Before considering whether a so-called *de facto* life sentence comes under the umbrella of the *Vinter* authority, it is necessary to consider whether Mr. Damache’s proposed sentence would truly be a life sentence.

9.4.8. At the outset, it can be identified that we are not dealing with a sentence of such length that it automatically means life as, for example, would be the situation where a sentence of 150 years was imposed. This is a 45 year sentence which has an inbuilt possibility of remission. The evidence is that the 13% remission would reduce it to 39 years imprisonment. On the evidence before me, it is said that for a now 50 year old man, this would amount to imprisonment until he is 89 years old.

9.4.9. During the course of the hearing, I raised the issue of life expectancy. The response was a verbal submission to the effect that the 45 year sentence would exceed Mr. Damache’s life expectancy. No evidence as to that was placed before the Court.. The Court has not been told what the life expectancy of this man is, given his apparent childhood in Algeria but his later life in Ireland. The methodology for the assessment of life expectancy is not self-evident. When we say life expectancy do we mean life expectancy at birth or life expectancy once a person reaches a certain age? Is such life expectancy increasing? If so, does that affect the calculation that should be made regarding persons in the middle years of their life rather than the early years?

9.4.10. In a case where the projected age at release is so far beyond what is commonly understood as life expectancy for humans as for example in the case of a sentence of 150 years, a court would be entitled to take judicial notice of this. What Mr. Damache has done here is to ask the Court to infer or take judicial notice that his life expectancy will be exceeded. Yet how can the Court infer or take such judicial notice when the Court can see many people living into their eighties and nineties.?

9.4.11. An additional consideration is that Mr. Damache has been in custody on this matter since 27th February, 2013. Nowhere in the evidence presented by Mr. Damache was it indicated whether any sentence he might receive would be backdated. If it were to be backdated, he would be released at age 86 years with remission. That three year difference in the potential age of release may also be vital in the consideration of life expectancy.

9.4.12. It is for Mr. Damache to satisfy the Court that there are substantial grounds for believing that he is at real risk of being sentenced to a *de facto* life sentence. No evidential basis was put forward to establish that the likely sentence will, in his particular circumstances, amount to a life sentence. No inference or judicial notice can be taken that his life expectancy will be exceeded where the Court is aware that many people live into their eighties and nineties. If Mr. Damache were to live until then by definition he would not serve a life sentence. In all the circumstances, Mr. Damache has not established on substantial grounds that he is at real risk of facing a *de facto* sentence of life imprisonment.

9.5. Decision

9.5.1. I have already concluded that on the evidence before me, Mr. Damache is indeed likely to be sentenced to 45 years in respect of both sentences. At a minimum, he is at real risk of facing a sentence of 45 years imprisonment. That sentence is liable to be reduced by 13% with “good time” credit and he is at real risk of a sentence of 39 years imprisonment. Notwithstanding that finding, I am not satisfied that Mr Damache has established on the evidence that this amounts to a *de facto* life sentence. I am also not satisfied that the arguments advanced in the case provide a sufficient basis to hold that an irreducible long-term determinate sentence could amount to inhuman and degrading treatment.

10. Coercive Plea Bargaining and Special Administrative Measures

10.1. Issue

10.1.1. In the U.S.A., many criminal cases are resolved through the process of plea bargaining where an agreement, usually written, is made between the prosecution and the defence that the defendant will agree to plead guilty to a particular charge in return for some

concession from the prosecutor. Mr. Damache claims that if extradited, he will be subjected to a coercive plea bargaining regime amounting to a flagrant denial of justice.

10.1.2. Related to the plea bargaining system is the possible imposition of special administrative measures ("the SAMs"), which Mr. Damache contended has a coercive influence on the decision whether to accept a plea agreement or not. SAMs involve a number of restrictive measures being imposed on certain inmates who are deemed to pose a threat to security and safety in order to prevent acts of violence or terrorism or disclosure of classified information. Restrictions are imposed on where the inmate is housed, on correspondence and on interaction with other inmates, prison staff and visitors. SAMs can be applied to prisoners waiting to be tried or while their trial is ongoing, as well as to convicted inmates. SAMs and other provisions of federal law also permit the monitoring of attorney-client communications of certain inmates.

10.1.3. The issue for the Court under this heading is whether Mr. Damache has established on substantial grounds that there is a real risk that, if extradited, he will be subject to a flagrant denial of justice in his exposure to such a system.

10.2. Evidence

Initial Affidavit of Mr. Dratel

The U.S. Federal Plea Bargaining System

10.2.1. Mr. Dratel stated that plea bargaining is a recognised and accepted component of the U.S. criminal justice system in both state and federal courts. He stated indicative of this is that more than 95% of federal cases are resolved by guilty pleas resulting from plea bargains between the prosecution and defence (U.S. Sentencing Commission's 2011 *Sourcebook of Federal Sentencing Statistics*).

10.2.2. Mr. Dratel indicated that plea bargaining in the federal system is governed by Rule 11 of the Federal Rules of Criminal Procedure, but that rule sets forth primarily procedural rules applicable to the court proceedings at which guilty pleas are entered, rather than the negotiations between defence counsel and the prosecutor, which are mostly informal.

10.2.3. His evidence established that the U.S. Constitution's due process clause imposes general restrictions on the plea bargaining process. In particular, plea bargains cannot contain unconscionable or unconstitutional terms. It further establishes that the courts in the U.S. have held that plea bargaining generally, and in most factual contexts, does not offend due process or the right to a fair trial. He stated that because a guilty plea in the federal system requires a detailed attendance and instructions with the defendant in order to establish that the guilty plea is made knowingly and voluntarily, and with a sufficient factual basis for the court to accept the guilty plea, courts in the U.S. have generally held that plea bargaining does not affect the right to a fair trial.

10.2.4. However, in his affidavit, Mr. Dratel contended that on a more practical, realistic level, the uneven bargaining power, and the severity of sentences upon conviction after trial compared with sentences imposed pursuant to a guilty plea, in combination with the availability of other pressure tactics, like supermax prison designations, certainly provides an overriding incentive for defendants, even those with strong defences at trial, to plead guilty in order to avoid a worst-case scenario that would result in imprisonment for a significantly longer period of time.

10.2.5. Mr. Dratel pointed to the strict and severe U.S. Federal Sentencing Guidelines' ("the Sentencing Guidelines") ranges for most sentences and stated that most defendants engage in plea bargaining in a bid to alleviate the prospect of extreme punishment after trial. He stated a factor which undoubtedly has a coercive influence on the decision whether to accept a plea agreement is the prospect of a substantial sentence in a maximum security facility and indeed the possibility of restrictions like SAMs being imposed on a defendant. He stated that a designation to a facility like the ADX or the Bureau of Prison's ("the BoP") Terre Haute, Indiana, or Marion, Illinois, which are facilities that hold many persons of the Muslim faith who have been convicted of terrorism-related offences, is another bargaining chip that prosecutors can use to overbear a defendant's will to resist pleading guilty.

10.2.6. As a result, due to the threat of an extended residence in supermax prisons like the ADX, Mr. Dratel stated that the two most important elements in plea bargaining in a terrorism case in the U.S. federal system are (a) the offence to which the defendant will plead guilty; and (b) the stipulations with respect to the applicable Sentencing Guidelines' level. Even then, he stated the plea bargain offers limited certainty as the ultimate sentence is imposed by a judge. That sentence will not be reviewable if it is reasonable, *i.e.* supported by an analysis of the sentencing factors listed under the relevant code.

10.2.7. Mr. Dratel went on to say that a plea agreement can also include a number of other collateral provisions, including financial penalties, waivers of most appellate rights (if the sentence is in accordance with the terms of the agreement), other waivers, and repatriation issues.

The Impact of SAMs On Defence Function and Plea Bargaining

10.2.8. Mr. Dratel averred that apart from SAMs, other provisions of federal law, *e.g.* the Foreign Intelligence Surveillance Act 1978 ("FISA"), also permit the monitoring of attorney-client communications that occur while a defendant is in custody.

10.2.9. Mr. Dratel criticised aspects of these other federal powers for reasons such as lack of notification, capturing of extensive privileged information and lack of judicial oversight. He also stated that evidence obtained may be admitted in a criminal trial without access to the underlying application for the warrant.

10.2.10. Hence, in his opinion, surreptitious monitoring of attorney-client communications through FISA is a genuine prospect for any lawyer and defendant involved in a national security and/or terrorism case. There is no way to determine whether such monitoring is occurring, or has occurred, unless the communications are deemed (by the government) sufficiently relevant to the prosecution to require disclosure as part of discovery. Accordingly, Mr. Dratel averred that counsel and client must operate under the assumption that monitoring is indeed occurring.

10.2.11. Mr. Dratel stated that information gleaned from interception of attorney-client communications or even simple monitoring of attorney-client e-mail correspondence, is passed on to criminal prosecutors without limitation. Mr. Dratel noted that indeed such communications were an integral part of the prosecution against his client Lynne Stewart, an attorney prosecuted for material support to terrorists after a breach of SAMs and sentenced to ten years imprisonment. In addition, challenges to the government's interception of such communications, and any derivative use prosecutors might have made of such information have failed.

The Chilling Effect of SAMs

10.2.12. Mr. Dratel emphasised that the prosecution of his client Lynne Stewart is an ideal example of the extent to which an attorney's conduct is criminalised under U.S. statutes proscribing "material support" to terrorists or to a (formally) designated foreign terrorist organisation. In that case, Ms. Stewart who represented Sheikh Omar Abdel Rahman, an Egyptian cleric convicted in 1995 in the U.S. for terrorism-related offences, continued to visit him post-conviction. Mr. Rahman was subject to a FISA warrant to monitor their telephone conversations and in-person visits and was also subject to SAMs. Contrary to the SAMs, Ms. Stewart provided a reporter with Mr. Rahman's statements regarding events and developments in Egypt.

10.2.13. In Mr. Dratel's opinion, the existence of the SAMs, and the related prosecution of Ms. Stewart, have exerted a chilling effect on the activities of lawyers and the willingness of clients to provide instructions. While such impact is not capable of measurement, Mr. Dratel averred that he has had a number of attorneys inform him that either they will not become involved in such cases for fear of personal criminal liability (because the standards of conduct with respect to the SAMs are arbitrary, confusing, and ultimately left to the discretion of the prosecutor), or that they will self-censor their communications and conduct in order to steer far clear of any dividing line between permissible and impermissible conduct. Mr. Dratel stated that in his own experience, the latter is true of all attorneys who are involved in such representation, and it applies not only in the SAMs context, but to all terrorism-related cases because of the possibility of FISA surveillance.

10.2.14. On the other hand, Mr. Dratel asserted that clients existing under a SAMs regime often refuse to trust that there is any confidentiality in their communications with counsel. Therefore, they are not forthcoming with counsel as they might be otherwise, which in turn deprives counsel of a full description of facts from the client, and hinders potentially fertile and productive avenues of investigation. Mr. Dratel continued to say that the prospect of FISA monitoring further discourages clients from sharing information with their attorney(s) (and the attorneys from soliciting such information from their clients who are in custody), and achieves the same problematic result.

The Likelihood That Mr. Damache Will Be Subject to SAMs, and Their Impact

10.2.15. Mr. Dratel averred that whether or not Mr. Damache will be subject to SAMs cannot be definitively determined at this time because the SAMs are imposed arbitrarily, asymmetrically, and without the capacity for genuine review. He stated that SAMs are imposed on some defendants facing terrorism charges, while others similarly situated do not suffer SAMs application, and, in practical terms, the government does not have to explain its decision to the Court. Mr. Dratel averred that indeed, the overwhelming rationale for imposing SAMs on a particular defendant is simply "the nature of the offense charged".

10.2.16. Judging by his own experience, however, Mr. Dratel stated that the inordinately flexible criteria for SAMs, which sometimes appears no more demanding or intricate than being charged with a terrorism offence, or being a Muslim defendant in a terrorism case, or having internet skills, or being in the habit of speaking publicly about the case, could easily encompass Mr. Damache.

10.2.17. In Mr. Dratel's opinion, the nature of the offences with which Mr. Damache is charged alone would motivate prosecutors to isolate him from the prison population, the media, and the public. Mr. Dratel averred that the SAMs are imposed on many defendants accused of terrorism offences, particularly those with international contacts, and/or communications, paramilitary, and/or recruitment skills.

10.2.18. Mr. Dratel further stated that in addition, even at the pre-trial stage, Mr. Damache would not be housed in general population, but instead would be placed in solitary confinement for the entirety of his pre-trial detention. Mr. Dratel averred that such isolation would be imposed even without SAMs, as many of his clients (and others) accused of terrorism-related offences, even when not subject to SAMs, are nevertheless placed in solitary confinement in the most secure wing of the detention facility. Therefore, Mr. Dratel contended that even if not formally subject to SAMs, the nature of pre-trial solitary confinement for many defendants in terrorism cases closely parallels the SAMs regime.

10.2.19. Mr. Dratel referred to his own article in which he addressed the detrimental effects of the SAMs on a defendant's capacity to adequately prepare for trial, to assist in his own defence, and to maintain an appearance of mental stability and physical health. In his opinion, the SAMs interfere irreparably with a defendant's right to a fair trial and the right to prepare and assist in the defence, and constitute inhuman or degrading treatment however those terms are defined. He stated that the SAMs often present the single most difficult obstacle in preparing a case for trial, and in keeping the defendant's attention on substantive issues. Also, he stated that the SAMs will rupture all relationships, familial or otherwise, that the defendant has with the outside world. The restrictions on communications and visitations guarantee that effect.

10.2.20. In Mr. Dratel's view, SAMs are not merely administrative. He believed that they form part of a brutal regime imposed at the direction of the prosecutor in a select category of cases, and not as a result of any independent or spontaneous analysis by the BoP. Also, they are neither necessary nor proportional in a great many cases. He continues by stating that they are extremely onerous, and not subject to modification. Administrative challenges have all failed, and challenges in the courts have been rejected as *unripe or unwarranted*. Mr. Dratel referred to the cases of *United States v. Yousef*, 327 F.3d 56, 165 (2d Cir. 2003); *United States v. Usama bin Laden* (El-Hage), 213 F.3d 74 (2d Cir. 2000) and *United States v. Abu Ali*, 528 F.3d 210, 243-44 (4th Cir. 2008) in this matter.

10.2.21. However, according to Mr. Dratel, there exists one exception, in the case of *United States v. Reid*, 214 F. Supp.2d 84 (D. Mass. 2002), which proves the rule, and even that modification was modest, although telling: that defence counsel was not required to sign an affidavit pledging adherence to the SAMs. None of the SAMs underlying provisions were ameliorated. Therefore, without the prospect of administrative or judicial relief, defendants facing SAMs often bargain away their right to trial in order to avoid the inhuman treatment, and attendant deterioration of mental and physical health, that accompanies the SAMs.

10.2.22. Consequently, the SAMs and the possibility of incarceration at ADX Florence can have a significant impact on a case, and on a defendant. Mr. Dratel states that he is aware of cases in which defendants' guilty pleas were conditioned on an agreement that they (a) not have SAMs imposed upon them, *United States v. John Walker Lindh*, Criminal No. 02-37A (E.D. Va.); and (b) not be designated to the ADX super-max prison facility (*United States v. Goba*, 1:02-Cr-00214 (W.D.N.Y.) (WMS-HKS) and *Walker Lindh*).

Initial Affidavit of Ms. Williams

On Plea Bargaining

10.2.23. Ms. Williams stated that the U.S. federal system provides multiple procedural safeguards during the sentencing process. She contended that if a dispute were to arise about any important fact at Mr. Damache's sentencing, the Court must allow Mr. Damache an adequate opportunity to present relevant information. She stated that the Court could allow Mr. Damache to present written statements from counsel or affidavits from witnesses to rebut any assertions made by the government. If any written statements and

affidavits prove ineffective, the sentencing court could then hold an evidentiary hearing to resolve the disputed issue, during which witnesses could be examined and cross-examined. Mr. Damache could then appeal his sentence to the appropriate appellate court. Upon any such appeal, the appellate court could then reverse the sentencing court's decision if it was "*without factual support in the record, or if after reviewing all the evidence [the court] was left with the definite and firm conviction that a mistake had been made*" as quoted in *US v. Beaulieu*, 893 F.2d 1177, 1181-82 (10th Cir. 1990).

10.2.24. Ms. Williams suggested that Mr. Dratel's statements concerning plea bargaining in the U.S. are flawed. She believed that the fact that 95% of federal cases are resolved by guilty plea does not prove that an "unequal bargaining power" exists between the defendant and the government. Rather, she would say that it shows that the government rarely charges an individual with a crime he or she did not commit. In the U.S. federal system, a defendant may only plead guilty if he or she actually committed the crime and admits to doing so in open court before the judge. The sentencing judge must then independently determine that a factual basis exists for the guilty plea, *i.e.* that the defendant is pleading guilty because he or she is actually guilty. Ms. Williams claimed that this represents an important and substantial procedural safeguard.

10.2.25. Ms. Williams went on to state that sometimes the government will agree, as part of a plea agreement, not to recommend an enhanced sentence; however, such a recommendation is advisory, as the judge ultimately determines how to punish the defendant. She stated that the government may also agree not to recommend placement in a supermax facility, or the court may recommend a particular placement; however, the designation of a detention facility post-conviction lies within the sole discretion of the BoP.

10.2.26. In Ms. Williams' opinion, no prediction can be made at this time as to whether plea negotiations will take place in Mr. Damache's case. If Mr. Damache has in fact asserted and maintained his innocence, and continues to maintain his innocence, then plea bargaining will not be an issue in this case. In this regard, she stated that she understands that when interviewed by An Garda Síochana that Mr. Damache denied any involvement in terrorist activities. Therefore, she was unclear as to the evidential basis upon which it is suggested that the issue of plea bargaining is likely to arise in Mr. Damache's case. She also added that if extradited, Mr. Damache will enjoy a presumption of innocence in relation to the offences for which he is surrendered.

On SAMs

10.2.27. In Ms. Williams' opinion, Mr. Dratel is incorrect when he states that SAMs are imposed "arbitrarily, asymmetrically, and without the capacity for genuine review." Ms. Williams believed that to the contrary, strict laws and procedures govern the placement of an inmate under SAMs and in this context she refers to the affidavits of Mr. Synsvoll and Mr. Julian, in which she stated that the details of these rules are dealt with comprehensively. Ms. Williams contended that it is apparent that SAMs are not imposed "arbitrarily or asymmetrically", nor are SAMs imposed on all terrorism or Muslim defendants. Similarly, she stated that it will be apparent that SAMs are subject to "genuine review".

10.2.28. Ms. Williams stated that in a case where the U.S. Attorney General specifically orders, based on information from the head of federal law enforcement or intelligence agency, that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the director of the BoP shall, in addition to the SAMs imposed, provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. She stated that Mr. Dratel attempts to use the prosecution of his client, Ms. Lynne Stewart, as an example of how SAMs have a chilling effect on lawyers and their clients. However, Ms. Williams contended that Mr. Dratel fails to mention that his client Ms. Stewart is the only attorney to ever have attorney-client communications used in a terrorism-related prosecution. Moreover, she stated that he also fails to mention that Ms. Stewart was shown to be using her attorney-client privileges to actually facilitate acts of terrorism. Hence, the prosecution's use of her communications was legally authorised.

10.2.29. She stated that the placement of an inmate in the Special Housing Unit of a facility and on single-cell status (*i.e.* solitary confinement) is rare in the U.S. federal system and hardly ever done in the pre-trial setting. It is only done if the BoP deems it necessary to ensure the safety, security and orderly operation of correctional facilities or to protect the public. It is also done if the person commits a prohibited act. She stated it is too early to predict if he will be held in such a single cell.

Affidavit of Mr. Synsvoll

10.2.30. Mr. Christopher Synsvoll, Supervisory Attorney at the U.S. Department of Justice Federal Bureau of Prisons Facilities known as the Federal Correctional Complex, Florence, Colorado, begins by defining SAMs as rules that allow the government to monitor and impose some limitations on the communications of dangerous inmates. The SAMs restrictions may be imposed by the Attorney General where they are determined to be "reasonably necessary to protect persons against the risk of death or serious bodily injury." The SAMs can last for up to one year. There is a thorough review of the necessity for the SAMs before the SAMs expire. If there is a finding of continued danger associated with the inmate's communications, the SAMs may be renewed.

10.2.31. Mr. Synsvoll stated that the imposition of SAMs is rare. He stated that there are 216,381 inmates currently in the custody of the Bureau of Prisons, of which 55 currently have SAMs imposed on them, 35 of these being incarcerated at the H Unit of the ADX, with a total of 407 inmates being incarcerated there at the date of his affidavit evidence in the case herein (August 2014). He went on to say that there have been a number of cases in which the SAMs of inmates have been vacated and/or not renewed in their entirety. The SAMs of 20 inmates who have been housed at the ADX have been removed and/or not renewed. Seventeen of those instances occurred relatively recently since 1st January, 2009.

10.2.32. In his role as Supervisory Attorney for the legal department at the FCC Florence, Mr. Synsvoll is familiar with all four levels of the inmate administrative grievance procedure created by the Bureau Administrative Remedy Program. He stated that inmates who are subject to SAMs may use the Administrative Remedy Program to challenge any aspects of their SAMs, including the imposition of the SAMs and the renewal of the SAMs. He stated that these inmates may also use the Administrative Remedy Program to request modifications to their respective SAMs and challenge the decision to deny a requested modification. He stated these are not futile processes.

10.2.33. Mr. Synsvoll outlined in detail the process which is an administrative one. It is unnecessary to outline that process in any detail here. Suffice to say that he contended that the process has led to modifications in SAMs which are requested by inmates and also that modifications can be made as a result of initiatives from the BoP.

Replying Affidavit of Mr. Dratel

10.2.34. Mr. Dratel averred that despite Ms. Williams' claims, the imbalance of power present in the U.S. plea bargaining system is demonstrated by a number of factors, from the virtually unreviewable discretion of prosecutors with respect to charging decisions, to the heavy sentences recommended under the Guidelines and the more likely prospect in some cases, including terrorism cases, of the defendant being confined in high security "supermax" prisons such as the ADX Florence or to the specially designed Control Management Unit ("the CMU") at Terre Haute, Indiana or Marion, Illinois, or being subject to SAMs.

10.2.35. He disagreed with Ms. Williams' assertion that no unequal bargaining power exists between the defendant and the government. He contested her understanding of the statistics on guilty pleas. More pertinently perhaps, he stated that his initial affidavit did not make the claim that the statistics prove an unequal bargaining power. Mr. Dratel's view is that it is the prosecutor's leverage during negotiations that creates unequal bargaining power, which is manifested in a variety of procedural and substantive rules and practices that vest in the prosecutor the principal authority to determine the charge and, in turn, the sentence.

10.2.36. Mr. Dratel averred that the government's superior bargaining power is not a figment of a defence lawyer's imagination. He referred to an article by a sitting federal judge, the Honorable Jed S. Rakoff of the Southern District of New York, entitled "Why Innocent People Plead Guilty" (2014) 61(18) *The New York Review of Books* in which he describes the constitutional right to a jury trial "a mirage". In this article, Judge Rakoff stated that in plea bargaining, the prosecution has all the power and advantage. Judge Rakoff declared, "it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision."

10.2.37. Judge Rakoff pointed out that the Guidelines "along with mandatory minimum [sentences], were causing the virtual extinction of jury trials in federal criminal cases." Judge Rakoff noted that "[t]he reason for this is that the [sentencing] guidelines, like the mandatory minimum [sentence], provides prosecutors with weapons to bludgeon defendants into effectively coerced pleas bargains."

10.2.38. In addition to those factors discussed by Judge Rakoff, Mr. Dratel averred that there are other tools that amplify the prosecutor's power in plea bargaining and, ultimately, sentencing. He stated that not only are there the dramatically reduced sentences for cooperating defendants – an advantage bestowed exclusively at the prosecutor's effectively unreviewable discretion – but also the prosecutor possesses the ability to grant an additional one-point Guidelines reduction for a sufficiently early guilty plea. A guilty plea itself provides an additional two-point reduction for Acceptance of Responsibility.

10.2.39. On the other hand, Mr. Dratel stated that defendants who proceed to trial face the implicit threat of a significantly longer sentence if convicted, a practice known colloquially as the "trial tax". He referred to Judge Rakoff's comments in this regard with reference to a very large disparity between narcotics sentences on a guilty plea and after trial. Judge Rakoff commented that until the advent of the current federal system, "a genuinely innocent defendant could still choose to go to trial without fearing that she might thereby subject herself to an extremely long prison term effectively dictated by the prosecutor."

10.2.40. Mr. Dratel highlights his own experience of disparity in sentencing based upon one co-accused pleading and another, less culpable defendant, receiving a far higher sentence having contested his case.

SAMs

10.2.41. Mr. Dratel stated that in his experience of representing more criminal defendants subjected to SAMs than any other lawyer, the process for imposing SAMs is a rubber stamp by the BoP which simply implements the wishes of prosecutors. Mr. Dratel stated, as an example, that he does not know of any single instance of the SAMs being applied independently by the BoP or of the BoP declining to impose the SAMs once a prosecutor has decided to impose them. Mr. Dratel contested the reviewability of SAMs but that process is unnecessary to deal with under this heading. Mr. Dratel also gave an example of a case in which he stated the imposition of SAMs was arbitrary involving, as it did, a person extradited to the U.S.A. from the UK who was not on special security conditions in the UK but had SAMs imposed on him in the U.S..

10.2.42. Mr. Dratel continued by saying that the fact, as noted by Ms. Williams, that a formal decision regarding SAMs is made by the BoP is anything more than semantics, as the BoP is an agency within the DoJ, in which federal prosecutors are the principal authorities. Likewise, Mr. Dratel believed that the statistics cited by Mr. Synsvoll require some further analysis. Mr. Dratel stated that while few U.S. federal inmates are subject to SAMs, almost every inmate who is subject to SAMs has been charged with or convicted of terrorism offences. Therefore, a significantly higher proportion of terrorism defendants suffer from SAMs than those accused or convicted of other crimes including those involving violent conduct, rendering the numbers – including the total number of federal inmates – meaningless. He again asserted that no inmate has brought a successful challenge in court to the restrictions imposed.

Second Affidavit of Professor Rovner

10.2.43. Professor Rovner defined SAMs as additional contact and communication restrictions that can be imposed by the U.S. Department of Justice ("the DoJ") on federal prisoners already in solitary confinement, including in pre-trial detention. She stated that these restrictions frequently bar a prisoner's attorneys and family members from sharing any information received from that prisoner with third parties, under threat of criminal sanction. Separate from the implications for zealous advocacy and free speech, these "gags" as she calls them, together with the DoJ's refusal to provide meaningful information, mean that the public knows very little about a vital aspect of the government's treatment of prisoners in federal custody. She noted that this is the reason why a number of civil and human rights organizations have urged the members of the 53rd Session of the Committee Against Torture in Geneva to require the U.S.A. to provide basic information about prisoners in solitary confinement.

10.2.44. Professor Rovner noted the assertion by Ms. Williams that placement of a federal prisoner in single-cell status is rare and hardly ever done in the pre-trial setting. Professor Rovner indicated that she has been unable to locate any information from the BoP or the DoJ that states the number of people in pre-trial solitary confinement and she stated that such information is, in the aggregate, solely in the custody and control of the BoP. However, she did say that she has written about the experience of Syed Fahad Hashmi, including the three year period he spent in pre-trial solitary confinement under SAMs in her article entitled "Preferring Order to Justice" (2012) 61 *American University Law Review* 1331, the factual matters in same relating to Mr. Hashmi and others being true to the best of her knowledge.

10.2.45. She outlined Mr. Hashmi's case by saying that he was extradited from the UK to the U.S. in 2007 to face charges of providing material support to Al-Qaeda. He had SAMs imposed upon him within months of arriving in the U.S. He remained on SAMs for three years including during the period in which he accepted a plea bargain and was subsequently sent to ADX. She stated that he

accepted the plea bargain a day after the court ordered an anonymous jury. She stated the government dropped two charges in response to the plea on one charge and she queries whether the SAMs were imposed not because he was a high level terrorist but because the prosecution wanted to induce a plea. She stated that the conditions he was held under have drawn the criticism of human rights organisations.

10.2.46. In addition to Mr. Hashmi, Professor Rovner is also aware of reports of other people facing terrorism-related charges who were put in solitary confinement under SAMs pre-trial, including Ahmed Ghailani (held under SAMs for a year pre-trial, following years in detention at Guantanamo Bay) and Mohammed Warsame, who spent over five years in pre-trial detention, most of it in solitary confinement under SAMs.

10.2.47. According to Professor Rovner, SAMs can be imposed in ways that appear arbitrary or asymmetric due to the lack of opportunity for meaningful review. However, she did state that the evidence she relies upon in support of this opinion is, admittedly, anecdotal in that it is derived from people she has spoken and corresponded with in federal custody, including clients she has represented who are under SAMs and in the ADX.

10.2.48. Professor Rovner outlined her experience of two prisoners (one of whom she describes as her client and the other a co-plaintiff) who engaged in a process of internal review of SAMs which she averred was wholly meaningless. She said that in 2012, the co-plaintiff's SAMs were not renewed but her client is still subject to SAMs over nine years after their original imposition. One prisoner does not know why his SAMs were not renewed, just as the other does not know why he is still under SAMs. Her client has sought a court review but this has been dismissed on the basis that his 11 years of solitary confinement, nine of these years under the imposition of SAMs, did not give rise to a "liberty interest" worthy of constitutional protection.

10.2.49. The evidence of Professor Rovner was that under U.S. constitutional law, a prisoner is only entitled to "due process" when he is placed or retained in conditions of confinement that are sufficiently atypical and significant as compared to the "ordinary incidents of prison life". She said that in her client's case, the court, citing precedent from the U.S. Court of Appeals for the Tenth Circuit and quoting *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), found that "even though the conditions at ADX are 'undeniably harsh,' convicted terrorists in the ADX general population unit had no liberty interest in avoiding confinement in the ADX." She said that the court also cited several other decisions from the District of Colorado. In so holding, she believes that the court gave enormous deference to the government, finding that the decision to hold plaintiffs in ADX under SAMs was a matter of "professional judgment" by the executive branch, and was effectively unreviewable in light of the Supreme Court's decision in *Holder v. Humanitarian Law Project* 561 U.S. 1, 33-34 (2010).

10.2.50. According to Professor Rovner, once SAMs are imposed, the BoP makes the determination as to where to house the prisoner. For prisoners with post-conviction SAMs, she understood that the vast majority of them are incarcerated at ADX, though a couple of them are housed on death row. She said she knows of one prisoner with SAMs who was housed in a CMU, but his SAMs were less restrictive than most of the SAMs she has seen.

10.3. Submissions

Submissions of Mr. Damache

On SAMs

The Respondent would be Subjected to SAMs in the Requesting State

10.3.1. Counsel quoted extensively from Mr. Dratel's initial affidavit on the issue of the likelihood of Mr. Damache being subjected to SAMs. This likelihood is based upon the fact of the terrorism offences being involved and the nature of his alleged involvement in them. Counsel asserted that Ms. Williams, in her reply, does not engage with the contention that SAMs are likely to be imposed on Mr. Damache, but merely suggests that Mr. Damache's evidence is speculative. Ms. Williams is the prosecutor in the case and has made little effort to clarify whether these extremely coercive measures would be imposed on Mr. Damache. In the circumstances, and having regard to the evidence before the Court, it is submitted that the evidential threshold as to whether SAMs could be imposed on Mr. Damache has been far exceeded.

Surveillance of Attorney-Client Communications and the Impact of SAMs on Preparation for Trial

10.3.2. Counsel for Mr. Damache submitted that the impact of SAMs on plea bargaining and on the ability of an accused to contest the case is very significant. The will of the accused is broken down by prolonged and extreme solitary confinement and which is referred to in detail in Mr. Dratel's evidence. In addition, accused persons under SAMs are fearful to discuss their case with the legal advisors in case they are being recorded due to permitted monitoring of attorney-client communications that occur while a defendant is in custody and where the SAMs imposed on a particular defendant must expressly include a monitoring provision. However, under other federal provisions a warrant for communications will not require prior notice to the inmate or the attorney.

On Plea Bargaining

10.3.3. Counsel referred to the statistic that more than 95% of federal cases were resolved by guilty pleas resulting from plea bargains between the prosecution and defence. Counsel acknowledged that the majority of guilty pleas in the federal system are entered pursuant to a written agreement (confirmed during a subsequent court appearance) between the prosecution and the defendant, and that plea agreements are deemed valid unless they contain unconscionable or unconstitutional terms.

10.3.4. It was also acknowledged that it may well be that there is no radical difference between the two jurisdictions in respect of the various pressures on an accused in deciding whether to plead guilty. The DPP in this jurisdiction also has full discretion about charging decisions. Counsel said that negotiations frequently occur here about replacing more serious with less serious charges and that we have mandatory minimum sentences, albeit presumptive, which have operated in practice to generate a high number of guilty pleas.

10.3.5. Counsel focused on the operation of the system in practice in the U.S.. Both jurisdictions are at either ends of a spectrum of conduct. At its extreme end as in the U.S. system, it can veer into patent unfairness and as understood in Irish constitutional terms, slip into unconstitutionality. Counsel relied upon the views of Judge Rakoff as set out above and Mr. Dratel's evidence to demonstrate that federal prosecutors operate at this extreme end of the spectrum. In particular, charging decisions can dictate the sentence in circumstances where the Guidelines sentences and the actual sentence imposed mirror each other to a predictable degree. This, it was submitted, was different to the situation here where an accused can be assured that all relevant mitigation will be before the court for consideration.

10.3.6. Counsel submitted this is not the only unfairness facing Mr. Damache if he ultimately finds himself plea bargaining in the U.S. Counsel also relied upon Mr. Dratel's observations on the chilling effect of SAMs and other surveillance on the activities of lawyers and the willingness of clients to provide instructions as evidence of the unfair system. These measures have as their effect and arguably their object too, the breaking of the will of the subject, in this case Mr. Damache, and have a significant impact on the charging process. Counsel made further reference in this regard to Professor Rovner's description of her client's experience of the plea bargaining system in her earlier quoted article, in which she referred to his change of plea a day after the court ordered an anonymous jury.

10.3.7. Counsel referred to Ms. Williams' acknowledgement that the prosecutors may agree not to recommend placement in a supermax facility or that the court may recommend a particular placement although recognising that she said that the designations remain within the sole discretion of the BoP. Counsel submitted that this reply offers little reassurance to Mr. Damache and indeed the court as to the intentions of the prosecution in the event of surrender. Counsel submitted that Ms. Williams side steps the issue of whether a prosecutor has influence on the imposition of SAMS or pre-trial solitary confinement detention where she indicates that it is a matter for the U.S. Attorney General and the BoP. Counsel submitted that Mr. Dratel has been less equivocal when he stated they were imposed at the direction of the prosecutor in a select category of cases and not by the BoP.

10.3.8. Counsel then mentioned the secondary issue raised by Ms. Williams in respect of plea bargaining as to whether there are sufficient safeguards in place to prevent innocent persons pleading guilty. Counsel submitted that this misses the point to a certain extent, in that the issue is not whether the guilty pleas are truthful, but whether they are *voluntary* in the sense of being uncoerced and the product of free choice. They referred to Judge Rakoff's description that any contention that all such pleas are voluntary is "a total myth".

10.3.9. Counsel also submitted, however, that there may be significant problems even in respect of the alleged safeguards referred to by Ms. Williams. Judge Rakoff in his article noted that approximately 10% of the 300 people who have been exonerated by the Innocence Project had pleaded guilty. Counsel raised the issue of the overwhelming number of Muslim terrorist suspects who have chosen to plead guilty (and indeed, those who contested the charges) and queried rhetorically if indeed they were all factually guilty.

10.3.10. Counsel observed that one might be intent on fighting a charge, but have one's will so eroded by the extremity of the situation that there seems to be no choice but to plead guilty. Counsel submitted that when this happens by reason of the strength of the evidence, the fear of a custodial sentence or other intrinsic factor relating to the prosecution itself, then there could be little cause for complaint. However when this happens, because the person or persons with whom you must bargain have ensured that you have already spent several years in solitary confinement and have it within their power to ensure that you spend decades more, then the process is fundamentally wrong.

10.3.11. Counsel referred to the decision of Peart J. in the case of *Attorney General v. Murphy* [2010] IEHC 342, [2010] 1 I.R. 445 in which Peart J. was not persuaded that the plea bargaining system popular in the U.S. was such that extradition should have been refused in that particular case. Peart J. held that the comity of courts require that, in the absence of some very exceptional feature of another jurisdiction's criminal procedure which was likely to infringe a constitutionally protected fundamental right, the court ought to respect the right and entitlement of another sovereign state to have in place a system for the administration of criminal justice which it considered fair and appropriate. Peart J. found that the respondent in that case had entered upon the plea bargaining procedure freely and without coercion and with the benefit of legal advice. Accordingly, the respondent was held not to have made out his objection to surrender.

10.3.12. In Mr. Damache's situation, however, a completely different and far more compelling bank of evidence has been put before the Court to facilitate it in coming to a different conclusion. Counsel submitted that the largely unchallenged evidence of Mr. Dratel and Professor Rovner strongly support the view that, on the facts of Mr. Damache's case, there is a very real risk that constitutionally protected fundamental rights will be breached by the trial and sentencing systems in place in federal cases involving terrorism suspects. Counsel observed that in *Murphy*, the respondent had already been convicted in the U.S. and surrender was sought not for trial but for sentence. Further, the convictions in question were for sexual assault and not terrorism, and so counsel regarded the evidence put before Peart J. in support of the plea bargaining objection to have been rather weak and unsubstantial.

10.3.13. In addition, counsel noted that Peart J. was in a position to read the transcript of the respondent's trial, which was exhibited in the State's replying affidavit, and declared himself to be completely satisfied that, on the particular facts, Mr. Murphy entered into the plea bargaining process voluntarily and with the benefit of advice of his lawyers. On that basis, Peart J. in his judgment had little difficulty rejecting the generalised argument that was made on behalf of that respondent, alleging some sort of repression or duress.

10.3.14. By contrast, counsel submitted that the highly detailed treatment of the plea bargaining system in the U.S.A. by Mr. Dratel in his two affidavits provides this Court with a far greater storehouse of information as to what specifically is involved in the plea bargaining system in the U.S.A., not just in theory, but in practice. Based upon that evidence, counsel have submitted that federal plea bargaining in terrorism cases amounts to a constellation of unconstitutionality combined towards one end; the entering of a guilty plea by the accused. Counsel submitted that on a significant number of occasions, according to Mr. Dratel and Judge Rakoff, this is achieved through the overbearing of the will of the accused.

10.3.15. In conclusion, counsel submitted that it seems inconceivable that such a process would be permitted in this jurisdiction, or indeed, pursued by the DPP. This, counsel submitted, is no mere difference between jurisdictions. Counsel concluded by saying that the combination of factors already evident in Mr. Damache's case point to a real risk of a flagrant denial of justice in the U.S.A., by reason of the plea-bargaining process.

Submissions by the State

On Plea Bargaining

10.3.16. Counsel submitted that the issue of plea bargaining could be dealt with briefly. The High Court judgment in *Murphy* and the subsequent judgment of the Supreme Court (*ex tempore* 21st July, 2008) dealt with the point definitively. In that particular case, the court was dealing with a situation where a plea had actually been dealt with by way of a plea bargain under the U.S. system. Counsel therefore submitted that if such a system of plea bargaining is not regarded as a bar to surrender in a specific case which was the subject of detailed and explicit evidence, it is difficult if not impossible to see how it could amount to a bar to surrender in general.

10.3.17. Furthermore, it was submitted that the procedural safeguards surrounding the entering of pleas of guilty were considerably more elaborate than they are in this jurisdiction. Counsel proposed that whilst Mr. Damache's legal counsel points to the possibility of a very lengthy sentence as a factor to be taken into account, one might well posit the position of an accused person here who faces

a s. 15A charge – the difference in sentence as between a plea of guilty and a contested trial can be just as dramatic. Such an accused here has none of the procedural protections available in the U.S.

10.3.18. Counsel also referred to the decision of the House of Lords in *McKinnon v. Government of the United States of America* [2008] 1 W.L.R. 1739 and submitted that the same logic might be adopted in Mr. Damache's case.

10.3.19. Following a query from the Court, the Annual Report 2013 of the DPP was produced. For the years 2010 and 2012, when cases still to be heard are excluded, it appears that 91% of cases on indictment were dealt with by a plea of guilty to at least one count. In a further 4% there was a conviction by a jury and in 5% was there an acquittal (made up 3% by jury and 2% by trial judge). The figures for 2011 were almost identical except 90% were convicted after a plea of guilty and that 3% rather than 2% were acquitted by the trial judge.

On SAMs

10.3.20. Counsel for the State indicated that it is evident that Mr. Dratel's belief that Mr. Damache will be subjected to SAMs is wholly speculative, indeed Mr. Dratel acknowledges this himself in his affidavit which is outlined above. Counsel stated that he does little more than advance the possibility that Mr. Damache might be subject to SAMs. They also noted that Mr. Dratel later disagrees with the evidence of Mr. Synsvoll to the effect that SAMs are imposed by the Attorney General "where they are determined reasonably necessary to protect persons against the risk of death or serious bodily injury." Counsel also observed that Mr. Synsvoll notes that the imposition of SAMs is rare and counsel contended that this may perhaps best be characterised as something of an understatement when it is considered that of the 216,381 inmates in the custody of the BoP, 55 are currently the subject of SAMs of whom 35 are housed in the H Unit of the ADX. At the time of the swearing of Mr. Synsvoll's declaration, there were 407 prisoners in the ADX.

Submissions by the Amicus Curiae

On Plea Bargaining

10.3.21. In relation to plea bargaining, the *amicus curiae* refers exclusively to the recent case of *Natsvilshvili and Togonidze v. Georgia* (Application No. 9043/05, 29th April, 2014) where the European Court of Human Rights ("the ECtHR") considered whether the plea bargaining process in Georgia complied with Article 6 of the European Convention on Human Rights ("the ECHR").

10.3.22. In finding that there was no violation of Article 6 on the facts, the Court held at para 92 that it was necessary that the plea bargain was accompanied by the following conditions:-

(a) the bargain had to be accepted by [the accused] in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and

(b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.

10.4. The Court's Analysis

10.4.1. At the outset, it is important to restate that the issue being addressed under this heading is whether Mr. Damache has established on substantial grounds that he is at real risk of being subjected to a coercive plea bargaining regime that amounts to a flagrant denial of justice should he be extradited to the U.S.A.. To the extent that SAMs are at issue under this heading, it is that the risk of imposition of SAMs pre-trial increases the risk of coercive plea bargaining.

10.4.2. The issue of whether the imposition of SAMs and the resultant containment in solitary confinement amounts to a breach of the prohibition on inhuman and degrading treatment is dealt with later in this judgment. It is also important to emphasise that the question of whether the imposition of SAMs breaches other rights, such as Article 8 rights (or indeed Article 6 rights concerning the use of such evidence at trial), was not directly put in issue here. Similarly, the fact that federal law may permit the monitoring and use of attorney-client privileged information at trial is not directly challenged as amounting to a breach of rights. Instead, the focus was placed by Mr. Damache on the existence of such measures affecting and inhibiting attorney-client relationships, which may affect the plea bargaining ability of attorney and client and which in turn furthers the unequal bargaining position between prosecution and accused.

10.4.3. Mr. Damache does not make the point that no plea bargaining is permitted in this country (a point which had been made in the *Murphy* case). Statistics show that in this jurisdiction, a very high proportion of indictable crime is dealt with on a plea of guilty. It is commonly understood that many pleas of guilty in this jurisdiction were made subsequent to an agreement between the prosecution and defence as to the basis on which such a plea is being proffered and accepted. The precise numbers of such agreements are not available. That type of "plea bargain" may take the form of either an acceptance of a lesser charge or an agreement to accept that the plea of guilty to the more serious charge is on the basis of an acceptance by the DPP of a particular version of the facts which may present the defendant in a better light.

10.4.4. In the case of *Murphy*, the High and Supreme Court had the benefit of being able to look at the plea bargaining process that had actually taken place there. That is manifestly different from that which obtains here – an apprehended risk that must be assessed. There is a degree of logic in the submissions of counsel for Mr. Damache to the effect that his situation is stronger in that the Court has to consider his situation prospectively on the evidence before it, in contrast to *Murphy* where the court was able to dismiss the argument on the basis of a retrospective consideration of whether he had in fact been coerced. On the other hand, the Court is obliged to have regard to the general principles outlined in the *Murphy* case.

10.4.5. The first point to note is that the Supreme Court viewed the appeal in *Murphy* as almost unstateable and with no merit on the facts or in law. In particular, the Supreme Court acknowledged that the view that it might take of a structured plea bargaining system that had appropriate safeguards was a purely theoretical and hypothetical question. The Supreme Court acknowledged that the particular system at issue there (a U.S. state court as distinct from a U.S. federal court) was one which was structured. A whole series of cautions and explanations were given in open court by the judge as to what was involved before Mr. Murphy committed himself to pleading guilty to the particular charge. The Supreme Court noted, at p. 3, that the discussion in that case which took place between the defendant, counsel for the prosecution and the judge "could not in any sense be said to be a flagrant denial of a fair trial, particularly when all the essential elements of the process were stated or repeated in public." The Supreme Court noted that the High Court judge had been satisfied that the plea was given voluntarily.

10.4.6. Mr. Damache complains that he is at real risk of being subjected to an excessive sentence if he were to refuse a plea to a lesser count or a single count, that he might be sent to a more repressive prison regime if he were to plead not guilty and that he might be subject to SAMs if he were to so plead not guilty. Furthermore, Mr. Damache strongly argues that in all the circumstances, including the conditions under which he may be held, that he is at real risk of being forced to plead guilty involuntarily. He averred that these amount to a flagrant denial of justice.

10.4.7. The first argument of Mr. Damache is easily disposed. *Murphy* is clear authority for the proposition that a plea bargaining system that incorporates appropriate safeguards does not amount to a flagrant denial of justice. The *Natsvlishvili* decision confirms that plea bargaining does not of itself amount to a violation of Article 6 rights provided certain safeguards are met. Those safeguards are that the plea is to be accepted by the accused in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner which is also subject to sufficient judicial review. In a sense, these decisions recognise that a carrot and stick approach to decisions to plead guilty is not *per se* unconscionable. That approach is indeed similar to that of the House of Lords in *McKinnon* at para. 38 of same in which, when dealing with a plea bargain regarding extradition, it was held that it was "*no more appropriate to describe the predicted consequences of non-cooperation as 'a threat' than to characterise the predicted consequence of cooperation as 'a promise' (or indeed a bribe).*"

10.4.8. From the foregoing, it can be seen that a criminal justice system is entitled to operate on the basis that a person who makes a plea of guilty to the offence charged, or to a lesser offence, will receive a lighter sentence than a person who is convicted after trial. This is subject to safeguards. The evidence clearly established that any plea bargain entered into by Mr. Damache would be reviewable for both constitutionality and unconscionability. The differences in sentences that may be imposed are matters of degree and are not susceptible to adjudication at this remove other than in a context of assessing whether there would be a flagrant denial of justice. In that respect and in light of the evidence before me, it has not been so established that there is a flagrant denial of justice. It should also be observed that in relation to sentences that may be imposed after a plea of guilty, Mr. Dratel's evidence established that there was likely to be little difference in the sentence imposed even after a plea of guilty.

10.4.9. The other matters raised by Mr. Damache relate to the prosecution's attitude to sentence or to conditions of imprisonment. In so far as attitudes to sentence by the prosecution may be part of the agreement, it seems that such terms are already inherent in plea negotiations in this jurisdiction where the ultimate sentence may be dictated by the evidence put before the court as a result of the agreement between prosecution and defence as to the circumstances of the offence and the defendant's role in it. Indeed, as the DPP is increasingly required to indicate a range to the court regarding the severity of the offence, such an indication may well be likely to form part of "the plea bargain" in this jurisdiction in those offences where the DPP is bound to give a range. These are all matters that in essence a defendant is entitled to ascertain and "nail down" prior to entering a plea. It cannot amount to a flagrant denial of justice that such a facility exists.

10.4.10. The issue of where a sentence may be served probably plays very little role in any negotiations in this jurisdiction. That, however, is irrelevant. It is whether its inclusion in the factors which may form part of a plea bargaining process could amount to a flagrant denial of justice. Again, the process is subject to court review and cannot amount to an unconscionable bargain. In those circumstances, the fact that such a matter may be the subject of a plea bargain is not a flagrant denial of justice.

10.4.11. Mr. Damache raises a second issue, however, and that is the question of the voluntariness of any plea bargain he might enter into. The requirement for voluntariness in the entry into the plea bargain is highlighted in *Natsvlishvili*. Mr. Dratel's evidence explicitly points to the merits of the case against an accused as being the focus of the federal judge. The question of voluntariness is raised in his later affidavit when he stated that it is in practice not voluntary. He refers to Judge Rakoff's acceptance that the U.S. Supreme Court likens the plea bargain to a fair and voluntary contract, thus requiring voluntariness on the part of an accused. From Judge Rakoff's point of view and indeed Mr. Dratel's, this equal bargaining power is a myth. From this Court's perspective, the issue is whether there is a real risk that there will be a flagrant denial of justice if Mr. Damache was to be extradited to the U.S.A..

10.4.12. Even accepting that there is a real risk he would be subjected to SAMs and held in solitary confinement, and that this might coerce him to plead guilty where he might otherwise have decided to maintain his innocence (irrespective of either his guilt or his innocence), is this proof of a real risk of a flagrant denial of justice as to warrant refusal of extradition? It seems to me that the test is whether the U.S. has a system whereby plea bargains are subject to the scrutiny set out by the ECtHR as above.

10.4.13. In so far as has been put before this Court, the U.S. has such a system of judicial scrutiny. The U.S. courts may only proceed on plea bargains that are neither unconstitutional nor unconscionable. The acceptability of the plea bargaining system in the U.S.A. is apparently posited on the concept of a fair and voluntary bargaining position of the accused.

10.4.14. With respect to SAMs, while there has been general criticism of the application of these measures to accused persons and comment as to how it might have affected their decisions to plead guilty, there is no indication of any judicial view as to whether those measures actually overbear the will of accused persons in general or an accused person in particular. Certainly from the evidence produced to me of the U.S. judicial position on plea bargains, it appears open for assessment that such measures might amount to conditions of coerciveness for the purpose of assessing whether it is unconstitutional or unconscionable, including an assessment of its fair and voluntary nature. In those circumstances, I am not satisfied that the provisions of the U.S. federal judicial system regarding plea bargaining amounts to flagrant denial of justice.

10.4.15. This is not to say that where such a system for review exists, that it could never be established that there might be a flagrant denial of justice. If it was clear that certain practices had been found never to be capable of amounting to involuntary or coercive bargaining power then, depending on the nature of those practices, it may be appropriate for this Court to make a finding that the system was a flagrant denial of justice. However, that situation has not been established here.

10.5. Conclusion

10.5.1. For the reasons set out above, it has not been established on substantial grounds that Mr. Damache is at real risk of being exposed to a process of coercive plea bargaining that would amount to a flagrant denial of justice. I reject his opposition to extradition on this ground.

11. Prison Conditions and Restrictions

11.1. The Issues

11.1.1. Under this heading, Mr. Damache submitted that the request for his extradition should be refused as there is a real risk that his fundamental rights to bodily integrity, to the protection of his person and to be treated with dignity and humanity will be violated if he is returned to the U.S.A.. Mr. Damache contended that he is at real risk of being imprisoned at U.S. Penitentiary, Administrative Maximum, Florence, Colorado ("the ADX"). Mr. Damache claimed that the conditions there amount to solitary confinement and those

conditions on their own or in conjunction with other restrictions such as special administrative measures ("the SAMs") and restrictions on the practice of religion violate fundamental constitutional and international norms.

11.1.2. Separately, he claims that the conditions at the ADX would violate his right to freedom to practice his religion.

11.1.3. Mr. Damache must establish on substantial grounds that he is at real risk of incarceration in the ADX before the question arises of the determination of whether the conditions therein violate his fundamental rights. Thereafter, the issue is whether those conditions of incarceration would violate constitutional rights and/or rights under the European Convention on Human Rights (ECHR), and thereby prohibit his extradition to the U.S.A..

11.1.4. Mr. Damache also claims that the imposition of SAMs and the imposition of solitary confinement at the pre-trial stage amounts to a violation of his fundamental rights.

11.2. The Parameters of this Decision

11.2.1. Mr. Damache made many and varied complaints about SAMs especially as regards the resultant solitary confinement, monitoring of attorney-client communications, discriminatory application and restrictions on receiving communications from friends and family. He complained about the process by which they may be implemented and the absence of meaningful judicial review. What has been difficult for the Court to assess is the relevance of these complaints to identifiable grounds upon which he objects to his extradition. For example, in the thirty-three points of objection filed on his behalf, there is only one reference to "special administrative measures" and that is when dealing with his detention on conviction in the ADX. On the other hand, the submissions dealt extensively with SAMs and plea bargaining. In Part 10 of this judgment, I have dealt with SAMs and plea bargaining. I outlined that only the issue of SAMs and solitary confinement was left to be decided within this section.

11.2.2. It was on conditions at the ADX that Mr. Damache concentrated his evidence and his oral submissions. Reference was made to solitary confinement pre-trial and to post-convictions conditions at Terre Haute, Indiana, in some of the affidavits filed on behalf of Mr. Damache. At the hearing on 27th February, 2014, counsel for Mr. Damache referred to those conditions at Terre Haute. Such a widening of the focus of the extradition hearing is not warranted on the basis of the manner in which the proceedings had unfolded up to that point. There was little substantive engagement in conditions at Terre Haute.

11.2.3. The position with regard to the pre-trial solitary confinement was slightly different. This had been put in the equation by Mr. Dratel and by Professor Rovner in particular. It seems that if SAMs are imposed, it follows that a person will be held in solitary confinement. Post-conviction, the statistics show that confinement is most often at the ADX for those with SAMs. Very few people at present appear to have SAMs imposed pre-trial. The U.S. authorities by letter dated 13th August 2013 told the Irish authorities that should Mr. Damache be extradited and pre-trial detention be ordered by a Judge, "Mr. Damache would be housed in the Philadelphia Federal Detention Center until his trial concludes." (Ms. Williams confirms in her later affidavit that the judge may order Mr. Damache to be detained pending trial and in that event he would most likely be detained pending trial in the Philadelphia Federal Detention Center). Mr. Damache did not give any evidence relating to the conditions at this prison and in particular did not give evidence as to how pre-trial solitary confinement might operate there. In those circumstances I have taken the view that pre-trial solitary detention on its own as a breach of Article 3 (as not as part of the issue of a coerced plea bargain) was not being pursued by Mr. Damache. If he did intend to pursue it, then clearly he has not laid the evidential basis upon which the Court could reach a conclusion that those conditions amounted to inhuman and degrading treatment. This part of the judgment will concentrate on the conditions at the ADX which was the mainstay of the case made by Mr. Damache under the heading of prison conditions.

11.3. Evidence of the Risk of Incarceration at the ADX

The ADX Prison

11.3.1. The ADX is commonly called a supermax prison. The ADX is currently the only supermax prison in the U.S. federal criminal justice system. It only caters for male prisoners. From the evidence produced to me, it appears that the use of supermax prisons is common in the penal systems of individual states within the U.S. The numbers of prisoners in solitary confinement in the U.S. is substantial, although the precise figures are illusive. For example, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ("Special Rapporteur") in his August 2011 interim report, cites Alexandra Naday, Joshua D. Freilich and Jeff Mellow, "The Elusive Data on Supermax Confinement", (2008) 88(1) *The Prison Journal* 69 which estimated that between 20,000 and 25,000 individuals are being held in isolation at any given time.

11.3.2. In *Prisoners, Solitude and Time* (Oxford University Press, 2014), Professor Ian O'Donnell, who filed an affidavit on behalf of Mr. Damache and whose credentials will be referred to later, cites an NGO study in 2012 estimating the numbers in solitary confinement in the U.S.A. as being in excess of 80,000. That latter figure is also cited in the Amnesty International Report *Entombed: Isolation in the US Federal Prison System* (July 2014), relied upon by Mr. Damache. In Amnesty's view, of those 80,000 prisoners, 25,000 are housed in the supermax prisons (state and federal) and the remainder are serving shorter periods in punishment or administrative segregation cells in other prisons. Of course, those figures must take into account the very large number of persons incarcerated in the U.S.A.. The relevance of these references to the large numbers of persons in solitary confinement within the U.S.A. generally is that it is a topic that has attracted the attention of international human rights monitoring bodies as well as academics. There is consequently a considerable amount of research and authoritative legal statement about this aspect of the U.S. penal system.

11.3.3. In affidavit evidence filed on behalf of the State, Mr. Kenneth Fulton, Unit Manager for the General Population Units at the ADX, says that the ADX houses less than one-quarter of one per cent of the inmates in the custody of the Bureau of Prisons ("the BoP"). Mr. Christopher Synsvoll, Supervisory Attorney at the Federal Correctional Complex, Florence, Colorado, averred that at the time of his declaration of the 6th August, 2014, there were 407 inmates incarcerated at the ADX.

11.3.4. There is no dispute but that the ADX is the most secure prison in the federal system. Even the U.S. officials describe it as providing an uncommon level of security. In order to understand whether Mr. Damache is at real risk of incarceration in such uncommon circumstances, it is necessary to look at the route into such a prison.

Initial Classification of Inmates for the ADX

11.3.5 Mr. Damache relied upon the affidavits of Mr. Dratel referred to above and also on two affidavits sworn by Professor Rovner. The State relied upon the affidavits referred to above of Mr. Fulton and Mr. Synsvoll, as well as the affidavit of Mr. Steven D. Julian who is the Associate Warden at the ADX. Ms. Williams, the Assistant U.S. Attorney with carriage of the proceedings against Mr. Damache, has also sworn affidavits dealing with the ADX.

11.3.6 Professor Rovner averred that when ADX opened in 1994, it was originally conceived by the BoP as a "behaviour management"

facility in which prisoners earned their way in through a demonstrated inability to function in less restrictive prison settings and could earn their way out by demonstrating clear conduct over time. She acknowledged that there were a few high profile exceptions to this. All of this changed after 11th September, 2001. She referred to memos of the BoP immediately after the tragic events of this date in which all inmates in federal custody who were convicted of, charged with, associated with or in any way linked to terrorist activities were placed in administrative detention as part of an immediate national security endeavour. She stated that Muslim men convicted of terrorism-related crimes were transferred to the ADX from less restrictive prisons despite a lack of evidence that they had "earned their way in" through their conduct while in prison or were in any way involved in the events of 11th September, 2001.

11.3.7. Mr. Fulton averred that the main mission of the ADX is to affect inmate behaviour such that inmates who demonstrate non-dangerous behaviour and participate in required programmes progress to another, more open BoP facility. Ms. Williams in her evidence stated that Mr. Damache would only be incarcerated at the ADX if BoP officials determine that he is:-

- (1) A risk to institutional security and good order or poses a risk to the safety of staff, inmates, others or to public safety if confined at another correctional facility; and/or
- (2) As a result of this status, is unable to be safely housed in the general population of another institution.

Placement Process for the ADX

11.3.8. Mr. Julian outlined in more detail the process for placement at ADX. He listed further factors which must be considered in determining whether inmates meet one or both of the referred to criteria. The factors, numbered as per his affidavit, which would appear to have any possible relevance to Mr. Damache's situation, are as follows:-

"(a) The inmate is subject to restrictive conditions of confinement as a result of SAMs or based on documented reliable information from a government agency that the inmate was convicted of, charged with, associated with, or in any way linked to terrorist activities and, as a result of such, presents national security management concerns that cannot adequately be met in an open prison institution;

...

(e) The inmate has notoriety to the extent that the inmate's well being would be jeopardized in a less secure environment.

(f) The inmate has access to resources within a correctional environment or in the community to the extent housing the inmate in less secure conditions poses a heightened probability of effectuating an escape."

It should be noted that these factors are not the exclusive ones that will determine the admission to the ADX.

11.3.9. The ADX is a post-conviction committal prison. The staff at the BoP institution where the inmate is being considered for referral to ADX initiate the referral process. First, a packet of information including documents related to the inmates disciplinary, criminal and psychiatric history, as well as other information, are sent for review by the warden of the institution in which he is currently incarcerated. Secondly, if the warden agrees with the referral, it is signed and forwarded to the BoP's regional director in the region where the inmate is located. Thirdly, if the regional director concurs with the referral, it is then signed and submitted to the chief of the BoP's Designation and Sentence Computation Centre ("the DSCC").

11.3.10. The DSCC then conducts an initial assessment of the referral package and the inmate's need for placement in the ADX general population. If it is determined by the DSCC at that stage that the inmate warrants consideration for placement in the ADX general population, the DSCC chief forwards the package to the BoP's national discipline hearing administrator in the BoP's central office in Washington D.C. The discipline hearing administrator assigns a hearing administrator to conduct a hearing to determine whether it is appropriate to place the inmate at the ADX. The hearing administrator has correctional experience and is also familiar with BoP policies and operations.

11.3.11. Every inmate who is referred for placement at the ADX is to be provided with a written notice of hearing at least 24 hours prior to the hearing. This notice of hearing informs the inmate that he is being considered for placement in the ADX general population because he meets either or both of the criteria set out above. The inmate is given further information regarding the process. The inmate can take part in the process by receiving a written summary of the specific behaviour or situation which forms the basis for the placement recommendation, unless such information would endanger staff or others. He is to receive that written summary at least 24 hours prior to the hearing.

11.3.12. Each inmate has the right to be present at the hearing except where institutional security or good order would be jeopardised. He has an opportunity to make an oral statement to the hearing administrator. He can also submit documentary information for consideration. He is entitled to the written recommendation and a summary of the facts and reason supporting the recommendation to the extent institutional security or individual safety would not be jeopardised.

11.3.13. Following the hearing, the hearing administrator prepares a written recommendation which is sent to the national discipline administrator for review and then forwarded to the assistant director of the BoP's correctional programmes division. That assistant director, or his designee, reviews the hearing administrator's report and supporting documentation. The assistant director accepts or rejects the hearing administrator's recommendation and notifies the Chief of the DSCC of the final decision. The DSCC then enters a designation in accordance with the final decision. If the inmate is approved for placement at ADX, the Chief of DSCC forwards a copy of the decision to the institution where the inmate is housed for delivery to the inmate.

11.3.14. The inmate is advised of the opportunity to appeal the decision using the BoP's Administrative Remedy Program. The appeal is made first to the Chief of the DSCC and then to the BoP's Office of General Counsel in Washington D.C.

Mr. Damache's Chances of Being Placed in the ADX

11.3.15. In her affidavit, Professor Rovner averred that the BoP places many prisoners who have been convicted of terrorism-related crimes in the ADX. She pointed to the fact that one of the criteria for ADX placement is that the prisoner was in any way linked to terrorist activities. She stated that those ADX prisoners with terrorism convictions who do not have SAMs are typically housed in what the BoP calls "General Population Units" in which prisoners are held in classic solitary confinement conditions. Those units will be discussed further later. She averred that there is a real risk that Mr. Damache will be imprisoned in the ADX for an indefinite period.

She referred to a number of her clients who were placed in the ADX following the events of 11th September, 2001. One of those had committed crimes in 1985 and was convicted in 1996, yet was incarcerated in ADX for 13 years after 11th September, 2001.

11.3.16. Mr. Dratel's views on the imposition of SAMs have been referred to in an earlier part of this judgment. Essentially, he cannot be definitive about whether Mr. Damache will have SAMs imposed upon him. He viewed the criteria for SAMs as so inordinately flexible that sometimes it appears that being charged with terrorism offences or being a Muslim defendant in a terrorism case or having internet skills or being in the habit of speaking publicly about the case is sufficient. These criteria cover Mr. Damache. He stated that the nature of the offences with which Mr. Damache is charged alone could motivate prosecutors to isolate him from the prison population the media and the public. He stated in particular that SAMs are imposed on many defendants accused of terrorism offences, particularly those with international contacts and/or communications, paramilitary and/or recruitment skills.

11.3.17. He stated that if the SAMs are imposed, Mr. Damache is quite likely to be sent to either the ADX or to a particular wing at the BoP's Terre Haute, Indiana or Marion, Illinois. Mr. Dratel stated that in his experience, the ADX is the BoP's institution principally suited to housing inmates subject to SAMs. His view is that imposition of the SAMs would dramatically, if not dispositively, increase the prospect that, if convicted, Mr. Damache would serve his sentence at the ADX.

11.3.18. As stated earlier. Ms. Williams does not accept the above. She views Mr. Dratel's predictions that Mr. Damache will likely be held in pre-trial solitary confinement and will be incarcerated at ADX, as lacking any factual support and are far too premature. She stated that, at this time, there is no way to predict where Mr. Damache will be housed if convicted and sentenced to incarceration. She made the perfectly plain point that it is a judge and not the prosecutor that determines whether Mr. Damache will be held in custody pre-trial, and, of course, it is a matter for the jury if he is convicted and also then a matter for the judge as to whether he is sentenced to imprisonment.

11.3.19. She said that because of the classification system used to analyse a person prior to their incarceration at the ADX, she says that there is no way to predict where he will be housed as that process cannot take place until after his conviction. She said that because much of the relevant information is not available until after Mr. Damache is convicted and sentenced, should that occur, no determination can be made as to which BoP facility Mr. Damache would be assigned.

11.3.20. In response to the perceived view of Mr. Damache's case that his incarceration in the ADX will be based on the nature of the offences for which he may be convicted, she said in this regard "[i]t is perhaps relevant to note that to the extent experience may act as our guide, Mr. Damache's co-conspirators are not incarcerated at ADX, nor at Terre Haute, Indiana, nor at Marion, Illinois." She said in that regard that the assumption underlying much of the case made by Mr. Damache would appear to be ill-founded and wholly speculative.

11.3.21. At this point, it is worth noting that two out of three of Mr. Damache's co-conspirators are women and are therefore ineligible to be sent to the ADX which is a male prison. The third co-conspirator was sentenced as a co-operating witness.

11.3.22. Ms. Williams accepted that the government may, as part of a plea agreement, agree not to recommend placement in a supermax facility. The court may also recommend a particular placement. However, ultimately the designation is a matter for the BoP.

11.3.23. The Court requested further information concerning the total number of inmates who had been convicted of Islamist motivated acts of terrorism and those who were held in the ADX. In a supplemental affidavit, Mr. Synsvoll stated:-

"[a]t the date of this affidavit, there are 403 inmates housed in the ADX. Of those 403 inmates at the ADX, 32 have convictions for international terrorism crimes. There are 324 inmates in the custody of the Bureau who have convictions for international terrorism crime."

This would amount to virtually 10% of those with such convictions. That is the percentage that counsel for the State urged on the Court to accept.

11.3.24. Mr. Dratel filed a replying affidavit to the affidavit of Mr. Synsvoll. He averred that the 10% statistic is misleading. He said that it does not include convicted but not yet sentenced prisoners. He referred to a BoP report from 2012 which cited that 5% of prisoners convicted of international terrorism offences between 2001 and 2012 had yet to be sentenced. He also referred to the use of other prisons which are particularly restrictive and stringent. He again raised the issue of SAMs and those prisoners with SAMs being almost certain to go to the ADX. He said that the difference in chances between an ordinary prisoner ending up in the ADX is statistically zero, whereas 10% is an infinitely higher chance in practical and mathematical terms.

11.3.25. Mr. Dratel also said that it is mere semantics to say that the decision on imposing SAMs is taken by the BoP. He said that the BoP is an agency within the DoJ in which federal prosecutors are the principle authorities. He also stated that the statistics regarding SAMs provided by Mr. Synsvoll require further analysis. Mr. Synsvoll had stated out of 216,381 inmates, 55 had SAMs imposed at the time of the declaration. 35 of those 55 inmates are incarcerated at the ADX in the H Unit.

11.3.26. Mr. Dratel said that while few U.S. federal inmates are subject to SAMs, almost everyone who is has been charged with or convicted of terrorism offences. Thus, he said a significantly higher proportion of terrorism defendants suffer from SAMs than those accused or convicted of other crimes including those involving violent conduct. He said this renders the numbers, including the total number of federal inmates, meaningless. Furthermore, Mr. Dratel said that the vast majority and perhaps all convicted inmates subject to SAMs are confined at ADX. Those not at ADX are almost all, or all, pre-trial detainees incarcerated at local detention facilities within the district in which they are being prosecuted or, like Omar Abdel Rahman, are at BoP medical facilities because of their health issues or are on death row in another prison.

11.3.27. Professor Rovner did not file a replying affidavit but instead, apparently due to time constraints, filed a report. The State did not make any particular objection to this but raised a general complaint about the lateness of both replies saying it was a continuation of a theme throughout the proceedings. I am prepared to consider it in general terms. In her report, Professor Rovner said that it is important to consider a few points. She remarked that the statistics of Mr. Synsvoll do not show those who have been confined at the ADX but who have been since released. Those statistics also do not show the numbers of those convicted of international terrorism who are on remand (i.e. those convicted but not yet sentenced), the number that are women, whether some were co-operating witnesses and how many were deemed ineligible to be confined in ADX for medical reasons.

11.4. The Court's Analysis on the Risk of Incarceration at the ADX

11.4.1. In this case, the outcome for Mr. Damache if he were to be extradited can be characterised as uncertain. It is uncertain if SAMs would be applied to him. It is uncertain if he will be convicted of the offences for which his extradition is sought. It is uncertain

if he will receive a sentence of imprisonment. It is uncertain if he will be incarcerated on conviction in the ADX. Some uncertainties are considerably less uncertain than others and indeed border on virtual certainty. For example, if he is convicted of the offences, it is a virtual certainty that he will be sentenced to a term of imprisonment. Others, such as the applications of SAMs, are far from certain. The law however is clear; certainty is not required for a successful challenge to one's extradition on grounds of exposure to prohibited conditions of detention. In dealing with an apprehended breach of either his constitutional or ECHR right to be protected from inhuman and degrading treatment Mr. Damache must establish that there are substantial grounds for believing that he is at real risk of being subjected to such prohibited treatment.

11.4.2. In this case, Mr. Damache has provided evidence from two highly experienced lawyers with direct involvement, albeit at different stages of the criminal justice and penal processes, in the trials and incarceration of Muslim prisoners charged with and/or convicted of crimes relating to terrorism. These lawyers have deposed that there is a real risk that Mr. Damache will be sent to the ADX on conviction. As outlined above, they approach the matter from two different routes. Both acknowledged either implicitly or explicitly that there can be no certainty on this issue.

11.4.3. One of the routes by which a man could end up in the ADX is, post the events of 11th September, 2001, directly related to his status as either being convicted of terrorist offences or linked to terrorist activities. It is abundantly clear that Mr. Damache, if convicted of the offences for which his extradition is sought, would come into that category. That establishes a risk but further examination is required before it could be accepted as a real risk on substantial grounds.

11.4.4. Counsel for the State referred to *Babar Ahmad & Ors v. The United Kingdom* (Applications Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April, 2012) (2013) 56 E.H.R.R. 1, [2012] E.C.H.R. 609 and to the acceptance before the European Court of Human Rights ("the ECtHR") by the UK that it was "common case" that some of those applicants were likely to be incarcerated at the ADX on conviction of the offences. The relevance of this submission to my determination of the risk of Mr. Damache's imprisonment in the ADX is difficult to understand. If it was truly common case that some of the applicants would be sent to ADX, it simply amounts to the fact that the ECtHR was relieved of the burden of having to assess that risk.

11.4.5. While questioning the relevance of that submission, it is nonetheless interesting to observe that the precise reason for that concession by the UK is unknown. It may be that there were findings of that fact in their own national courts against which the UK did not believe it could argue before the ECtHR. It may also be that concessions were made by the UK authorities in the domestic courts. Those concessions could have been based upon communications from the U.S. authorities. What is known is that the ECtHR found at para. 221 that the present applicants were "not physically dangerous." Therefore, the risk of them being incarcerated in the ADX was based upon the risk that they would fulfil the other criteria. Thus, the concession that they were at real risk of being incarcerated at the ADX must relate to the fact that they were charged with, and therefore risked being convicted of, terrorist offences.

11.4.6. Furthermore, although counsel for the State referred to the fact that in *Babar Ahmad*, it was accepted that there was a real risk of incarceration at the ADX, there has been no attempt to explain why those cases may be different to this. While undoubtedly some of those applicants faced more serious charges, that was not obviously true of all the applicants. For example, the charges against the first and third applicants of conspiracy to kill, kidnap, maim or injure persons or damage property were based upon two allegations *i.e.* that the websites allegedly giving material support to terrorists had firstly exhorted Muslims to travel to Chechnya and Afghanistan to defend those places and secondly that classified U.S. Navy plans relating to a U.S. naval battle group operating in the Persian Gulf had been sent to the website. Given the specific allegations made against Mr. Damache, it is difficult to view those "not physically dangerous" applicants as facing more serious offences than Mr. Damache.

11.4.7. The U.S. officials did not say that Mr. Damache would not be sent to the ADX. Ms. Williams' view is that the predictions that he will be held in the ADX lack any factual support and are far too premature. In her view, "there is no way to predict where Mr. Damache would be housed if convicted and sentenced to incarceration." Yet, the issue that this Court has to determine is one of real risk. While it may be the case that the decision-making process only takes place post-conviction, certain factors must exist which indicate whether there is no current risk that Mr. Damache may be sent there. For example, a man facing extradition to the U.S.A. for federal prosecution of road traffic offences, with no prior history of violence and with no notoriety, could, it would seem, be assessed as at no current risk of being incarcerated at the ADX.

11.4.8. Furthermore, it is the U.S. government who seek the extradition of Mr. Damache. Factor (a) of the factors for determining whether an inmate meets the criteria for placement at the ADX, as set out in the affidavit of Mr. Julian, refers to "documented reliable information from a government agency". If there was no current risk of a government agency providing that documented reliable information to the BoP, one would expect that evidence to have been provided "to dispel any doubts" as to this aspect of the risk. I say this conscious that there is no shifting burden to the State and that I have to have substantial grounds for believing that there is a real risk. I simply observe here that it may well have been open to the U.S. government to dispel any doubts. While they have engaged with the evidence of risk of incarceration, they have not done so to the extent of dispelling any doubts.

11.4.9. Moreover, it is accepted by Ms. Williams that the U.S. government may recommend as part of a plea agreement that the defendant would not be sent to an ADX. I draw the reasonable inference that the U.S. government must have the ability to make that recommendation *prior* to the conviction and sentence. They would presumably only make that recommendation where it was warranted on the evidence before them at that time. On the basis of this evidence, I am entitled to infer that the U.S. government have not at this time ruled out the placement of Mr. Damache at the ADX as it could have been possible for them to dispel any doubts in that regard. The U.S. authorities engaged in providing rebuttal evidence to this State with regard to the issue of risk of incarceration but chose not to engage with this element. In other words, if there was no risk at the present time to Mr. Damache being sent to the ADX, the U.S. government could have informed the Court of this or indeed, at the very least, could have informed the Court that it is not possible to do so at this stage due to other constraints.

11.4.10. Ms. Williams stated that she understands that Mr. Damache's case rests on an assumption that he is likely to be detained at the ADX by reason of the nature of the offences with which he is charged and may ultimately be convicted. She then said in that regard it is relevant to note "that to the extent experience may act as our guide", his co-conspirators are not incarcerated at ADX. This reasoning does not withstand any scrutiny. Two of his co-accused were women and could not be sent to the ADX. The third person was a co-operating witness who received a far shorter sentence than Mr. Damache is likely to receive.

11.4.11. It also has to borne in mind that the facts alleged in this case are that Mr. Damache was a leader in this group (see Diplomatic Note, "the Damache-led group"). This reference could relate simply to the group who was going abroad for training in military tactics and explosives but in my view, it is clear from the superseding indictment that Mr. Damache's alleged role was indeed instrumental in the nature of the conspiracy. Furthermore, the international nature of the alleged offences, the possible targets and the detailed and coordinated planning amount to an allegation on the more serious end of the scale of terrorist offences.

11.4.12. As referred to above, at first glance the statistics provided by the U.S. authorities might appear to indicate that about 10% of those convicted of international terrorism offences might end up at the ADX. The question of real risk of incarceration is not to be determined by a mere glance at a statistical likelihood. There may well be indicators that show that a particular person is not likely to be within that 10% or indeed that he is likely to be in that 10%. For example, the ECtHR rejected that one applicant, Abu Hamza (see para. 180 of *Babar Ahmad*), was at risk of being sent to the ADX on the basis of his disability and therefore, the ECtHR found his case manifestly unfounded on the Article 3 ground. It is also clear that women are not sent to the ADX and no statistics have been provided on how many of the 403 convicted persons are women. We know that two of them at least must be women as they are convicted co-conspirators of Mr. Damache.

11.4.13. Therefore, that 10% statistic itself does not represent a true figure as to the risk of being sent there. It is appreciably higher than that when one takes into account the women who were convicted, those convicted but not yet sentenced, those who have serious health issues, those who were co-operating witnesses and those who may have been sentenced to relatively short sentences. This is apart from the consideration of the specific offences with which a person is charged.

11.4.14. In light of all of the foregoing, I am quite satisfied that Mr. Damache has established that if convicted, there are substantial grounds to believe that there is a real risk that he will be sent to the ADX. His extradition is sought for prosecution for alleged offences of international terrorism of considerable seriousness. He is a major actor in the conspiracy, if not the leader of it. The allegations are of some notoriety concerning as they do a conspiracy to kill a Swedish cartoonist. I reject the State's view that his apprehensions are based solely on the issue of SAMs being imposed. The evidence produced to me covered risk based on other considerations as well.

11.4.15. Moreover, I consider that the affidavits of the U.S. officials filed in these proceedings in support of the extradition request do not dispel doubts. On the contrary, they refer to facts which are irrelevant, namely the placement of his female alleged co-conspirators, and rely upon a statement that it is too premature to predict where he will be sent. I am bound to consider the issue of real risk of incarceration in the ADX. I cannot dismiss his challenge on the basis that prediction is premature. Furthermore, the U.S. affidavits do not engage with the issue that the U.S. government can and does engage with a recommendation of placement at the ADX prior to conviction and sentence.

11.4.16. I have also separately considered the issue of SAMs and its relevance to incarceration. I have no doubt that if SAMs are imposed on Mr. Damache, that on conviction there is a very strong likelihood that he would be sent to the ADX. There appears to be a degree of overlap in the identification of those in ADX for offences of international terrorism and those with SAMs. In light of my findings with regard to the real risk of incarceration in the ADX, it is perhaps unnecessary to go further. However, I would comment that in light of the statement by Mr. Dratel concerning, for example, the plea bargain in *United States v. John Walker Lindh*, Criminal No. 02-37A (E.D. Va.), it is also clear that SAMs are a matter on which the U.S. prosecuting authorities are in a position to give an indication prior to conviction and sentence. Indeed, it would appear to be uncontested that they may be imposed at the pre-trial stage. Again, the U.S. authorities have not dispelled any doubts that he is at real risk in relation to same when it seems that it was within their power to do so – it is after all a decision of the U.S. Attorney General to impose SAMs. No specific reason as to why the U.S. authorities could not indicate at the extradition stage their current position on SAMs and Mr. Damache has been given to this Court.

11.5. The Conditions at the ADX

The Physical Layout of the ADX

11.5.1. There is little dispute between the parties as to the physical layout of the ADX including such matters as cell size and unit division. Where there is dispute it must be borne in mind that access to the ADX is severely restricted. In particular, Amnesty International notes that it has been denied access to the ADX since 2001. Lawyers, such as Professor Rovner, have limited access to the interior of the supermax and rely upon information from their clients corroborated where possible by other available sources.

11.5.2. At the ADX, on first incarceration an inmate is housed in one of four General Population Units. Although the term "General Population Unit" is used, the conditions of confinement are entirely unlike what would be understood as general population in virtually any other prison. General Population Units in supermax facilities are at a level of maximum security. Each inmate is housed in a single cell, which in the words of Mr. Fulton, provide "very restrictive procedures for movement of the inmates, interaction with staff, and other inmates, recreation, visitation, and programming." For reasons more fully explained later in this judgment, it is appropriate to term the confinement in the ADX as solitary confinement.

11.5.3. There are four General Population Units (D, E, F and G units). There is also a Step-Down Programme Unit. The cell in each General Population Unit measures 87 square feet (8.08 metres squared). There is also a sally port area of the cell, which is 17 square feet (1.58 metres squared). Each cell has a solid steel outer door and an inner barred grille. Each cell's solid outer door has a small window area which looks out onto what is termed "the Range" meaning the inside prison area. The wall next to the door for each cell also has a window which is approximately 46 inches long and 12 inches wide. Each cell also has a window that looks outside, providing the inmate with natural lighting. Mr. Fulton's description does not include the dimensions of this window. The photographs exhibited in the affidavit of Professor Rovner and which are also found in the Amnesty International report show a window to the outside which I am satisfied is considerably more narrow than the window leading out to the Range. It was averred by Professor Rovner, and was not contested, that those small windows only have a view of a cement yard. Prisoners at the ADX cannot see any nature – not the surrounding mountains or even a patch of grass. Again, Professor Rovner averred, and it is not contested, that each cell contains a poured concrete bed and desk as well as a steel sink, toilet and shower. All General Population Unit inmates eat all meals alone inside their cells within arms length of the toilet.

11.5.4. When involved in out of cell exercise, the inmate is either taken to an indoor cell that is empty except for a pull up bar or is permitted to have his recreation in an outdoor solitary cage. According to Mr. Fulton, some of the out of cell recreation occurs in secure single recreation areas and some secure single recreation areas are grouped together on large recreation yards. This appears to accord with the inside recreation area and the outside recreation area as described by Professor Rovner. A photograph of two of these outdoor cages has been provided in the affidavit of Professor Rovner. These are apparently slightly larger than the cell areas and are understandably known as dog runs because they resemble animal kennels.

Social Contact

11.5.5. The amount of hours an inmate spends inside the cell is variously described by both sides. Ms. Williams stated that the inmates in General Population Units have ten hours out of cell exercise each week in single cell recreation areas, some of which are grouped together on large recreation yards. Mr. Fulton said that the inmates receive a minimum of ten hours out of cell recreation. Professor Rovner stated that the prisoners are held in solitary confinement on average for 22 hours a day. The Amnesty International

report, to which Professor Rovner referred, describes the confinement as being for 22 to 24 hours a day. Given the averments of Ms. Williams and Mr. Fulton, it would appear that there is no guarantee that two hours each day will be spent out of the cell and it appears more likely that there could be some days in which no out of cell recreation is provided. In any event, the 22 to 24 hour in-cell period accords with the definition of solitary confinement as found by the Special Rapporteur.

11.5.6. Furthermore, it is clear that when an inmate is exercising in the inside recreation area, he is doing so in isolation from at minimum other prisoners. When provided with outdoor recreation, it appears that the inmates are entitled to converse with each other.

11.5.7. When inside their own cells, there is no direct or face to face contact with other inmates. Professor Rovner swore that the prison was specifically designed to limit all communication among the people it houses and that accordingly, the cells have thick concrete walls and solid steel doors. That averment is not specifically denied by the U.S. officials but instead Ms. Williams averred that it is possible and permissible for inmates to talk to each other in their cells via the ventilation system. Mr. Fulton asserted that they may talk with each other while in their cells in moderate tones. Professor Rovner swore that the contact with inmates in the main unit is through attempted shouting through the thick cell walls, doors, toilets and vents. Her case is that this is not meaningful communication with others¹

11.5.8. Each inmate in the General Population Unit is permitted to receive two fifteen minute social telephone calls per month. Each inmate may receive up to five social visits monthly. Professor Rovner made the point that many prisoners in the ADX receive few, if any, visits in a year as the prison is located at quite a distance from many family members. Professor Rovner pointed out that the total amount of telephone contact permitted in a year is six hours. Inmates with children have to divide these hours between the children and other family members. It is to be noted that Mr. Damache stated, in his affidavit, that he was being visited while in Dublin by religious personnel and friends from the Clonskeagh Mosque. He had difficulty with such visits in Cork prison and no doubt by extrapolation will have difficulty in the U.S.A.. Each cell has a light, which the inmate may turn on and off as needed. The lights have three settings (dim, medium and bright). The inmate controls the setting of the lights from inside his cell. The inmate can turn the light completely off. The inmate is required to turn the light on when staff are interacting with him at the front of his cell. Lights in the prison cell range are switched off at night but as in all federal prisons are briefly turned on for three cell counts during the night.

11.5.9. Mr. Fulton stated that all inmates at the ADX have contact with other persons on a daily basis. This is outlined as follows: the warden, associate wardens, captain and department heads perform weekly rounds so they can visit with each inmate. Correctional officers perform regular rounds throughout all three shifts on a daily basis. A member of an inmate's unit team visits him every day, Monday through Friday except on holidays. Inmates receive regular visits from medical staff, education staff, religious services staff and psychology staff when they perform their rounds and upon request, if needed. Inmates also have access to medical and mental health visits upon request. Professor Rovner maintained that it is important to recognise that such "contact" may be limited to an officer pushing a food tray through a slot in the door or shackling a prisoner and walking him 75 feet to the outside recreation cage, the whole time holding a baton at the ready. Professor Rovner maintained that there is a fundamental psychological divide that exists between prisoners and correctional staff. Professor O'Donnell deals with it further in his affidavit which will be referred to below.

11.5.10. Each general population inmate has an individual colour television in the cell providing 24 hour select broadcast channels (50 channels) and channels for closed circuit institutional programming (recreation, education, religious services, and psychology, radio stations, and digital music channels). One of the television channels is utilised to provide bulletins to the inmates and also shows the date and time.

11.5.11. All inmates have access to media and reading materials. All inmates have access to multiple libraries (legal, religious and leisure) and can obtain materials from each library. All inmates can also receive reading materials through the mail. All inmates may receive non-contact legal and social visits. These are behind screen visits often taking place while the prisoner is shackled.

11.5.12. All inmates except those on SAMs may send and receive general and special correspondence.

11.5.13. Professor Rovner stated that on the whole, the conditions of confinement in which many ADX prisoners are held are more restrictive than the conditions in federal death row. In doing so, she referred to a declaration by an expert working in the area which was made in a civil action brought by prisoners in the U.S. Proof by way of an exhibited declaration is not appropriate. I take the view that the declaration simply provides the basis of Professor Rovner's opinion that conditions at the ADX are worse than those on death row. Ultimately, however, this Court is only concerned with the conditions at the ADX and comparisons with death row are irrelevant.

Movement of Inmates and Interaction with Staff

11.5.14. According to Professor Rovner, inmates in the General Population Units ordinarily require shackles behind the back when being moved from their cells. They may be subjected to a strip search. When leaving the unit, a general population inmate is handcuffed from the front in circumstances where a Martin chain, black box and leg irons are used. A Martin chain wraps around the lower portion of the inmates abdomen and connects to the handcuffs. Professor Rovner said they may be subjected to a strip search on movement from their cells. That is not disputed in the affidavits of the U.S. officials.

11.5.15. Professor Rovner averred that the contact outlined above between inmates and ADX staff or other personnel is extremely limited. She stated that the ADX staff who perform rounds, including medical help personnel, typically do so by speaking with inmates in brief exchanges through the double doors of their cells. She said in those circumstances, the staff and prisoner are separated by a steel door and a barred grille. In other words, the distance of the sally port, the barred grille and the steel door remain between inmate and member of staff.

11.5.16. Professor Rovner also stated that on the limited occasions that ADX staff seek to "converse" with prisoners, they must stand directly next to the solid steel door, with the prisoner on the other side. Due to the way the door is configured, ADX prisoners need to speak loudly in order to be heard by, for example, the imam or mental health personnel, meaning that these conversations are not private. None of the affidavits filed on behalf of the State dispute that the interactions with staff including medical and religious personnel occur in the manner as described above.

11.5.17. Professor Rovner went on to describe how her client Mr. Silverstein kept a diary of his interactions with staff for a 30 day period and that his interaction amounted on average to "less than one minute each day". Professor Rovner stated that for most ADX prisoners, the interaction and communication with prison staff is so minimal as to be virtually meaningless. The affidavits filed by the State do not specifically engage with that contention, rather they simply list the various personnel who may engage with the inmate as outlined above.

Process Once an Inmate Arrives at the ADX

11.5.18. Mr. Fulton included information in his affidavit about how the BoP reviews the status of inmates. This appears to apply to all inmates in the federal prison system. This is done in three ways: initial classification, programme review and progress reports. It is not necessary to set this out in detail, save to note that he states that meetings are held in which an inmate's case is formally reviewed by the unit team. The inmate is expected to attend and these team meetings give staff and inmates the opportunity to discuss issues in an open format. At the ADX, inmates can raise questions and concerns about their ADX confinement and their progress through the system.

11.5.19. He stated that the progress report is the principle document used by the unit team to evaluate the behaviour and activities of inmates. The progress report is a detailed comprehensive account of an inmate's case history, prepared by the case manager at prescribed intervals during the inmate's confinement. Generally, the case manager composes the progress report with input from other unit staff, work detail supervisors and education instructors. A progress report is required a minimum once every three years. Every time a progress report is completed or updated, the inmate is provided with a copy. He says that only the most recent progress report is retained in the inmate's central file.

The Step-Down Programme

11.5.20. Mr. Fulton outlined that the ADX contains, in addition to the four General Population Units, one Step-Down Programme Unit. The Step-Down Programme has four phases. Incarceration in the General Population Unit is the first phase. Those conditions have been described above.

11.5.21. Inmates in the second phase of the Step-Down Programme are housed in what is termed the Intermediate Unit. The conditions in which inmates are held in the Intermediate Unit (J Unit) are as follows. Each cell has approximately 75.5 square feet (7.01 square metres) of living space and does not have a sally port or a shower. Each cell has a solid outer door. Each cell's solid outer door has a window which looks out onto the range. Each cell also has a window that looks outside. In J Unit, the inmates are assigned to one of eight groups. There are no more than eight inmates to a group. These inmates receive a minimum of 10.5 hours of out of cell recreation per week. The inmates engage in recreation out of cells on the range with inmates in their assigned group. The outdoor out of cell recreation is also with inmates in their assigned group but in secure single recreation areas. The meals are provided to the inmates by groups, meaning each group is allowed out of the cells one at a time to come to the front of the range to receive their meals and then return to their cells while unrestrained. The inmates eat their meals in their cells. The inmates are unrestrained when out of their cells on the range. These inmates receive three fifteen minute social telephone calls per month. They may receive up to five social visits per month. Shower stalls are located on the range. The inmates may shower at any time they are out on the range. The inmates may talk with each other while in their cells in moderate tones or during their out of cell recreation.

11.5.22. These second phase inmates have the same access to television under the same terms as the inmates in the General Population Unit. They also have the same contact with staff as is described in relation to the General Population Units. The same caveats are entered in relation to the Step-Down Programme.

11.5.23. Again, these inmates have access to the same media and reading materials as previously outlined. The inmates also have the same non-contact legal and social visits. The inmates may send and receive general and special correspondence.

11.5.24. Inmates in the third and fourth phases of the Step-Down Programme are held in two units which are located at the separate correctional facility located in the Florence, Colorado correctional campus known as the U.S. Penitentiary, High Security Florence. Inmates in the third phase are held in the Transitional Unit located in the Delta Bravo unit ("the D/B") of the said High Security U.S. Penitentiary. In this unit, the inmates are assigned to one of four groups. There are no more than sixteen inmates to a group. Each cell in D/B unit has approximately 80 square feet (7.4 metres squared) area of living space and does not have a sally port or a shower. The inmates are assigned to one of two groups. Each cell has a solid outer door. Each cell's solid outer door has a window, which looks out onto the range. Each cell also has a window that looks outside providing the inmate with natural lighting. The inmates consume their meals on the range with the other inmates in their assigned group. Showers are located on the ranges. The inmates may shower at any time they are on the range. These inmates receive a minimum of 21 hours of out of cell recreation per week. The inmates have recreation with other inmates in their assigned groups on the range or outdoors on a large recreation yard. The inmates in this phase consume their meals out on the range with the other inmates in their assigned group. The inmates are unrestrained when out of their cells. The inmates receive four fifteen-minute social telephone calls per month and may receive up to five social visits per month.

11.5.25. The inmates in the D/B unit have access to a similar package of broadcast channels but through five televisions located on the range of the unit and in two television viewing rooms. The institutional programming (recreation, education, religious services and psychology) is provided through video tapes and DVD's which the inmates may checkout from unit staff and view in separate programming rooms.

11.5.26. Again, all these inmates have similar contact with the staff as set out previously by Mr. Fulton. They have access to media and reading materials as set out previously. The inmates in the D/B unit may receive contact legal visits and non-contact social visits. They may also send and receive general and special correspondence.

11.5.27. The fourth phase of the Step-Down Programme is called the Pre-Transfer Unit and is located also in the D/B Unit. In the Pre-Transfer Unit, the inmates are assigned to one of two groups. The cell design is the same as the Transitional Unit design. The access to meals and showers is also as described previously. These inmates, however, receive a minimum of 24.5 hours of out of cell recreation per week. They receive 300 minutes of social telephone calls per month. They also may receive up to five social visits per month.

11.5.28. All the other conditions are the same as set out for the Transitional Unit population. In the Transitional and Pre-Transfer Units, inmates are unrestrained when out of their cells and restraints are not required during escorts to various programming areas. These inmates are subjected to pat searches and screened with a metal detector upon entering and leaving the unit and random visual searches upon entering. Any interaction between staff (e.g. education, religious, psychology, barber, medical, dental, etc.) and a Pre-Transfer Unit inmate while in his cell is done without a correctional officer present. If the interaction occurs outside of the cell, the inmate is not restrained.

Progression through the Step-Down Programme

11.5.29. Mr. Fulton set out in his affidavit that the placement of an inmate in each stage of the Step-Down Programme is a

classification decision. He refers to ADX Institution Supplement FLM 5321.06K(1) entitled "General Population and Step-Down Unit Operations" issued on 7th December, 2012. This supplement governs the procedure and criteria for inmates placement in, advancement through, transfer out of and, if necessary, removal from the Step-Down Programme.

11.5.30. Mr. Fulton averred that an inmate's continued housing at the ADX and his advancement through the Step-Down Programme is reviewed at least every six months by members of his unit team. This review is to determine eligibility for progression through the system. Ordinarily, the reviews are conducted in connection with regularly scheduled programme reviews. The nature of these programme reviews has been set out previously.

11.5.31. In order to progress through the Step-Down Programme inmates, must meet the following factors:-

- (a) A minimum of twelve months (for the General Population and Pre-Transfer Units) or a minimum of six months (for the Intermediate and Transitional Units) clear conduct;
- (b) Active participation in and completion of all programmes recommended by the unit team;
- (c) Positive behaviour, including respectful and appropriate conduct towards staff and other inmates; and,
- (d) Positive overall institutional adjustment, including personal hygiene and cell sanitation.

As can be seen from the above, the minimum period of time to work through the system is 36 months.

11.5.32. If the inmates meet the above eligibility criteria, they are referred to a Step-Down screening committee for consideration. That committee ordinarily consists of the warden, associate warden with daily oversight of unit management, captain, special investigative agent, case management co-ordinator, unit managers, psychology representative, and supervisory attorney.

11.5.33. The factors the committee may consider when making a decision about an inmates placement in and progression through the Step-Down Programme include but are not limited to, the following:-

- (a) The inmate's conduct while housed at the ADX;
- (b) The inmate's participation in and completion of programmes recommended by the unit team while housed at the ADX;
- (c) The inmate's behaviour and conduct towards, and interaction with, staff and other inmates while at the ADX;
- (d) The inmate's overall institution adjustment, personal hygiene, and cell sanitation while at the ADX;
- (e) The reason(s) the inmate was designated to the ADX;
- (f) The inmate's criminal history;
- (g) The inmate's involvement with criminal organisations, if any, and the potential safety and security threat(s) implicated by such involvement;
- (h) The inmate's overall adjustment during his history of confinement;
- (i) The institution's safety and security needs including the safety and security of staff;
- (j) The safety and security needs of the inmate;
- (k) The safety and security needs of other inmates;
- (l) The safety and security needs of the public; and,
- (m) Any other relevant factor(s).

11.5.34. The Warden of the ADX makes all final decisions regarding an inmate's placement in or advancement through the Step-Down Programme. An inmate's placement in and advancement through the Step-Down Programme is a classification decision as to whether he can safely function in a less restrictive unit without posing a risk to institutional security and order, to safety and security of staff, inmates or others including the inmate himself and to public safety.

11.5.35. The committee makes decisions about advancement on a case-by-case basis using its judgment. Therefore, eligibility for advancement through the Step-Down Programme does not equate with appropriateness for advancement to the next phase.

11.5.36. A written notice is sent to an inmate if he is denied progress through the Step-Down Programme. That notification includes the reason(s) for the denial unless it is determined that the release of this information could pose a threat to individual safety or institutional security, in which case that limited information may be withheld. Information that the inmate may appeal the decision through the BoP Administrative Remedy Programme is also included. If an inmate has been denied a transfer out of the Step-Down Programme, the notice will include the regional director's direction as to when the inmate should next be recommended for transfer out.

11.5.37. Mr. Fulton said that since October 2009, there has been a 56% increase in the movement of inmates from one of the four General Population Units to the Intermediate Unit. He said that since October 2009, there has been a 135% increase in the movement of inmates from the Intermediate Unit to the Transitional Unit.

11.5.38. Professor Rovner highlighted that one of the factors that determines whether a prisoner will be admitted to and/or progress through the Step-Down Programme is "the reason(s) the inmate was designated to the ADX". She said that to the extent that some prisoners are sent to the ADX because of their crimes of conviction, these are reasons that by definition cannot change. As a result, she said those prisoners are at real risk of indefinite ADX confinement. She pointed to a number of prisoners who have been held for very long periods of time in solitary confinement at ADX (and elsewhere). At least one of those was transferred out after thirteen years. Others have been in the ADX for much longer periods.

11.5.39. In her second affidavit, Professor Rovner noted that the U.S. affidavits do not address the number of prisoners in ADX who have been held in a General Population Unit or in the H Unit (where prisoners with SAMs are confined) for substantially longer than the three years it takes to complete the Step-Down Programme. She pointed out that the statistics offered by Mr. Fulton about the percentage increase of prisoners moving between the units, do not show the number of men who have been held in ADX for extremely long periods of time without ever being moved into even the first phase of the Step-Down Programme. She pointed to 11 named inmates who have been in ADX for considerable periods. One prisoner appeared to have been held there for 18 years until he committed suicide in 2013. Others vary between 16 years and four years, all of which are ongoing. Another man is Mr. Silverstein who has been referred to above. A further person has been held for ten years but it appears in two separate periods.

Statistics Provided by the U.S. Authorities at the Request of the Court

11.5.40. At the request of the Court, the U.S. authorities provided statistics that are apparently not maintained by the BoP in the ordinary course of business. This related to the movement through the Units at ADX. Mr. Synsvoll outlined how a computerised random selection was made of 60 inmates, representing about 15% of the total number at the ADX. Of those 60, 28 were in the General Population Unit, 17 in the Intermediate Stage, nine currently in Transitional phase and six currently in the Pre-Transfer phase. It is said that the average time an inmate spends in a General Population Unit before progressing is 7.5 years. The average time in Intermediate Stage before progressing is 1.29 years. The average time in Transitional Phase before progressing is six months. Two of the six inmates in the Pre-Transfer phase are said to be awaiting re-designation and transfer.

11.5.41. Eleven out of the 60 had failed the Step-Down Programme and were returned to the General Population Unit to start over. The view of the U.S. was that this had raised the overall length of time spent for this random sample – however, if a random selection, it would appear to raise the overall length of time generally. Ten of the 11 inmates had recommenced the programme and only one was in the General Population Unit at present. Eight of the 60 inmates were away from the ADX on writs or temporary transfers to BoP medical facilities for a range of two to six years. This raised the overall length of time as these prisoners are officially designated at ADX. Two of the inmates were on SAMs when they arrived and were in the Special Security Unit. One is now in the Intermediate Unit and one in the General Population Unit.

11.5.42. Mr. Synsvoll also pointed to the reasons already set out as to why an inmate might be either kept in the General Population Unit or in the Program Phases. Those issues may prolong the time the inmate spends at ADX.

11.5.43. It should also be noted that there is an entirely separate programme for SAMs inmates. This is set out in the affidavit of Mr. Julian.

Progression System for SAMs Inmates

11.5.44. These inmates are housed in H Unit in the ADX. SAMs inmates are not eligible for the Step-Down Programme for ADX general population inmates nor are ADX general population inmates eligible for the Special Security Unit Programme.

11.5.45. The Special Security Unit Programme for SAMs inmates is a three-step programme. Mr. Julian said that the purpose of the programme is to confine inmates with SAMs under close controls, while providing them opportunities to demonstrate progressively responsible behaviour and participate in programmes in a safe, secure environment. The programme balances the interests of providing inmates with programming opportunities and increased privileges with the interests of ensuring international and national security. The success of the inmate's participation in the programme provides information that can be considered in the evaluation of whether SAMs continue to be necessary or whether the inmate's communications can be monitored in a manner that will not compromise national or institutional security interests.

11.5.46. Phase One is the baseline phase of the programme. Inmates in this phase may be permitted two non-legal telephone calls per month, access to a commissary list and art and hobby craft items and escorted shower time on the inmates range three times each week.

11.5.47. In Phase Two of the programme, an inmate may be permitted three non-legal telephone calls per month, access to an expanded commissary list and additional art and hobby craft items. The inmate is permitted to go to the shower unescorted five times each week. An inmate in Phase Three of the programme is allowed to participate in range recreation in a group of as many as four inmates five days a week. Phase Three inmates spend a minimum of one and half hours per day on the range with up to three other inmates. The inmates are not restrained or escorted by BoP staff. The inmates eat one meal together and engage in recreational activities including watching television, reading and playing cards. These inmates may shower at any time they are on the range. In addition, they have access to a further expanded commissary list as well as the expanded art and hobby craft list.

11.5.48. There are four eligibility factors for advancement into the next phase of the programme, including a minimum of twelve months of clear conduct, active participation in and completion of all programmes recommended by the unit team, positive behaviour and respectful conduct towards staff and other inmates and positive overall institutional adjustment.

11.5.49. There is a similar process to the Step-Down Programme for consideration for advancement. There are similar factors that the programme screening committee considers and also there is the possibility of having a further review if not advanced initially. There is also the opportunity to appeal.

11.5.50. According to Mr. Julian, ten H Unit inmates have progressed to Phase Three of the programme. Their SAMs were modified to allow them to have physical contact with other inmates in a group setting. Two of those inmates have had their SAMs removed altogether and have been placed into the Intermediate Phase of the ADX Step-Down Programme. Two of the ten inmates have regressed to Phase One and Two. It appears that additions had to be made to one range of the special security unit to allow the Phase Three inmates to gather outside their cells. Those additions included the installation of a new flat screen television and a table where the inmates could eat together. Inmates remaining in Phase One and Phase Two are reviewed every six months at a minimum to determine whether they are appropriate for placement in the next phase.

11.5.51. Inmates in Phase Three receive a minimum of ten and a half hours of out of cell recreation per week with up to five other inmates. Inmates in Phase One and Phase Two are provided a minimum of ten hours of out of cell recreation per week with up to five other inmates. H Unit has an established schedule for recreation covering a two-week period. Recreation alternates daily between outside and inside recreation allowing an inmate to have recreation outside three days one week and two days the following week. The ten hours of out of cell recreation reflects an increase over the five hours of out of cell recreation provided to H Unit inmates prior to September 2009. Mr. Julian said that the management challenges posed by the inmates are very real as are the dangers they pose to staff, other inmates and the public. In his words "with these inmates, humane treatment starts with safety – for staff,

inmates, and the public.” He said that the change reflects the BoP’s core values (correctional excellence, respect, and integrity) through a continual review of the operating procedures to determine if gradual modification is necessary, first and foremost to reflect sound security practices, and only then to safely expand inmate access to programmes.

11.5.52. Outdoor recreation for H Unit inmates takes place in individual recreation areas located in an open air yard (it appears that these are the same individual recreation areas known as dog runs in the General Population Unit). The yards are surrounded by the building walls. The inmates can see around the yard as well as the other inmates in the individual recreation areas. Conversations between inmates can be carried out in a normal tone of voice. Many H Unit inmates choose to spend the majority of their recreation time talking with other inmates.

11.5.53. The individual recreation areas measure 12 feet by 20 feet. The areas contain pull up bars and inmates are allowed to play with soccer balls. The indoor recreation area measures 14 feet by 10 feet. Inmates are allowed to play with a handball during indoor recreation. Inmates can request instruction in aerobic exercise from ADX recreation staff who have training in aerobic exercises that can be performed in the individual recreation areas.

11.5.54. Since 2003, H Unit inmates are scanned, before and after recreation, while fully-clothed using a body scanning machine to check for contraband. H Unit inmates have access to wellness programmes, weekly leisure games via the ADX closed circuit television system, weekend brain teaser games, arts and crafts, a weekly movie programme, and special holiday activities. SAMs inmates have access to 50 television channels. They have access to a library of books in the H Unit and can obtain any publication “determined not to facilitate criminal activity or be detrimental to national security; the security, good order, or discipline of the institution; or the protection of the public.”

11.5.54. The SAMs inmates also have contact with other persons on a daily basis in the Unit. This is as set out in relation to the General Population Unit. H Unit inmates also make frequent use of their opportunity to speak with ADX staff who speak Arabic.

Criticisms of the Operation of BoP Policy

11.5.56. Professor Rovner in her second affidavit identified a section of a General Population Unit known as the “severely restricted communication tier” which she says is not mentioned in the institution supplement. She says that to the best of her knowledge, no prisoner held on that tier has been permitted entry into the Step-Down Programme. One prisoner held on this range does not know who his case manager and unit manager is because they have not spoken to him. These are members of the unit team who, according to ADX policy and Mr. Fulton’s affidavit, purportedly visit each prisoner on a daily basis.

11.5.57. According to Professor Rovner, this prisoner has not had a programme review in eighteen months, despite ADX-BoP policy and the affidavit of Mr. Fulton, stating that these occur every six months. She said that this experience is corroborated by other ADX prisoners, including some not housed in the “severely restricted communication tier”, with whom she is in contact. She said that these prisoners have not had the team meetings in months or years and instead receive the programme review form slipped under their cell doors

11.5.58. Professor Rovner said that the prisoners on the “severely restricted communication tier” are only permitted visitation with immediate family and cannot call family members on weekends or evenings when they are home from work or school. She said that men on this tier are also limited in who they can correspond with.

The Effects of Solitary Confinement on Mental Health and Psychological Suffering

11.5.59. In her first affidavit, Professor Rovner stated that the mental health effects of prolonged isolation of the type found at ADX can be simply painful and debilitating. She relied upon quotes from Dr. Craig Haney, who she describes as a psychologist and one of the foremost experts in the U.S. regarding the psychological effects of solitary confinement, that had been filed in the case of *Silverstein v. Federal Bureau of Prisons, et al.*, 2011 WL 4552540 (D.Colo.2011) referred to earlier. Counsel for the State objected at the hearing of the action to any reliance upon this report as it was hearsay and not sworn in these proceedings.

11.5.60. On behalf of Mr. Damache, Professor Ian O’Donnell, Professor of Criminology at the School of Law, University College Dublin has sworn an affidavit. Professor O’Donnell holds a B.A. in Psychology from Trinity College, Dublin, an MPhil in Criminology from Cambridge University and a PhD from London University as well as an LLD from the National University of Ireland. He is a fellow of the British Psychological Society and a chartered psychologist. He formerly worked as the director of the Irish Penal Reform Trust and is a research officer at Oxford University Centre for Criminological Research.

11.5.61. Professor O’Donnell gives expert opinion based upon his reading and knowledge of the published literature that pertains to the psychological effects of solitary confinement and his own research on these effects. His findings are drawn from his book, *Prisoners, Solitude and Time*, referred to above.

11.5.62. According to Professor O’Donnell, a person’s sense of self is forged in a social context and is maintained through interaction with others. In solitude, without the mirroring effect of others, the personality can threaten to disintegrate. This is a frightening prospect, especially when not anticipated. As a species, human beings are innately sociable and to deny them an outlet for this sociability strikes at the very heart of personhood.

11.5.63. Professor O’Donnell acknowledged that absolute solitude for the prisoner does not exist. It may be possible to hear a neighbour’s muffled shouts and to conduct a conversation of sorts or to exchange written messages. In addition, cells are visited by staff delivering meals; there are opportunities to engage with the warden, chaplain, or healthcare professionals; there may be phone calls too, (non-contact) visits from families and lawyers. However, such encounters do not constitute meaningful engagement. Professor O’Donnell stated that by being denied the opportunity for meaningful contact with others, the prisoner in solitary confinement is prevented from being fully human.

11.5.64. According to Professor O’Donnell, there is wide agreement in the scientific literature about the range of harms associated with solitary confinement. The adverse impacts can be categorised in the following ways:-

- (a) Physiological: headaches, heart palpitations, muscle pains, digestive problems;
- (b) Cognitive: impaired concentration, confusion, memory loss;
- (c) Perceptual: hallucinations, illusions, paranoia, fantasies;

(d) Emotional: depression, anxiety, panic, despair;

(e) Motor: lethargy, chronic tiredness, apathy.

11.5.65. Professor O'Donnell in his affidavit and in his book also acknowledged that in addition, some prisoners can report positive effects such as enhanced status among their peers, clarity of thought, and feelings of personal accomplishment. Professor O'Donnell referred to the methodological problems arising in research in this area which may be small sample sizes, a lack of control groups, no before and after measures, few standardised instruments, variation in conditions, duration and reasons for isolation. He noted, however, that nonetheless and notwithstanding individual differences in the nature and intensity of the response, there is broad agreement among academic commentators that prolonged exposure to involuntary solitary confinement exacts a significant psychological toll.

11.5.66. Professor O'Donnell averred that when social contact is reduced, the prisoner is left with a limited range of possibilities, prominent among which are truculence and withdrawal. However, as belligerence requires energy and because isolation begets listlessness, a state of passivity often results. The restrictions of the physical environment find behavioural expression in a severely limited repertoire of movement, emotional constriction, and poverty of speech. He referred to one of the leading prison researchers in the U.S., Professor Hans Toch of the State University of New York, Albany, who talks about "the cold suffocating vacuum" that is the isolation cell. Professor Toch talks about the isolation of such persons making them feel trapped and sealing their fate. These people are left face to face with themselves alone in a void. Professor O'Donnell stated that for those who find the burden of self-examination unbearable, self harming behaviour sometimes results.

11.5.67. Professor O'Donnell also referred to Professor Craig Haney and to testimony he has given to the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights. Professor O'Donnell also refers to the psychiatrist Dr. Stuart Grassian who examined fourteen maximum security prisoners involved in litigation against the Massachusetts Department of Corrections. Dr. Grassian highlighted a number of themes that he found to be "strikingly consistent" and wholly negative. These included generalised hyper-responsivity to external stimuli, whereby everyday sounds and smells became amplified and unbearable. Prisoners reported perceptual distortions and hallucinations, hearing voices and seeing impossible things happening. They experienced massive free-floating anxiety, sometimes leading to panic attacks, as well as problems with thinking, concentration, and memory. They were troubled by paranoia and aggressive fantasies involving torture and mutilation of prison guards. They exhibited a lack of impulse control, leading to self-harm or damage to their cells.

11.5.68. Professor O'Donnell referred to one other consistent finding. This is the rapid diminution of difficulties when the period of isolation was terminated. Even the most severe symptoms were found to dissipate quickly, thus emphasising their reactive nature. Professor O'Donnell referred to the fifteen day limit on solitary confinement called for by the UN Special Rapporteur. The Special Rapporteur chose fifteen days as the cut off "because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible." In Professor O'Donnell's view, this seems to be overstating the case given what is known about how people tend to recover their psychological functioning when restored to company.

11.5.69. Professor O'Donnell's book is testimony to a capacity in individuals to resist, however imperfectly, the imposition of hardships that could crush them. It acknowledged that some men and women can even flourish in hostile environments. However, Professor O'Donnell is quite clear that the book is not an apology for cruel treatment. As he says at p. 282 of the book:-

"the fact that some prisoners in solitary confinement can transcend the degradation and loneliness of their immediate circumstances does not mean that more of them should be given this opportunity. That people triumph over adversity is not a reason for more adversity."

11.5.70. Professor O'Donnell stated that it is long-term administrative segregation where the challenges of isolation are greatest. Punitive or protective segregation is less psychologically threatening because the reason for its imposition is clear, and there are usually boundaries around duration together with a variety of due process safeguards. Also, those isolated for offences against prison discipline or for their own safety, while perhaps denigrated on account of their offending history or their misbehaviour, are spared the burden of expectation that comes with the "worst of the worst" label.

11.5.71. Professor O'Donnell referred generally to the use of supermax confinement in the U.S. pointing out that evidence suggests that it is used more widely than intended, that there is considerable variation in its uses across different jurisdictions in the U.S., and that in states where the correctional services have scaled back on the frequency with which they deploy this measure the consequences have been less dramatic than anticipated.

11.5.72. As stated above, Professor O'Donnell referred to Professor Haney's research, in particular his research concerning 100 prisoners at the Pelican Bay Special Housing Unit in California. Professor Haney found that levels of psychological trauma were significantly higher than in other prisoner samples. In addition, he found that prisoners in supermax fared worse than prisoners in protective housing, although the physical conditions endured by the two groups were broadly similar, involving segregation and severely limited regimes. Professor Haney posited that the reason for this difference was that the prisoners in protected custody, while isolated and stigmatised, had opted for protection and as such had some control over their status. Even so, they were an unhappy, angry and anxious group. When the isolation was coerced rather than chosen, however reluctantly, and when the reason for it was administrative rather than protective, the levels of trauma increased further.

11.5.73. Professor O'Donnell stated that the stripping away of the kind of social contact that is vital to forming and sustaining a coherent identity and self-image, activity that most humans engage in continuously and often unthinkingly, takes time to repair. There are negative consequences for others too, as sometimes the anger and frustration that have built up over a period of solitary confinement find expression in acts of violence. It takes time for prisoners who have spent many empty days preoccupied with fantasies of revenge to realign their internal lives with the demands of a new environment.

11.5.74. While virtually every supermax prisoner suffers to some extent, the intensity of the pain is far greater for those with a pre-existing mental illness for whom the experience can be more immediately incapacitating and more permanently disabling. Prisoners who enter solitary confinement with a history of mental ill-health deteriorate faster and further than others.

11.5.75. In Professor O'Donnell's view, the denial of meaningful human relations is inherently destructive of individual's identities and is an affront to the dignity of the person. This is true whether prisoners display mastery over their environment, or crumble, or simply cope. For these reasons, the practice of extended solitary confinement, whether in supermax or elsewhere, has attracted much opposition.

11.5.76. Given that prisoners in supermax have so little personal contact with other human beings, their encounters with staff are invested with huge significance. The denial of engagement with others leads to human relations that can be hostile in affect and effect. Under normal circumstances, when staff and prisoners interact, they come to see each other as rounded individuals with unique combinations of positive and negative attributes. When viewed through a steel mesh or a perspex sheet and when escorted in handcuffs and chains, their mutual humanity is not given an opportunity to grow.

11.5.77. When staff are required to treat any interaction with prisoners as potentially hazardous, and when prisoners are often preoccupied with violent fantasies regarding staff, encounters become charged and anxiety-provoking for both sides. Professor O'Donnell said that it requires extraordinary resourcefulness for a prisoner to behave with dignity in such an environment; the same is true, to a lesser extent, for staff.

11.5.78. The State did not file any affidavit from a psychologist. Instead, they relied upon the affidavits of the U.S. officials as set out aforesaid. None of those affidavits were sworn after Professor O'Donnell's affidavit. Ms. Williams stated that Professor Rovner's suggestion that Mr. Damache may suffer serious psychological harm if he is sent to ADX is without factual support. She said that ADX provides extensive psychological and psychiatric care to inmates who suffer from mental illnesses. She said that all new inmates at ADX receive an initial psychological evaluation and, if necessary, follow up assessment and treatment planning. Thereafter, medical professionals monitor any treatment needs such as medication or modification to an inmates housing, work or programme assignment.

11.5.79. Ms. Williams said that mental healthcare at ADX is provided by one psychiatrist and two psychologists. These doctors make regular rounds through the housing units and can refer an inmate to one of the BoP's Psychiatric Referral Centres for acute psychiatric care. In the most serious of cases, these doctors can also request a transfer to a psychiatric hospital.

11.5.80. On 1st May, 2014, the BoP's *Program Statement on the Treatment and Care of Inmates with Mental Illness* was updated. The program statement provides detailed direction on the mental health evaluation required of all inmates being referred to the ADX and a review of that evaluation by the Psychological Services Administrator for the BoP. The program statement also excludes those inmates who are seriously mentally ill from being housed at the ADX unless there are extraordinary security concerns. That program statement referred to the diagnostic and statistical manual of mental disorders for its definition of a mental disorder. The program statement goes on to say that classification of an inmate as seriously mentally ill requires consideration of his/her diagnosis; the severity and duration of his/her symptoms; the degree of functional impairment associated with the illness; and his/her treatment history and current treatment needs. It refers to three types of diagnosis that are generally classified as serious mental illnesses and lists six others that are often classified as serious mental illnesses especially if the condition is sufficiently severe persistent and disabling. It can be seen that the mental illnesses must in general be severe and long standing with a degree of functional impairment and requiring particular treatment before it will be a cause for non-placement in the ADX. Even then, security needs may require that a seriously mentally ill inmate must be sent to and/or remain in the ADX.

11.5.81. I note that the ADX Institution Supplement "General Population and Step-Down Unit Operations" was handed to the Court on behalf of the State together with the letter of Mary Rodriguez, Acting Director of the U.S. DoJ, Criminal Division, Office of International Affairs and the affidavit of Mr. Synsvoll. This document records that violations occurring during out of cell recreation that will cause suspension of outside recreation include *suicidal attempts or gestures*. This document must have currency for it to be produced. Thus, the Program Statement regarding inmates with mental health issues published in May 2014, referred to above, when read with this shows that even seriously mentally ill persons, as well as those less seriously ill but nonetheless psychologically disturbed, held at ADX will be subject to rules which punish them for suicide attempts or gestures.

11.5.82. That is the extent of the evidence presented by the State in dealing with the mental health of the inmates including the psychological effects of confinement in the ADX.

11.5.83. It should be noted that there is no evidence that Mr. Damache is suffering from a mental illness at present. Therefore, it is not at issue that the ADX is inhuman and degrading because he risks being sent there despite being mentally ill.

11.5.84. The issue of mental health concerns and the treatment of prisoners is raised at length in the Amnesty International Report referred to above. Quite disturbingly, they report a lawsuit on behalf of an inmate sent to the ADX who repeatedly self-harmed but after brief periods of referral to the federal medial facility for psychiatric review was returned to the Control Unit at the ADX. He variously lacerated his scrotum with a piece of plastic, bit off his finger, inserted staples into his forehead, cut his wrists and was found unconscious in his cell. After 10 years and 5 months in the Control Unit, he was placed in the General Population Unit in the ADX where he sawed through his Achilles tendon with a piece of metal. He later was placed on anti-psychotic medication following mutilation of his genitals. They also report another inmate who had a history of mental illness since childhood but was transferred to ADX despite a history of self-harming and attempted suicide at another prison. He twice cut his wrists in the Control Unit.

11.5.85. It would appear that the new psychiatric rules outlined by Ms. Williams may have been put in place to deal with the grossly abusive conditions outlined in the Amnesty International Report. I note, however, that I was subsequently provided with a copy of the "General Population and Step-Down Unit Operations" as referred to above which allows restrictions of out of cell recreation if suicidal attempts or gestures are made.

11.5.86. It is also interesting to note that Professor O'Donnell referred to prisoners, who in order to attract attention because of the restrictive conditions, deliberately self-harm or even goad prison guards into pre-emptive strikes. He says at pp.81-82 of his book that this is done "to prove to themselves that they retain some power, however residual, to influence their environment." It seems, therefore, that the circumstances can cause a reaction which itself may not be driven from mental illness as usually defined but is nonetheless brought about by the conditions of isolation. A prisoner will face a disciplinary offence and a reversal of any prior advancement through the Step-Down Programme.

11.5.87. Amnesty International also report that one inmate who was returned to the ADX (from U.S. Penitentiary, Florence, where he was in the Step-Down Programme) for a minor rule infraction, attempted suicide after hearing of the death of his mother and seeking psychiatric help for hours. This inmate received an incident report for "tattooing or self-mutilation" but that was expunged after intervention by his lawyer. He remained in the ADX having to again accrue a sustained period of clean conduct.

Further Materials Relied upon by Mr. Damache

11.5.88. As referred to above, Mr. Damache relied upon the Amnesty International Report on incarceration in the ADX. He also relied upon the Interim Report of the Special Rapporteur on Torture and other cruel and inhuman and degrading treatment and punishment, presented to the 66th session of the United Nations General Assembly on the 5th August, 2011. He also relied upon the Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of United States of America*, which was published in

November 2014. The Convention against Torture to which the U.S.A. and Ireland are parties, also prohibits at Article 16:-

"other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The Committee against Torture dealt with solitary confinement at para. 20 of its report:-

"While noting that the State party has indicated there is 'no systematic use of solitary confinement in the United States', the Committee remains concerned about reports of extensive use of solitary confinement and other forms of isolation in US prisons, jails and other detention centres for purposes of punishment, discipline and protection, as well as for health related reasons. The Committee also notes the lack of relevant statistical information. Furthermore, it is concerned about the use of solitary confinement for indefinite periods of time, and its use against juveniles and individuals with mental disabilities. The full isolation for 22 to 23 hours a day in super-maximum security prisons is unacceptable (art. 16)."

11.5.89. The Committee goes on to direct the U.S.A. as follows:-

"The state party should:

(a) Limit the use of solitary confinement as a measure of last resort, for as

short [a] time as possible, under strict supervision and with the

possibility of judicial review;

(b) Prohibit any use of solitary confinement against juveniles, persons with intellectual or psychosocial disabilities, pregnant women, women with infants and breastfeeding mothers in prison;

(c) Ban prison regimes of solitary confinement such as those in super-maximum security detention facilities;

(d) Compile and regularly publish comprehensive disaggregated data on the use of solitary confinement, including related suicide attempts and self-harm."

11.5.90. It should also be noted that the U.S.A. upon ratification of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment entered the following reservation to Article 16:-

"that the United States considers itself bound by the obligation under Article 16 to prevent 'cruel inhuman or degrading treatment or punishment' only insofar as the term 'cruel inhuman or degrading treatment or punishment' means the cruel unusual and inhumane treatment or punishment prohibited by the Fifth, Eight and/or Fourteenth Amendments to the Constitution of the United States."

Furthermore, the U.S. reservations indicate that the U.S. understanding of mental pain is prolonged mental harm for certain specified actions. The Committee against Torture has recommended in its report that the U.S.A. should withdraw its reservation to Article 16 as these have the potential to undermine the application of the Treaty.

11.5.91. From the reservation to the Convention against Torture, it is clear that the U.S.A. maintains that it is only bound by the Convention Against Torture to the extent that the definition of torture, inhuman and degrading treatment accords with its own view.

Availability of Judicial Review

11.5.92. Professor Rovner made certain complaints about the availability of judicial review of the decision to send someone to the ADX and of the decision to permit entry into and progress through the Step-Down Programme. Those complaints were only partially addressed by the affidavits presented by the State. I viewed it as appropriate to seek further clarification of the information in respect of the aspect of judicial review. The availability of judicial review has been identified by the Irish courts as well as the ECtHR as relevant to whether the treatment reaches the threshold for consideration as inhuman and degrading treatment.

11.5.93. Mr. Synsvoll set out in his further affidavit that an inmate may challenge his confinement at ADX and his progress through the Step-Down Programme through "two possible avenues to obtain judicial review". He referred to procedures under the due process clause of the Fifth Amendment and the Cruel and Unusual Clause of the Eighth Amendment to the U.S. Constitution.

11.5.94. He referred to the case of *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012) where the U.S. Court of Appeals for the Tenth Circuit concluded that confinement at ADX did not violate the due process clause of the Fifth Amendment. The court found that the conditions of detention were not "extreme" and that the inmates' confinement was not indefinite. Mr. Synsvoll said the court emphasised that in considering a claim for judicial review that "the proper approach is a fact-driven assessment that accounts for the totality of conditions presented by a given inmate's sentence and confinement." In effect, an inmate has to prove that his confinement at ADX:-

- (1) Does not relate to and further a legitimate penological interest;
- (2) The conditions of placement are extreme;
- (3) The placement increases the duration of confinement; and,
- (4) The placement is indeterminate because it is not reviewed periodically.

It is also possible that an inmate could show that his own placement at ADX is untypical.

11.5.95. Separately, a non-SAMs inmate may challenge his confinement under the Cruel and Unusual Clause of the Eighth Amendment to the U.S. Constitution. Mr. Synsvoll indicated that the Supreme Court of the U.S. has said that such unconstitutional punishments must "involve the unnecessary and wanton infliction of pain." The unnecessary and wanton infliction of pain encompasses action

taken "totally without penological justification". To prove an Eight Amendment claim, a prisoner must establish two elements:-

(1) He must show that "a prison official's act or omission must result in the denial of the 'minimal civilised measure of life's necessities'" and that the deprivation would either cause serious harm or place the inmate in a "substantial risk of serious harm": and,

(2) He must show that that prison official acted with a "sufficiently culpable state of mind".

11.5.96. Mr. Synsvoll concluded that "it would be inaccurate to conclude that ADX inmates lack avenues for judicial review of their confinement. Two plausible avenues exist, and inmates continue to file such judicial challenges to their confinement." It can be seen that the judicial review under the Eight Amendment clause is limited to a consideration of the U.S. Constitution's understanding of cruel and unusual punishment in so far as that may be different from the protections provided under international human rights law.

11.5.97. Professor Rovner in her replying report referred back to her prior affidavits. She pointed out that the U.S. Tenth Circuit is the judicial circuit that decides the constitutionality of conditions of confinement at the ADX. That court has held that conditions at ADX do not give rise to a protected liberty interest. While there is a possibility that the court could reach a different conclusion with a different set of facts, she says that it is notable that the court found that men held there for between 7-11 years did not have a liberty interest. She also said that the U.S. Court of Appeals for the Tenth Circuit has also held in *Silverstein* that a 30-year period in solitary confinement did not even raise a triable issue of fact as to whether the prisoner's conditions deprive him of the minimal civilised measure of life's necessities. In her view, absent a dramatically different set of circumstances, it is hard to envision a situation in which a prisoner held in ADX for years, with or without SAMs, would be able to secure meaningful judicial review of his conditions under either of these constitutional provisions.

Plans for a Further Supermax

11.5.98. Professor Rovner averred, and it does not seem to be contradicted, that the BoP has confirmed that a newly acquired prison in Illinois will hold federal prisoners in supermax conditions. This will be known as Thomson Correctional Center. Apparently, a new warden for the Thomson Correctional Center has been hired and large amounts of federal funding has been released for the activation of Thomson Prison. The press release has stated that the full activation of Thomson Prison is expected to take two years. The appropriations process is currently underway in Washington. This would allow for the incarceration of a larger number of inmates in supermax conditions.

11.6. The Right to Practice Islam in the ADX

11.6.1. As Mr. Damache also complains about religious rights' issues at the ADX which may give rise to both Article 3 and Article 8 rights, it is appropriate to deal with the facts as alleged at this time.

11.6.2. Mr Damache complains that the conditions of detention of Muslim prisoners at the ADX are such that his surrender would violate his constitutional right to respect for his religion as guaranteed by Articles 44.2.1 and 44.2.3 of the Irish Constitution as well as Article 9 of the the ECHR. Allied to that is a claim that even if the conditions on their own did not amount to a flagrant denial of justice, when taken together with the other conditions at ADX, they amount to inhuman and degrading treatment.

The Evidence concerning Islamic Practices

11.6.3. Mr Damache relied upon the affidavit of Professor Rovner to establish the facts with regard to the religious needs of inmates held there. He also relied on the expert evidence of Dr. Ali Selim, Senior Member of Staff at the Islamic Cultural Central of Ireland whose academic background is in Islamic and Faith studies. He has served as the Secretary General of the Irish Council of Imams.

11.6.4. The initial hearing of this entire case took place over a three week period. All sides appeared to be acting on the assumption that Mr. Damache was indeed a Muslim who practised his religion. The Court pointed out at the end of the hearing that certain matters may need to be put on affidavit if the Court was to have regard to it. This was done on the basis that there seemed to have been an oversight as to this basic proof (and indeed any evidential deficiency was not brought up by the State in any of their submissions). I was of the view that in line with the sui generis nature of extradition hearings, it was quite appropriate that I seek confirmation of such issues. There had been discussion about a Statement of Claim in which Mr. Damache had brought proceedings against the State in terms of his conditions of incarceration in this jurisdiction. While it was accepted that such a Statement of Claim could be exhibited in an affidavit, it appears I had not made myself clear. Mr. Damache's solicitor swore an affidavit exhibiting the Statement of Claim. I had sought an affidavit from Mr. Damache. The State objected but I again overruled that objection and permitted him to put an affidavit before the Court.

11.6.5. Mr. Damache did not swear an affidavit for the purpose of these proceedings. Instead, he relied upon an affidavit sworn in proceedings he had taken against the Irish Prison Service and the State regarding his conditions of detention in Cork Prison. In that affidavit, he averred that he was a devout Muslim whose faith was one of the most important aspects of his life. He averred, *inter alia*, that the fundamental expression of his belief in Islam is the observance of daily prayer at prescribed times five times a day. He referred to the requirement for ablutions before prayer and also for the need for congregational prayer.

11.6.6. In her second affidavit, Professor Rovner raised a variety of what she terms religion issues. The first issue she raised was that the ADX does not offer a Halal diet. It offers a common fare diet which is Kosher. She purported that Halal foods are similar to Kosher foods, there are differences including the preparation of and blessings over the food. She said that while it is possible to order Kosher foods from the commissary, there are no Halal items available for purchase. Professor Rovner does not purport to be an expert on Islamic matters, her affidavit is designed to bring to the attention of the Court those matters of concern as she sees fit for Muslim prisoners. It is a curious feature of Dr. Selim's fifty-six paragraph affidavit dealing as it does with tenets of the Islamic faith, including extensive quotes from the Qu'ran, that he does not address any issue regarding Halal diet within the Muslim faith. Dr. Selim states at para. 3 of his affidavit that specifically he has been asked to provide an opinion on whether the alleged conditions at the ADX might conflict with Mr Damache's religious rights and with the religious observances that are required by the Islamic faith. In those circumstances, there is simply no basis for considering the issue of Halal food as part of the religious observances required by the Islamic faith.

11.6.7. The next issue Professor Rovner raised is that several clients have been told by BoP staff members that the call to prayer is prohibited in ADX. Ms. Williams, at para. 35 of her affidavit of the 6th August, 2014, stated that although there is no formal congregational prayer for any faith group, Muslim inmates are permitted to perform the Azan (call to prayer) and the Salat (five daily prayers) in their cells. Inmates also have access to prayer rugs, prayer oil, prayer beads and religious headgear in their cells. Professor Rovner's evidence is hearsay insofar as it relies on what other inmates have told her (and those inmates have not sworn

affidavits in this case). Ms. Williams has made a clear sworn statement that contradicts Professor Rovner. In the circumstances, the State's evidence is preferred and, on a factual basis, there is no necessity to proceed with any further consideration of this particular point.

11.6.8. Professor Rovner also makes a complaint that she has received reports year after year from Muslim men about the refusal of ADX staff to coordinate the dispensing of medication with Ramadan. She purported to give evidence as to the requirements for fasting during Ramadan and says that they cannot ingest any food or liquids including to take necessary medication during that time. Ms. Williams says that special arrangement for meals during Ramadan and other religious holidays are made. Ms. Williams did not address the specific issue of medication. It is another curious feature of Dr. Selim's affidavit that he does not address this issue of the ability to take medication during Ramadan. Therefore, on this issue, it appears that the factual basis has not been laid as regards any interference with a specific religious observance requirement.

11.6.9. Professor Rovner then averred that other Muslim prisoners report having difficulty figuring out the correct Qibla (direction of prayer) because ADX staff refuse to indicate which direction is east. With the high walls in the prison, it is difficult to work out where the sun rises. Ms. Williams in her affidavit does not contradict that allegation specifically.

11.6.10. Dr. Selim set out the importance of prayer as one of the five pillars of Islam, the neglect of which is a grave offence. According to Dr. Selim, Muslims face the Ka'bah in their prayer. He says that they do not offer their prayer to the Ka'bah but to the Lord of the Ka'bah. The Ka'bah is the cube at the centre of Islam's most sacred Mosque in Mecca, Saudi Arabia.

11.6.11. Professor Rovner in her first affidavit stated that no group prayer of any kind was permitted. That is accepted by Ms. Williams. Dr. Selim in his affidavit says that "Muslims can pray individually but they are urged to pray congregationally". Later in his affidavit, he stated that the fact that both the Qu'ran and Sunnah have laid great stress on the congregational prayer shows that obligatory prayer is meant to be offered collectively. He quoted from the Qu'ran as well as from various narrations reported as having been said by the Prophet Muhammad. He said that denial of congregational prayer amounts to a serious breach of a core religious requirement of Islam.

11.6.12. The final matter raised by Professor Rovner is the lack of access to the Imam. She said that her clients' experiences have been that their access to an Imam has been extremely limited. Ms. Williams asserted that the ADX has a contract Imam who visits the prison four times a month. According to Professor Rovner, whether any individual Muslim prisoner is able to see the Imam and for how long and under what circumstances varies. She said that one client who is on the "severely restricted communication tier" has not seen the Imam in several years.

11.6.13. Professor Rovner also stated that the Imam stands behind the sally port and steel door when he comes to the prisoner's cells which makes it difficult to hear because the Muslim prisoner and Imam are separated by a steel door and some distance. One of their clients reports that the Imam does not pray with prisoners. When that client asked to see the Imam in private he was told there was not enough staff for that to happen.

11.6.14. Dr. Selim pointed out that Islamic counselling is distinguished in the sense that in addition to physical, psychological and social dimensions, it includes a spiritual dimension. He said Islamic counselling caters to the soul and offers spiritual development as well. It offered the possibility of transformation and the opportunity of re-evaluation of one's life based on key religious beliefs. He says that due to the fact that the approach of Islamic counselling is primarily Islamic or originating from the Qu'ran and Sunnah, it can only be performed by Muslim scholars. While Dr. Selim acknowledges that it is a matter for the Court to assess the level to which Islamic counselling is available to the inmates at ADX, he says that the rare contact with the Imam as reported and the fact that they have to speak to him through a metal door would not appear to be sufficient as a form of religious counselling given the conditions in the ADX. He stated that such inmates must have very pressing spiritual needs and that there appears to be a complete absence of the time, the privacy and the human contact that would be required to make religious counselling possible.

11.7. Submissions on the Breach of Religious Rights

11.7.1. Counsel on behalf of Mr. Damache submitted that the conditions as outlined above amount to a breach of the right to respect for the religion of Muslim men and therefore surrender where there is a real risk that he would be incarcerated in the ADX would amount to a violation of his religion as guaranteed by Articles 44.2.1 and 44.2.3 of the Constitution and Article 9 of the ECHR. In the course of written and oral submissions, counsel focused upon the factual situation as outlined above. While some of these may or may not amount to a breach of Irish constitutional observance rights, there was little focus on how that might affect a decision to surrender him to the U.S.A.. It must also be observed that counsel submitted that the question of religious observance rights must be taken into account with the consideration of the overall Article 3 conditions.

11.7.2. Counsel for the State submitted that the issue of religious observance rights did not engage Article 3 at all. Counsel further submitted that in any event, the Court had to find in the first place a breach of the right involved, i.e. the constitutional or the ECHR right. Counsel submitted that unlike an Article 3 right, this was not an absolute right. It was necessarily a qualified one. In those circumstances, the *Rettinger* test did not apply at all, the *Rettinger* test being a test of whether there were substantial grounds to believe that there was a real risk that the person extradited would be subjected to a breach of Article 3 rights.

11.7.3. Counsel for the State also submitted that the dispute as regards the evidence was of considerable significance. What was at issue was the question of degree and the Court was being asked to assess a question of degree. In relation to the issue of congregational prayer, counsel submitted that this would not necessarily be any different to what would arise in this jurisdiction if one needed to be segregated from others. The freedom of association, conscience, and religious practice rights could be restricted where necessary. Counsel submitted that this limitation on religious practice could never be a basis for refusing extradition.

11.7.4. Counsel for the *amicus curiae* helpfully brought the attention of the Court to a decision of the Court of Appeal of England and Wales in *R. (B) v. Secretary of State for the Home Department* [2014] 1 W.L.R. 4188 and this has been discussed at Part 6 of this judgment.

11.8. Decision on Breach of Religious Rights

11.8.1. Freedom to practice one's religion is generally regarded as a universal human right within the Irish Constitution and within international human rights instruments. It is not an absolute right; it may be qualified by various matters such as public order or morality, public safety or for the protection of the rights and freedoms of others. In general, matters of religious observance may well be subject to some restrictions on their practice by virtue of, and necessarily incidental to, imprisonment.

11.8.2. In Part 6 of this judgment, I dealt with the test to be applied in the context of breaches of the prohibition on inhuman and degrading treatment and on fair trial rights. The State submitted that religious rights can never engage Article 3. That is not a

tenable submission. Entire aspects of the treatment of persons cannot be viewed as never being capable of engaging the possibility that such treatment may be inhuman and degrading.. With specific reference to religious rights, it is sadly not too difficult to conceive of such treatment reaching levels of inhumanity and degradation. Therefore, I do not consider the fact that religious rights are limited rights prevents the issue of observance of those rights *per se* from being considered under Article 3.

11.8.3. Furthermore, I consider that in so far as there could be a flagrant denial of religious rights it is possible that extradition might be prohibited in a particular case. That, as has been indicated, is a stringent test to meet. I am also satisfied that the same standard of proof applies, *i.e.* the respondent must establish on substantial grounds that there is a real risk of a flagrant denial of his right to manifest his religion.

11.8.4. I am quite satisfied that the nature and the extent of the constitutional right to practice one's religion in this jurisdiction is not a right that must be granted in identical terms to any person whose extradition is sought to another state. In the words of Murray C.J., there would have to be an egregious breach of the right to practice one's religion or, in the words of the ECtHR, a flagrant denial of that right before extradition is prohibited. Such a flagrant denial would have to destroy the essence of the right.

11.8.5. It is clear that Muslims incarcerated at the ADX are allowed to practice their religion. There are some restrictions but in general these appear to be necessarily consequential upon being held in solitary confinement. Indeed, it is not entirely clear that Mr. Damache could succeed in his claim in this jurisdiction that his religious rights under the Irish Constitution were being violated if such restrictions were found to be part and parcel of an otherwise lawful solitary confinement. However, that it is not the test that I have to consider, rather it is one of egregious breach.

11.8.6. In all the circumstances, I am satisfied that it has not been established that there are substantial grounds to believe that the conditions at the ADX amount to an egregious breach of religious rights. I will address further below matters regarding the remaining Article 3 issues that arise.

11.9. Submissions on whether the Conditions of Incarceration at the ADX amount to Inhuman and Degrading Treatment

11.9.1. Counsel for Mr. Damache submitted that under the restrictions on solitary confinement provided for in our own constitutional jurisprudence such prolonged exposure would undoubtedly amount to inhuman and degrading treatment. Counsel also submitted that the evidence establishes a real risk of being subjected to treatment contrary to Article 3 of the ECHR. Counsel sought to distinguish *Babar Ahmad*.

11.9.2. Counsel also submitted that irrespective of whether one views the matter through an Irish or an international lens, the prison conditions at the ADX would result in an egregious breach of the respondent's human rights. Counsel submitted that, without in any sense taking from the universality of these standards, it was useful to consider whether indefinite solitary confinement unrelated to prison security or discipline would pass constitutional scrutiny under Irish constitutional law. Thereafter, the submissions refer to a number of Irish decisions which will be addressed later in this judgment. Counsel submitted that those cases show that indefinite solitary confinement not justified by exigencies of prison discipline and good order will not meet constitutionally acceptable minimum standards.

11.9.3. The State on the other hand submitted "insofar as an issue is raised in respect of Article 3 of the Convention of Human Rights, the decision in *Barbar Ahmad* is a complete answer to same." The State submitted that it is not appropriate or permissible for the Irish courts to undertake the development of the existing case-law that would be required if *Babar Ahmad* was not to be followed. In that regard, they rely upon the Supreme Court in *J.McD. v. P.L. & Anor.* [2009] IESC 81, [2010] 2 I.R. 199. Although the State referred in its submissions at a later point to analogous constitutional rights to Article 3, the State does not engage directly with the argument that the Constitution may require a greater protection of human rights. In general, it may be said that the State relied upon the finding of the ECtHR to support the view that the evidence concerning conditions at the ADX did not amount to inhuman and degrading treatment.

11.9.4. Counsel for Mr. Damache took issue with the suggestion by the State that constitutional norms are irrelevant in the context of the decision of the ECtHR in the *Babar Ahmad* case. In that regard, Mr. Damache relies upon the decision in *Brennan* where it was held that there was a jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. It was in the written and oral submissions of the *amicus curiae* that greater exploration was made as to when and in what circumstances the State is obliged to vindicate one of the most fundamental rights of all, *i.e.* the protection of the person.

11.9.5. The *amicus curiae* submitted that the Constitution may in certain areas provide stronger protections to the individuals than the ECHR. They, along with counsel for Mr. Damache, referred to the decision of Hedigan J. in a case concerning prison conditions, *Dumbrell v. Governor of Castlereagh Prison and Others* (High Court, 6th August, 2010) and to an agreed note of his *ex tempore* judgment as follows:-

"This is a very disturbing case. It is quite unacceptable that the prisoner has been detained in 23 hour lock up for that long. In my view, Irish law has set higher standards than those of the European Convention on Human Rights. It is fundamental to the convention system that each country can take up a much more rights (sic) as they choose but no less. In this case, Irish law provides stronger rights than those agreed by the 47 convention signatories, some of whom from the former Soviet Union struggle with even those minimum rights. Ireland has higher standards."

11.10. The Court's Analysis of the Conditions at the ADX

The Approach to the Protection of Constitutional Rights and Extradition

11.10.1. The Supreme Court in *Finucane v. McMahon & Ors.* [1990] 1 I.R. 165 recognised that the courts had a duty to defend fundamental constitutional rights by refusing extradition where the risk of ill-treatment in the requesting state was established to the satisfaction of the Court. Lest there be any doubt, "it is surely beyond argument that [the unspecified personal rights guaranteed by Article 40] include freedom from torture, and from inhuman or degrading treatment and punishment" (per Finlay P., as he then was, in *State (C) v. Frawley* [1976] 1 I.R. 365 at p. 374). Finlay P. went on to say "[s]uch a conclusion would appear to me to be inescapable even if there had never been a European Convention on Human Rights, or if Ireland had never been party to it."

11.10.2. In circumstances where an individual is present within the jurisdiction of Ireland (regardless of whether he or she is a citizen, albeit noting that Mr. Damache is such a citizen), that person is entitled to the protection of the Irish courts in ensuring that he or she is not subjected to inhuman and degrading treatment. Thus, if there are substantial grounds for believing that there is a real risk that a person will be extradited to face such prohibited treatment, the Court is under a duty to refuse such extradition. The State

submitted that the decision in *Babar Ahmad* was sufficient to deal with the issue of inhuman and degrading treatment, because the ECtHR had found that there was no violation of Article 3 of the ECHR. Insofar as this Court is being asked to apply a standard of protection to such an individual's constitutional rights that would fall foul of his or her constitutional right to protection from such inhuman or degrading treatment within this jurisdiction, this is rejected. To hold otherwise would be an abrogation of the duty of the judiciary to uphold the Constitution insofar as there is an obligation to protect the individual from such inhuman and degrading treatment. The question that this Court must resolve is whether the conditions at the ADX to which there is a real risk that Mr. Damache will be subjected violates his constitutional right to protection from inhuman and degrading treatment.

The Irish Constitution and Solitary Confinement

11.10.3. Hogan J. in *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334 at para 1 asked the following question:-

"[i]s the detention of the applicant under conditions of what amounts to solitary confinement for all but one hour in the course of a day such a manifest contravention of the State's duty to protect the person under Article 40.3.2 of the Constitution such as would entitle him to immediate release?"

11.10.4. It is important to remember that the question for this Court in these proceedings is not whether Mr. Damache is entitled to release under Article 40.4.2 of the Constitution but to consider whether his extradition should be refused on the basis that there are substantial grounds to believe that he is at real risk of being subjected to constitutionally prohibited inhuman and degrading treatment if so extradited. The Court may be asked to address different questions on different occasions. Clearly in the instant case, the question at issue is whether extradition can be permitted if it is established that there is a real risk on substantial grounds that Mr. Damache will be subjected to conditions that violate constitutional prohibitions on inhuman and degrading treatment.

11.10.5. Para. 17 of the submissions of the amicus curiae states as follows:-

"The practice of housing a prisoner alone, with little or no contact with other prisoners, is variously referred to as solitary confinement, isolation or segregation. There are a number of variables, including hours per day in the cell, level of interaction with other prisoners, entitlement to visits, degree of access to information and media, justification for the measure, and the prisoner's right of independent review. It is therefore difficult to make any general statement as to whether solitary confinement constitutes a breach of fundamental rights. It is clear however that restrictions on social interaction engage issues of fundamental rights."

11.10.6. In the view of the Court, that submission encapsulates the state of the law from an Irish constitutional as well as an ECHR perspective. It is, however, possible to identify the principles underlying the assessment of whether the particular nature of the solitary confinement will constitute a breach of fundamental rights. In particular, minimum thresholds can be identified. As will be demonstrated, the Irish cases on imprisonment are particularly instructive in that regard.

11.10.7. While there is a great deal of case-law in this jurisdiction regarding the effect, if any, of imprisonment on constitutional rights, it is in relatively recent years that the question of solitary confinement has been considered in detail. The case of *State (C) v. Frawley* was an early exception. It had dealt with an extreme case of a prisoner who repeatedly endangered his life by swallowing metal objects and also was fearless in his attempts to escape. He was kept in solitary confinement with varying but short periods of exercise and association with other prisoners. In that particular case Finlay P. held that it was inconceivable to associate inhuman and degrading treatment with the necessary discharge of a duty to prevent self-injury or self-destruction.

11.10.8. The more recent cases draw upon the principles established in the earlier cases. Edwards J. in *Devoy v. Governor of Portlaoise Prison & Ors.* [2009] IEHC 288, relied upon by Mr. Damache and by the amicus curiae, rehearses in commendable detail "some of the more important judicial pronouncements concerning the principle at issue". It is unnecessary to repeat his analysis. It is perhaps sufficient to highlight the decision of McKechnie J. in *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, [2004] 2 I.R. 573 in which at para. 31 he stated:-

"...that convicted individuals continue to enjoy a number of constitutional rights, including the right of access to the courts. One can, of course, add that several other rights also continue to be enjoyed by such a person, including the right to life, to bodily integrity, the negative right not to be tortured or to suffer any inhuman or degrading treatment, the right, as Barrington J said in The State (Richardson) v. Governor of Mountjoy Prison [1980] I.L.R.M. 82, to practice ones religion and the right to natural and constitutional justice. This enumeration is indicative only and is not in any way exhaustive."

11.10.9. Edwards J. in referring to *A Just Measure of Pain - The Penitentiary in the Industrial Revolution 1750-1850* by the leading penologist Michael Ignatieff, said that there is no doubt that we have moved on from the days of routine solitary confinement. Edwards J. went on to say in his decision in *Devoy*:-

"[b]ecause man is a social animal the Court recognises that the humane treatment, and respect for the human dignity, of a prisoner requires that he or she should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. To that extent prisoners such as the applicant may be entitled to a degree of freedom of association as an aspect of his constitutional right to humane treatment and human dignity."

Edwards J. further stated:-

"[m]oreover, even in the absence of specific expert evidence on the question, it is easy to appreciate as a matter of common sense the total or substantial isolation from the society of one's fellow man, may over time amount to a form of sensory deprivation and be inhumane and abusive of the prisoner's psychological welfare and constitute a breach of his right to bodily integrity. Again recognition of this is reflected in the Prisons Act, 2007 and the Prison Rules. Although the disciplinary provisions of the code allow (inter alia) for solitary confinement as a penalty for breach of discipline such a penalty can only be applied "for a period not exceeding 3 days". Moreover, among the penalties expressly outlawed are penalties consisting of any form of sensory deprivation, penalties of indeterminate duration and penalties which amount to cruel, inhumane or degrading treatment."

11.10.10. I would observe that Edwards J. in referring to "inhumane" appears to use it in the same sense as "inhuman and degrading treatment," which is the phrase used in the various international human rights treaties and in the Irish cases cited above.

11.10.11. In *Devoy*, the court held that the regime of detention did not amount to isolation nor did the restrictions imposed on his ability to associate mean that his detention is inhumane and contrary to his human dignity. Indeed, in that case, the facts alleged by the applicant were disputed by the respondent prison authorities.

11.10.12. The court held that the evidence did not bear out the contention that he was in isolation. Though there were significant restrictions on his ability to associate with other prisoners, he could associate and is associating with another prisoner in his unit. He could regularly see his teacher, his fitness instructor, his chaplain, the Governor, the Chief Officer, the Medical Officer and had visits from approved family members. He had significant out of cell time - it appears four and a half hours spread out over three periods per day. He had entertainment exercise facilities for self-improvement and the physical conditions of detention were very good. The court held that it was completely satisfied that there was no evidence to justify his contention that his regime of detention was inhumane and contrary to his human dignity.

11.10.13. In the case of *Dumbrell v. Governor of Castlereagh Prison*, counsels' note of judgment (which although is stated to be the note of a single counsel, I am assured by counsel for the State that it is in fact agreed by both counsel) does not record the full circumstances. However, it is clear that Hedigan J. held that it was quite unacceptable that the prisoner had been detained in 23 hour lock up for a period that appears to have been less than six months. In that case, the State had conceded a judicial review to the effect that his detention in isolation was unlawful for a period between 21st February, 2010, to 6th August, 2010, and that the decision to detain him in isolation was taken otherwise than in accordance with Prison Rules 207. A further declaration was granted that the failure to provide him with any reasons for his detention in isolation was contrary to natural and constitutional justice.

11.10.14. The applicant in that case had also sought an order under Article 40.4.2. for his release on the basis that his detention was not in accordance with his constitutional rights. Hedigan J. said, having considered the *Devoy* case, that the situation was one that might result in an order of release. However, he held that such an order would be premature. He referred to the fact that the Governor had promised to implement Rule 62. That rule permits the Government to direct that a prisoner shall not, for a specified period, be permitted to engage in structured activities, participate in communal recreation, or associate with other prisoners. The direction specified therein can only continue for as long as is necessary to ensure the maintenance of good order of safe or secure custody. Such a direction has to be reviewed every seven days. After 21 days, the continuation of any extension must be authorised in writing by the Director General of the Prison Services. In that case, it appears that Rule 62 had not been followed.

11.10.15. Given the nature of the status of the judgment, merely being counsels' note thereof, and the fact that there appeared to be a clear breach of Rule 62, the value of the case as authority may be slightly limited. Nonetheless, it is a clear statement of the importance of the application of Irish values in the consideration of fundamental rights and of the unacceptability of a prolonged period of detention in 23 hour lock-up.

11.10.16. The next case in time is that of *Kinsella v. The Governor of Mountjoy* [2011] IEHC 235, [2012] 1 I.R. 467. The facts were extreme. Concerns for the applicant's safety, coupled with shortage of single cells in the prison, resulted in the applicant being detained in a small, padded observation cell without access to proper sanitation or recreation facilities. He was confined there for a period of 11 days prior to an application for his release pursuant to Article 40.4.2. of the Constitution. In posing the question whether the present conditions met the constitutionally acceptable minimum standards, Hogan J. relied upon Article 40.3.2. of the Constitution which requires the state by its laws to:-

"..protect as best it may from unjust attack, and, in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen."

11.10.17. Having referred at para. 8 to the detention in a padded cell as *"a form of sensory deprivation in that the prisoner is denied the opportunity of any meaningful interaction with his human facilities of sight, sound and speech..."*, Hogan J. at para. 9 held as follows:-

"[b]y solemnly committing the State to protecting the person, Article 40.3.2 of the Constitution of Ireland 1937 protects not simply the integrity of the human body, but also the integrity of the human mind and personality."

11.10.18. After observing that no expert evidence had been lead by the applicant with regard to the psychological harm which he might suffer, Hogan J. noted that it was an application which of necessity had to be made with a degree of considerable urgency. Hogan J. then stated at para. 9:-

"[m]oreover, one does not need to be psychologist to envisage the mental anguish which would be entailed by a more or less permanent lock up under such conditions for an 11 day period. Nor, for that matter, does one need to be a psychiatrist to recognise that extended detention over weeks under such conditions could expose the prisoner to the risk of psychiatric disturbance."

11.10.19. While acknowledging that allowances must be made for the exigencies of prison life and the complex arrangements necessary for management of prisoners with different needs, Hogan J. held it was impossible to avoid the conclusion that continuous detention in a padded cell with merely a mattress and a cardboard box for 11 days compromised the essence and substance of the guarantee of protection of the person set out in Article 40.3.2. irrespective of the crimes that the prisoner had committed or the offences with which he is charged.

11.10.20. In that case, Hogan J. held that he could not say that at that moment in time, the applicant's continued detention had been rendered entirely unlawful by the breach of his constitutional right. He did say that if the guarantee of Article of 40.3.2. was to be rendered meaningful in the present case, the further opportunity he gave to the Executive to address the situation could only be measured in terms of days, having regard to the known facts concerning the applicant's present conditions of confinement.

11.10.21. In the case of *Connolly*, already referred to above, the applicant had, for good reason, sought protection from the general prison population. He was then held in a unit which had 23 hour lock up in a single cell. He was entitled to come off this regime and apparently did so for one week but returned to it on the basis he was being threatened in the general prison population. He had a cell with a bed, a counter, a place for storing clothes, a television, a toilet and a sink. He was simply brought outside the cell for one hour during the day and received all his meals in the cell. He had ready access to reading material and spent most of his days reading. In the hour when he was not on lock up, he cleaned out his cell and had access to the yard with other prisoners from his landing with whom he had a good relationship. He was not able to participate in any training or other recreational activities.

11.10.22. Hogan J. having referred to Article 40.3.2 also recalled that the Preamble to the Constitution seeks that the *"dignity and freedom of the individual may be ensured"*. Hogan J. at paras. 14-15 went on to state:-

"14...[w]hile prisoners in the position of Mr. Connolly have lost their freedom following a trial and sentence in due course of law, they are still entitled to be treated by the State in a manner by which their essential dignity as human beings may be assured. The obligation to ensure that the dignity of the individual is maintained and the guarantees in respect of the protection of the person upheld is, perhaps, even in (sic) more acute in the case of those who are vulnerable, marginalised and stigmatised.

15. While due and realistic recognition must accordingly be accorded by the judicial branch to the difficulties inherent in the running of a complex prison system and the detention of individuals, many of whom are difficult and even dangerous, for its part the judicial branch must nevertheless exercise a supervisory function to ensure that the essence of these core constitutional values and rights – the dignity of the individual and the protection of the person – are not compromised: Creighton v. Ireland [2010] IESC 50 per Fennelly J."

11.10.23. Hogan J. said that the obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners. He went on to state at para. 17 that:-

"...the Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights. Anyone who doubts these fundamental precepts need only look at the Preamble, Article 5, Article 15, Article 34, Article 38 and the Fundamental Rights provisions generally."

As Hogan J. stated at para. 18:-

"...it is by upholding these values and rights that we can all aspire to the better realisation of the promise which these noble provisions of the Constitution hold out for us as a society."

11.10.24. The court was in no doubt that the conditions for Mr. Connolly were immeasurably better than those under which Mr. Kinsella had been held. Hogan J. held that at para. 20:-

"...the essence of the obligation in Article 40.3.2 to protect the person is to ensure that the integrity of the personality of every detained person is upheld."

11.10.25. With reference to the presence of a television and access to reading material, Hogan J., also at para. 20, said those help to ensure that the detained person has regular interaction with his facilities of sight and sound *"even if the risk of psychological anguish and psychiatric disturbance must undoubtedly increase if prisoners are held under such conditions over a long period of time."*

11.10.26. He referred to the fact that the circumstances of each prisoner on the restricted regime was regularly monitored by the prison authorities on a monthly basis and that the regime had not been imposed as a punishment in that case.

11.10.27. Hogan J. went on to hold as follows, at para. 22:-

"[y]et the locking up of prisoners under such circumstances for very long periods of time – which I would rather measure in terms of an extended period of months – must be regarded as an exceptional measure, which might, in some instances, at least, compromise the substance of the detainees right to the protection of the person and the safeguarding of his human dignity. Certainly, the indefinite detention of a prisoner under such circumstances for periods of years would undoubtedly violate the guarantee to protect the person in Article 40.3.2, since it would be hard to see how the integrity of the detainees personality – the very essence of the guarantee of the protection of the person and preservation of the human dignity of the prisoner – could be preserved under such circumstances."

11.10.28. Hogan J. went on to say that in view of the acute difficulties, the judicial branch could rarely be prescriptive in terms of specific conditions of prison detention. In those circumstances, he held at para. 23 that *"it would be generally inappropriate to lay down any ex ante rules regarding solitary confinement"*. Again, like *Kinsella*, he held that where a specific finding of constitutional violation is called for, absent compelling circumstances, it will generally be appropriate as an initial step to give the executive branch an opportunity to remedy the breach in early course. That was of course in a situation where the applicant was seeking release under Article 40.4.2 of the Constitution.

11.10.29. In the circumstances of that case, Hogan J. did not hold that the present detention violated the substance of the guarantees of Article 40.3.2 to protect the person, even if he was denied effective access to human contact for 23 out of 24 hours. He did go on to say that if his detention under those conditions were to continue indefinitely for an extended period of months with no sign of variation, the point might very well come in which the substance of these constitutional guarantees would quickly be compromised and violated. In that case, is noted previously that Mr. Connolly had chosen the regime, there was assiduous attention to his psychological welfare and he had the opportunity to associate with other prisoners during his out of cell time. Furthermore, there was no suggestion of a barrier regime being in place between himself and contact with the staff in the prison. Nonetheless, it was a regime which, were it to continue, may well be a violation of his constitutional rights.

11.10.30. The final decision referred to in submissions by the *amicus curiae* is the case of *Killeen v. Governor of Portlaoise Prison* [2014] IEHC 77. This strictly speaking was not a case about solitary confinement as the three applicants were held together in a separate prison unit and were entitled to associate together. The argument was used that they were being segregated from the general prison population and it is in that context that the word "segregation" is used. This should be distinguished from the meaning of the word segregation in the phrase "administrative segregation" as used previously in this judgment to refer to the housing of prisoners alone in cells. Notwithstanding that, the judgment is instructive as to the principles applicable where there is a claim that conditions of confinement amount to a breach of the constitutional right to protection of the person.

11.10.31. The applicants had brought a claim by way of judicial review for an order of *certiorari* quashing the decision to segregate them from the mainstream prison population. They claim they were in indefinite segregation confinement in a special part of the prison. It appeared that they had been detained together in a segregated unit for more than a year. They were allowed to associate with each other for at least three hours per day. They had access to a yard and to some exercise equipment. The evidence revealed that although they claimed lack of access to educational facilities, they had never actually sought educational facilities. The evidence also revealed there was a plan to move them into a new unit which had additional facilities including a full gym, kitchenette and a large classroom. They would have a yard to themselves and would be unlocked to the same extent as the general prison population. The prison authorities had argued that the applicants were prisoners of such notoriety and violence that they were a danger to good

prison order and safety. It was conceded that the applicants were problem prisoners.

11.10.32. Hedigan J. quoted with approval from *Devoy v. Governor of Portlaoise Prison* that passage from Edwards J. where he recognised that the humane treatment and respect for the human dignity of a prisoner required that he or she should not be totally or substantially deprived as a society of fellow humans for anything other than relatively brief and clearly defined periods. Hedigan J. also held that while segregation may be required in certain circumstances, it must be for the prison authorities to determine when it is so required. He did say that it was something that should only occur in exceptional situations, citing Hogan J. in *Connolly*. When it does occur, such segregation should be kept under review. He held that where the rights are being curtailed, it is both clear from national and international jurisprudence that the principle of proportionality must be applied.

11.10.33. Hedigan J. held as follows at para. 6.5:-

"Thus national and international requirements are broadly the same:-

(a) There must be good reasons – the segregation must be necessary – the onus is on the authority to justify.

(b) it should be no more than is necessary to meet the requirements of the occasion i.e. safety and security.

(c) It should be proportionate to the objective sought.

(d) There should be ongoing review.

In the event of prolonged segregation there should be available judicial review of the necessity and proportionality of the measure."

11.10.34. Hedigan J. assessed the claims by applying the principles to the case. Rule 62 had provided for ongoing review of short periods up to seven days, whereas the later period was silent as to review of any ongoing segregation. He did note that the rules had to be read in light of the Constitution. He reviewed the necessity and proportionality of the measure by determining whether the risks posed by each applicant existed and constituted evidence upon which the respondents may rationally base a decision that segregation from the main prison population was the only way to resolve the security problems posed by the applicants. He was satisfied that there were such reasonable grounds to believe that segregation was necessary in that case.

11.10.35. The court assessed minimum interference and proportionality. Hedigan J. was satisfied that each of the applicants had misled Dr. Lambe, the psychologist, as to the history and conditions of their imprisonment. He did note that there appeared to be serious effects on the three applicants in terms of their mental health and psychological condition. However, he held that their segregation, although a most undesirable measure, seemed the minimum necessary to ensure the safety of the prison and its inhabitants. He held that their segregation was proportionate because it was rationally based, was clearly connected to the object pursued, it was not arbitrary and it was the minimum interference because of its very nature, i.e. segregation is required by the threat they have posed and continued to pose to the safety and security of the prison population. He noted, moreover, that it was planned to move them to the new unit with the facilities as outlined above.

11.10.36. In relation to the review by the Director General, he held that it must be read constitutionally and he directed that the Director General ought to review the situation every three months or upon request by the prisoners' legal advisors providing such requests are not made vexatiously. Interestingly, Hedigan J. said at para. 6.9 as follows:-

"[a]s to review by an independent judicial authority in cases of prolonged isolation and solitary confinement; such confinement is not in issue here."

11.10.37. From that, it appears that Hedigan J. was saying that prolonged isolation in solitary confinement required oversight by an independent judicial authority.

11.10.38. When this case was listed for further argument in February 2015, counsel for Mr. Damache submitted a further case on solitary confinement which had been decided by the High Court in the interim. Cregan J. in *McDonnell v. Governor of Wheatfield Prison* [2015] IEHC 112 held that the conditions of detention in that case breached the constitutional rights of the applicant and was not necessary or proportionate to the perceived threat to his person. In that case, the prisoner who was in solitary confinement for his own protection was on 22-23 hour lock-up. He had in-cell sanitation facilities including a shower. He also had television in his cell. He received one visit a week from family of approximately thirty minutes duration. He was allowed three phone calls a week of six minutes each in duration. He had been offered attendance at school lessons but had declined. It appears at various stages he was able to associate with other prisoners but for a variety of reasons that was not the situation at the time of the hearing of the case.

11.10.39. With respect to the risk to his mental health, Cregan J. at para. 92 held:-

"It is clear – based on the evidence, based on international experience and based on common sense – that where a prisoner is kept in solitary confinement for a protracted period of time – and in particular in this case over 11 months – that there is a real and substantial risk that his mental health will be seriously affected."

11.10.40. Cregan J. at para. 95 also held that:-

"...keeping the applicant in conditions of solitary confinement for a period of over eleven months is clearly a breach of his constitutional right to bodily and psychological integrity. It is also a breach of his constitutional right to humane treatment. It follows inexorably from the decisions in Kinsella and Connolly. Indeed given the express statements by Hogan J., it is difficult to see on what basis the respondent has sought to justify detaining the applicant in solitary confinement for a period of eleven months. It is clear that the longer a person is held in solitary confinement against his will – (even for his own protection) the greater the risk of damage being caused. This is such a clear and sustained violation of the applicant's constitutional rights that it requires a clear and sustained response by the prison authorities to adopt a more proportionate response, to improve his situation and to take immediate steps to allow the applicant access to more social interaction with other prisoners (if only on his own landing), to partake in structured activities, to have access to a gym and to have regular access to the psychological services in the prison."

11.10.41. In that case, Cregan J. went on to consider whether the breach of the constitutional rights was proportionate. This, perhaps, shows a different approach to the issue. Implicit within the earlier cases, was that if the conditions of imprisonment were found to amount to inhuman and degrading treatment this was prohibited under the Constitution. Such an absolute prohibition is found

within international law as will be discussed shortly. The approach of Cregan J. may be explicable in that as part of any determination as to whether particular treatment is inhuman, a consideration of necessity and proportionality is required. In other words, Cregan J. may simply have approached the matter in a different order. In the end, Cregan J. held that the interference with the constitutional rights was not proportionate or necessary in the circumstances.

11.10.42. In conclusion, Cregan J. held with respect to solitary confinement at point 14 in para. 114:-

"...[i]t is only to be used in exceptional circumstances and then – most critically – for a limited period of time. Indeed the UN study describes solitary confinement in excess of fifteen days as 'prolonged solitary confinement'. Whilst one could take issue with a period of fifteen days and whilst it is impossible at this point to lay down precise periods, I would have thought that any period of solitary confinement longer than three or four weeks is certainly 'prolonged solitary confinement'. After this period of time there should be an intensive review of such cases and more intensive management of such prisoners to ensure that such conditions can come to an end at the earliest possible time."

International Legal Obligations

11.10.43. Both parties and the *amicus curiae* have referred to international standards and decisions – judgments of international courts or treaty implementing bodies – in the course of their written and oral submissions. Further reference was made on behalf of Mr. Damache to the Report of the Special Rapporteur on Torture and Other Cruel and Inhuman and Degrading Treatment referred to above and to the Amnesty International report. While the submissions addressed the weight to be given to various documentation, there was little focus on the extent to which, if any, those international norms and obligations could impact upon the interpretation of Irish constitutional rights. The explanation may be that it is self-evident that the Irish courts have made reference to international norms to assist in the interpretation of similar provisions within the Irish Constitution (e.g. *State (Healy) v. Donoghue* [1976] I.R. 325 and the reference to the provisions of Article 6 of the ECHR regarding the right to legal aid in criminal trials for poor persons).

11.10.44. A more recent example is contained in the decision of the Supreme Court (Clarke J.) in *People (DPP) v. Gormley* [2014] IESC 17. That case concerned the Article 38 right to a trial in due course of law and in particular the right to have access to a solicitor prior to interrogation. The Supreme Court expressly stated at para. 5.8 that:-

"...in considering such a question, it is appropriate for this court to have regard to both the jurisprudence of the ECtHR and that of the superior courts of other common law countries which have like constitutional provisions. Such jurisprudence can be of assistance in analysing similar rights guaranteed under the relevant legal regimes. In that context I propose to turn first to the jurisprudence of the ECtHR and thereafter to the relevant international jurisprudence."

11.10.45. The Supreme Court later in its judgment, at para. 7.11. stated that:-

"[i]t is important to emphasise that this Court has consistently held that the Constitution is as it were, a living document which requires to be interpreted from time to time in accordance with prevailing norms."

11.10.46. The reference to "this Court" in the above quotations does not mean that the High Court is unable to consider international jurisprudence, rather it is a statement both of the Supreme Court's own jurisprudence on the matter and an acknowledgement that the interpretation and application of the Constitution, which is at first instance an obligation imposed on the High Court, must from time to time have regard to prevailing norms. Naturally regard must be had to the principle of *stare decisis* but such a principle may in appropriate circumstances permit the development of constitutional norms. There are many examples of the High Court referring to international instruments or jurisprudence when considering constitutional norms. For example, in *O'Leary v. Attorney General* [1993] 1 I.R. 102, Costello J. in the course of considering the status of the presumption of innocence in the context of fair trial rights under Article 38 of the Constitution, made reference to the protections afforded to the presumption in a wide variety of international instruments. He then concluded at p.107:-

"by construing the constitution in the light of contemporary concepts of fundamental rights, (as I am entitled to do: see State (Healy) v. Donoghue [1976] I.R. 325) the plaintiff's claim obtains powerful support."

11.10.47. From the above, it is well-established that I may have regard to decisions of international courts or decision-making bodies, the jurisprudence of other superior courts, as well as international legal instruments, in the interpretation and understanding of the constitutional provisions regarding fundamental rights. Those other instruments and decisions do not in any sense create rights. Instead, they provide the Court with an understanding of contemporary concepts of those rights in order truly to fulfil the constitutional guarantees of protection of those rights.

11.10.48. The horrors of World War II had propelled, indeed compelled, the community of international states to join together for the protection of human rights. According to José Ayala-Lasso, former United Nations High Commissioner for Human Rights, *"it is a truism to state that respect for human rights is a cornerstone for world peace and stability"* (*Forward to 'International Covenant on Civil and Political Rights: International Human Rights Law in Ireland'*, O'Flaherty and Heffernan, Brehon Publishing, 1995). From 1948, the Universal Declaration on Human Rights in Article 5 made the unequivocal statement that *"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

11.10.49. After many years in the drafting, the General Assembly adopted and opened for signature the International Covenant on Civil and Political Rights ("the ICCPR") and its first optional protocol in December of 1966. The ICCPR came into effect in 1976. Ireland signed up to the ICCPR in 1973 and ratified it in 1989 and acceded to it in 1990. In accordance with the dualist system that Ireland operates with regard to international treaties, no treaty is part of Irish domestic law until incorporated by statutes. Therefore, the courts are precluded from giving effect to the provisions of any treaty where this would be contrary to or would impose obligations beyond those existing in Irish domestic law. That does not preclude reference by the Court to such treaties and obligations in the context of the consideration of contemporary concepts of fundamental rights as referred to above.

11.10.50. Article 7 of the ICCPR states:-

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

11.10.51. The ICCPR provides for an independent Human Rights Committee ("the Committee"). The Committee is to be composed of persons of high moral character and recognised competence in the field of human rights with consideration being given to the

usefulness of the participation of some persons having legal experience. The Committee oversees the reports from states parties to the ICCPR as well as hearing and deciding upon communications from alleged victims under the first optional protocol. The Committee has adopted a practice of issuing general comments, which not only offer guidance to government officials involved in drafting states parties reports to the Committee but give guidance on the meaning of the substantive articles in the ICCPR.

11.10.52. In General Comment 20 on Article 7, the Committee stated at para. 2 that "the aim of the provisions of Article 7 of the ICCPR is to protect both the dignity and the physical and mental integrity of the individual." The Committee held that the prohibition in Article 7 was complemented by the positive requirements of Article 10, para. 1 of the ICCPR which stipulates that "*all persons deprived of the liberty shall be treated with humanity and with respect for the inherent dignity of the human person*". The Committee noted that the text of Article 7 allows of no limitation. The Committee reaffirmed that even in situations of public emergency no derogation from the provisions of Article 7 is allowed. The Committee noted that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7. The Committee further noted that states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

11.10.53. Ireland has also ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As referred to above, Article 16 prohibits:-

"[o]ther acts of cruel inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Article 11 requires a State to keep under systematic review, inter alia, arrangements for the custody and treatment of persons subject to any form of arrest, detention or imprisonment with a view to preventing acts of cruel, inhuman or degrading treatment or punishment. The Committee against Torture is the implementation body for the Convention against Torture. As referred to above, it has stated unequivocally in its *Concluding Observations on the Third to Fifth Periodic Reports of the USA* that "*the full isolation for 22 to 23 hours a day in super-maximum security prisons is unacceptable (Art. 16).*"

11.10.54. Separately, the United Nations Commission on Human Rights, a subsidiary body of the UN Economic and Social Council, decided in 1985 to appoint an expert, a Special Rapporteur, to examine questions relevant to torture and other cruel, inhuman or degrading treatment or punishment. That body has now been replaced by the United Nations Human Rights Council which is a United Nations intergovernmental body whose 47 member states are responsible for promoting and protecting human rights around the world. Juan Mendes is the current Special Rapporteur. His report in relation to solitary confinement has been previously referred to and quoted from. According to the Special Rapporteur, solitary confinement is the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day. In particular, the prolonged solitary confinement he defines as any period of solitary confinement in excess of fifteen days. While the Special Rapporteur was aware of the arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful, he concluded that fifteen days was the limit of prolonged solitary confinement because at that point "*according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.*" (para. 26 of his report)

The European Convention on Human Rights

11.10.55. Article 3 of the ECHR states "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*".

11.10.56. The ECtHR has addressed the issue of solitary confinement and Article 3 in a considerable number of cases. In early cases, the court held that total sensory deprivation was prohibited by Article 3 (see *Messina v. Italy* (No. 2) (Application no. 25498-94, 28th December, 2000) (final) and *Ramirez Sanchez v. France* (Application no. 59450-00, 4th July, 2006) (2007) 45 E.H.R.R. 49. Although it is recognised in the modern world, states face very real difficulties in protecting the populations from terrorist violence the convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the conduct of the person concerned, as stated in *Ramirez Sanchez* at para. 116.

11.10.57. It has been recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (see *Ireland v. United Kingdom* Application. no. 5310/71, 18th January, 1978) [1978] E.C.H.R. 1. That assessment depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.

11.10.58. The ECtHR stated at para. 118 in its decision in *Ramirez Sanchez* that:-

"the court has considered treatment to be 'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It is deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (...). In considering whether a punishment or treatment is 'degrading' within the meaning of Article 3, the court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (...). However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3."

11.10.59. In order for a punishment or treatment associated with it to be inhuman or degrading, the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The most comprehensive analysis of the circumstances in which solitary confinement of prisoners will violate Article 3 was set in the case of *Babar Ahmad*. From para. 200 up to and including para. 215 of the judgment, the ECtHR set out the general principles applicable to Article 3 considerations of solitary confinement. The court repeated the principles set out in its previous decisions referred to above.

11.10.60. The ECtHR confirmed that complete sensory deprivation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment that cannot be justified by the requirements of security and any other reason. Other forms of solitary confinement which fall short of complete sensory isolation may also violate Article 3. The ECtHR confirmed that all forms of solitary confinement without appropriate mental and physical stimulation are likely in the long-term to have damaging effects resulting in deterioration of mental faculties and social abilities. The ECtHR found at the same time that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman or degrading treatment or punishment.

11.10.61. The ECtHR held that while prolonged removal from association with others is undesirable, whether such a measure falls

within the ambit of Article 3 of the ECHR depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. The court noted that it had never laid down precise rules governing the operation of solitary confinement. The court has never specified a period of time, beyond which solitary confinement will attain the minimum level of severity required for Article 3. The court has emphasised that solitary confinement even in cases containing relative isolation cannot be imposed on a prisoner indefinitely. The court also said that it had been particularly attentive to restrictions which applied to prisoners who are not dangerous or disorderly; to restrictions which cannot be reasonably related to the purported objective of isolation; and to restrictions which remain in place after the applicant has been assessed as no longer posing a security risk.

11.10.62. The ECtHR said in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoners welfare and the proportionality of the measure. Solitary confinement measures should be ordered only exceptionally and after every precaution has been taken. It must be based on genuine grounds *ab initio* as well as when its duration is extended. The authority's decisions should make it possible to establish that they have carried out an assessment of the situation that takes into account the prisoner's circumstances, situation and behaviour and must provide substantive reasons in their support. The statement of reasons should be increasingly detailed and compelling as time goes forth. Further, a system of regular monitoring of the prisoner's physical and mental condition should also be put in place in order to ensure that the solitary confinement measures remain appropriate in the circumstances. It is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement.

11.10.63. The ECtHR rejected the applicants' cases on the evidence before it that the solitary confinement at issue in that case violated Article 3. The court observed that it did not appear to be in dispute that physical conditions at the ADX, that is the size of cells, lighting, sanitary facilities, etc., met the requirements of Article 3. The issues were:-

- (i) The lack of procedural safeguards before placement at ADX; and,
- (ii) ADX restrictive conditions and lack of human contact.

11.10.64. The court found no basis for the applicants' submission that placement at ADX would take place without any procedural safeguards. They accepted the evidence submitted by the U.S. authorities that not all inmates who are convicted of international terrorism offences are housed at ADX. They held that the applicants had not shown that they would be detained at ADX merely as a result of conviction for terrorism offences. They accepted the declaration submitted that the BoP applied accessible and rational criteria when deciding whether to transfer an inmate to ADX. In the view of the Court, the high degree of involvement of senior officials within the BoP who were external to the inmates' current institution provided an appropriate measure of procedural protection. They held, at para. 220, that there was recourse to the BoP's administrative remedy programme and to the federal courts "by bringing a claim under the due process clause of the Fourteenth amendment to cure any defects in the process." They held that although recourse to the courts is difficult, the fact that Fourteenth amendment cases have been brought by inmates at ADX shows that such difficulties can be overcome.

11.10.65. In relation to the second aspect of the complaint, the court held that while the present applicants were not physically dangerous, and the court must be particularly attentive to any decision to place prisoners who are not dangerous or disorderly in solitary confinement, the applicants' current detention in high security facilities in the U.K. demonstrates that the U.S. authorities would be justified in considering the applicants, if they are convicted, as posing a significant security risk and justifying strict limitations on their ability to communicate with the outside world. They held that there was nothing to indicate that the U.S. authorities would not continually review their assessment of the security risk which they consider the applicants to pose. They referred to the various reviews as set out in the facts aforesaid.

11.10.66. With regard to the acknowledged highly restrictive conditions at ADX, the ECtHR said that the aim was to prevent all physical contact between an inmate and others and to minimise social interaction between inmates and staff. However, they said that that did not mean the inmates were kept in complete sensory isolation or total social isolation. Although the inmates were confined to their cells for the vast majority of the time, they had a great deal of in-cell stimulation provided through television, radio, newspapers, books, hobby and craft items and educational programming. The court then made the following statement at para. 222:-

"the range of activities and services provided goes beyond what is provided in many prisons in Europe."

They said that the limitations on the services provided, for example, restrictions on group prayer, were necessary and inevitable consequences of imprisonment. Those restrictions related to the purported objectives of the ADX regime. The court went on to say that the services provided at ADX were supplemented by regular telephone calls and social visits and the ability of inmates, even those under SAMs, to correspond with their families. The court found that there were adequate opportunities for interaction between inmates. They said that when the inmates were in their cells, talking to other inmates was possible, admittedly only through the ventilation system. They noted that at recreation periods, inmates can communicate without impediment. They held that, although it was of some concern that outdoor recreation can be withdrawn for periods of three months for seemingly minor disciplinary infractions, they placed greater emphasis on the fact that inmates' recreation had only once been cancelled for security reasons and that the periods of recreation have been increased from five to ten hours per week. They held that that meant that the isolation experienced by ADX inmates was partial and relative.

11.10.67. The court repeated that solitary confinement cannot be imposed indefinitely even if entailing relative isolation. They held that if an applicant were at real risk of being detained indefinitely at ADX, then it would be possible for conditions to reach the minimum level of severity required for violation of Article 3. Indeed, they said this may well be the case for those inmates who had spent significant periods of time at ADX. They did hold, however, that with reference to figures provided by the DoJ in relation to the inmates in the ADX general population, 89 out of 252 were in a Step-Down Programme. They held it showed that inmates were progressing through the system. They also noted that inmates with convictions for international terrorism have entered the Step-Down Programme and in some cases have completed it and been transferred to other institutions.

11.10.68. The court in its judgment had referred to various international materials on solitary confinement such as the Council of Europe *Guidelines on Human Rights and the Fight against Terrorism*, which said that while persons deprived of their liberty must be treated with due respect for human dignity, the imperatives of the fight against terrorism may require that a person deprived of his or her liberty for terrorist activities be submitted to more severe restrictions than those applied to other prisoners. These can relate to restrictions on communications, on placing persons in specially secured quarters or in separation of such persons within a prison or among different prisons on condition that the measure taken is proportionate to the aim to be achieved. They have referred to the European Prison Rules regarding the possibility of applying security measures and the necessary review periods required throughout

that person's imprisonment.

11.10.69. The court also referred to the 21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the EU Committee on Torture") which observed that solitary confinement can have an extremely damaging effect on the mental, somatic and social health of those concerned. The damaging effect can be immediate and increased the longer the measure lasts and the more indeterminate it is. The most significant indicator of the damage which solitary confinement can inflict is the considerably higher rate of suicide among prisoners subjected to it than that among the general prison population. As a punishment, the EU Committee on Torture said it should be imposed for no more than 14 days. Where it is imposed for preventative purposes, periodical and external reviews should be rigorously followed. Those must consider whether the restrictions imposed were strictly necessary. One of the matters that the EU Committee on Torture referred to was that sufficiently large exercise areas be provided to allow genuine exertion.

11.10.70. The court also referred to the Inter-American Commission on Human Rights which found that isolation could in itself constitute inhuman treatment and a more serious violation could result for someone with a mental disability. The court also referred to the various decisions of the United Nations Human Rights Committee regarding violation of Article 7. The court also referred to recommendations by the United Nations Committee against Torture that solitary confinement be strictly and specifically regulated by law and applied only in severe circumstances with a view to its abolition. This Committee says there should be adequate review mechanisms relating to the determination and duration of solitary confinement and solitary confinement for long periods of time may constitute inhuman treatment.

11.10.71. The ECtHR also referred to the Special Rapporteur's Interim Report of 28th July, 2008, which found that isolation for 22 to 24 hours per day may amount to ill-treatment. That report had included a copy of the *Istanbul Statement on the Use and Effects of Solitary Confinement* which was adopted at the International Psychological Trauma Symposium in December 2007. That Statement had said it was convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill-effects. In effect, that document supports the view of Professor O'Donnell.

11.10.72. The report of the 5th August, 2011, by the current Special Rapporteur was also referred to by the Court, as mentioned earlier. Although the court made reference to various findings of the Special Rapporteur, it did not refer to his finding that prolonged solitary confinement in excess of 15 days should be subject to an absolute prohibition.

11.10.73. At this point, it should be observed that the ECtHR sought to clarify a possible tension between a relativist approach to Article 3 and an absolute one. The court laid down three principles. Firstly, the question of whether there was a real risk of a breach of Article 3 could not depend on the legal basis for removal to that State, i.e. no distinction between extradition and other removals. Secondly, with respect to the difference between torture and other inhuman and degrading treatment, the court affirmed that the prohibition was an absolute one. Thirdly, the court held that there could be no balancing between the risk of ill-treatment and the danger that the person posed. These are strong declarations by the ECtHR as to the importance of the protection contained in Article 3. The State, in adopting *Babar Ahmad* as a legal authority which this Court should follow, in effect, accepted that these principles should apply.

11.10.74. The ECtHR went on to say that treatment that might violate Article 3 in a contracting state might not attain the minimum level of severity for such violation in an extradition or an expulsion case. They gave examples of negligence in providing appropriate medical care which may violate Article 3 in a contracting country but not so readily established in an extra-territorial context.

11.10.75. In relation to prisoners, the court referred to factors which had been decisive in violations of Article 3:-

- (1) Pre-meditation calculated to break a prisoner's resistance or will;
- (2) Intention to debase or humiliate or if measure is implemented in a manner that causes feelings of fear, anguish or inferiority;
- (3) The absence of any specific justification for the measure;
- (4) The arbitrary nature of the measure;
- (5) The length of time the measure has been imposed;
- (6) Distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

The court said that all those elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.

11.10.76. The court reiterated that it has been very cautious in finding that removal from the territory of a contracting state would violate Article 3. The court added, at para. 179, that it has "*even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law.*"

11.10.77. In my view in that statement the ECtHR is not declaring that simply because the conditions are to be faced in a Third Country there is no violation of the ECHR whereas the same conditions in a Contracting State to the ECHR would amount to a violation of Article 3. Therefore, in making this statement, the ECtHR was not saying that a person could be expelled to face conditions that would violate Article 3 rights simply because they were being sent to a functioning democracy. Instead, the ECtHR was observing that functioning democracies would be unlikely to violate Article 3 rights. In *Babar Ahmad*, the ECtHR did not find a violation of Article 3 on the facts before it. However, nothing in the judgment should be understood as meaning that if the conditions had been found to violate Article 3, it would have been permissible nonetheless to extradite the applicants to face those conditions.

11.10.78. Again in my view, the fact that a state is viewed as respecting the rule of law or human rights or democracy has no material impact where the requesting state's view of those concepts is at odds with the view of the ECtHR (or the court of a contracting state) on a fundamental and absolute right such as freedom from torture or inhuman and degrading treatment. For example, if it were established that a country with an honourable tradition of democracy, respect for human rights and the rule of law took a view that certain activities were not torture in the teeth of international standards and decisions to the contrary, there is no doubt that Article 3 would prohibit a person's expulsion or extradition to that country despite its history if there was a real risk that the requested person would be subjected to those prohibited activities. Protection under Article 3 is absolute. Assessing the risk can often be difficult in an extradition or expulsion case and the destination country's track record on the rule of law may be taken into

account, nonetheless where the real risk of a prospective breach is established on substantive grounds, the protection of the individual's rights under Article 3 must take precedence.

Other Views on the Issue of a Breach of Rights

11.10.79. Insofar as the Amnesty International report purports to give an opinion as to whether the conditions of solitary confinement amount to inhuman and degrading treatment, I do not take that into account. It is a matter for the Court to determine what is or is not inhuman and degrading treatment. Similarly, insofar as Professor Rovner and Mr. Dratel seek to give an opinion as to whether the conditions breach international standards, I ignore their views. This is solely a matter for this Court.

11.10.80. The State has taken issue with Professor Rovner's failure in her testimony to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights where just two months after the result in *Babar Ahmad*, she failed to refer to it, but instead stated that the conditions were inconsistent with international human rights standards and have been roundly condemned. I take that as being testimony as to her view, which is supported by the Committee against Torture and by the Special Rapporteur and that it in no way undermines her credibility. I repeat however, that her views in that regard play no part in my decision. It is for the Court to decide if the conditions amount to a violation of the standards relevant to the adjudication at issue.

Irish Constitutional Protection

11.10.81. From the foregoing, this Court can make conclusions as to what must be considered when examining conditions at the ADX for the purpose of assessing whether Mr. Damache is at real risk of being subjected to a violation of his fundamental constitutional rights. These conclusions are as follows:-

(a) Article 40.3.2 together with the Preamble to the Constitution forms the bedrock of the protection of the person from violations to his or her bodily or mental integrity, for respect for human dignity and for the prohibition on torture and inhuman and degrading treatment.

(b) In interpreting the meaning and extent of the constitutional protection of rights, the courts are required from time to time to have regard to prevailing norms. To assist in interpretation, it is appropriate for the court to have regard to international human rights instruments, decisions and judgments of international courts or treaty-implementing bodies and superior court decisions from other jurisdictions.

(c) The provisions of the ECHR and, by extension, of other human rights treaties and conventions are minimal standards of human rights protections to which a state party agrees. Ireland, through its Constitution and laws, is entirely free to give greater protection to the individual.

(d) When the Constitution provides for greater protection of a right than is or might be granted under an international human rights treaty or convention, the court is obliged to grant the protection of the constitutional right to a person with the locus standi to claim it.

(e) In common with other international decision making bodies, the Irish courts have addressed the issue of solitary confinement. The Irish courts define solitary confinement as physical isolation in cells for 22-24 hours per day. That definition coincides with a generally acceptable international standard from which to assess the issue of solitary confinement and inhuman and degrading treatment. The reference to 22-24 hour a day lock up does not exclude more frequent out of cell time from amounting to solitary confinement (see, in particular, Killeen).

(f) Indefinite detention in solitary confinement is prohibited under the Constitution. It is similarly prohibited under the ECHR and other international human rights instruments.

(g) The Irish courts have been prepared to accept, even in the absence of expert evidence, that solitary confinement may over time amount to a form of sensory deprivation and be inhumane and abusive of the prisoner's psychological welfare. That position is consistent with the findings of international bodies charged with overseeing the protection of fundamental right. Those findings have been based on a literature analysis of the effects of solitary confinement. There is general agreement that, in the wording of the ECtHR "partial and relative solitary confinement" is likely, without appropriate mental and physical stimulation in the long-term to have damaging effects which result in a deterioration of mental faculties and social abilities (see *Babar Ahmad*, para. 207).

(h) It is acknowledged that the damaging effects of solitary confinement can be immediate and increase the longer the measure lasts and the more indeterminate it is. If a person is held against his will in solitary confinement there is a greater risk of damage being caused.

(i) The Irish courts have held that a prisoner should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods. No particular length of time has been laid down beyond which detention in solitary confinement is unacceptable. The case law indicates that even partial and relative solitary confinement for a period of months rather than years is prohibited under the Constitution. This particular view fits within the even more strict views on the issue of solitary confinement of the Special Rapporteur on Torture and the UN Committee Against Torture regarding the meaning of the provisions of the Convention Against Torture and the ICCPR. Only the Special Rapporteur on Torture has laid down a maximum period of time for solitary confinement. The Committee against Torture has called for a full ban on supermax security detention facilities in the U.S.A. declaring full isolation of 22-24 hours a day in an ADX prison unacceptable.

(j) Security measures and effective management of the prisons remain a matter for the executive. Apart from the Connolly and McDonnell case, the High Court has dealt with prisoners who have been assessed as dangerous or disorderly. When prisoners are not dangerous or disorderly, there is an onus on the court to be particularly attentive to the restrictions which apply.

(k) There must be procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure. Solitary confinement should only be ordered in exceptional circumstances and after every precaution has been taken. The decision to impose solitary confinement must be based on genuine grounds, both initially and on review. The decisions should be compelling and provide reasons. The reasons must be increasingly detailed and compelling as time goes on. There must be regular monitoring of the prisoner's physical and mental condition. A prisoner must have access to

independent judicial review of the merits of and reasons for prolonged imposition of solitary confinement;

(l) Specific attention must be paid to the availability and duration and conditions of outdoor exercise.

(m) All of the conditions of the detention are to be considered to determine if cumulatively they amount to inhuman and degrading treatment.

(n) Where the court finds that there are substantial grounds to believe that a requested person faces a real risk of being subjected to torture or other cruel or inhuman and degrading treatment in the requesting state, the court must refuse the extradition. The applicable methodology for making that assessment is set out in *Rettinger*.

11.10.82. As the above demonstrates, Irish constitutional law protects the person from solitary confinement in a manner which is similar but distinct from the approach of the ECtHR and also from the approaches of the UN treaty bodies and the Special Rapporteur. Having said that, from the above analysis, it can be seen that the Irish constitutional protections are closer to those protected by the ICCPR and the Convention against Torture than the ECHR as identified by the ECtHR in *Babar Ahmad*.

11.11. The Court's Determination

11.11.1. The facts have been comprehensively set out. While there is limited disagreement as to these facts, it is the interpretation of the facts that is contentious. There is no real dispute but that detention at ADX is a form of solitary confinement. The issue is whether that detention amounts to a violation of inhuman and degrading treatment as understood under our Constitution. If it does so amount, the Court is bound to prohibit this State from extraditing Mr. Damache in circumstances where the Court has found that there are substantial grounds for believing that there is a real risk that he may be incarcerated at the ADX.

11.11.2. The physical conditions of detention are set out. Prolonged isolation within a cell, limited ability to communicate with other inmates, limited telephone and other contact with family and friends, restricted interaction with staff and professional people and minimal out of cell time within small out of cell recreation space have all been established on the evidence.

11.11.3. In addition to relying upon the findings of the international treaty bodies and the Special Rapporteur that solitary confinement is damaging to the bodily integrity (including the psychological integrity) of an individual, Mr. Damache has provided his own expert evidence on the damaging effects of solitary confinement. That expert evidence has not been contradicted by any countervailing expert testimony. It is compelling evidence. I am satisfied that prolonged exposure to involuntary solitary confinement exacts a significant psychological toll, is damaging to the integrity of the mind and personality, and is damaging to the bodily integrity of the person.

11.11.4. The evidence is compelling that there will be an absence of meaningful social interaction at the ADX. Being "*substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods*" (Edwards J. at para. 3 of his decision in *Devoy*) is harmful to a prisoner and lacks respect for his human dignity. There is no meaningful interaction with other human beings when required to communicate through a ventilation system. The use of the term "moderate level" by the U.S. authorities does not equate with conversational level. Indeed, as a matter of reasonable inference, it is more likely that yelling would be required to overcome the steel and concrete separating the inmates. In any event, it clearly lacks respect for human dignity to require persons to communicate through a ventilation system.

11.11.5. Counsel for Mr. Damache has urged upon the Court that it should look to the practical realities of the situation in the ADX rather than the stated rules for operation as set out in the affidavits of the various U.S. officials. In that regard, he points, *inter alia*, to Professor Rovner's accounts of her experience with her client as to the minimal interactions they have with staff in the prison. Even without Professor Rovner's evidence, although it does strengthen the matter, it appears that human interaction with staff members is brief and most importantly distant. These interactions take place either when a food tray is being put through the door or there are conversations which take place through a steel door and a barred grille with a distance in between. This, over a prolonged period of time, cannot amount to meaningful human and social interaction. Furthermore, at any point that an inmate is out of cell in Phase One or Two of the General Population Unit Programme, he is subject to shackling or cuffing in the manner as set out in Professor Rovner's affidavit. That again is not a meaningful interaction with another human being. Moreover, in that regard the situation can be contrasted with the treatment by the prison officers of the applicant in the *Connolly* case where the relations were cordial but nonetheless his solitary confinement would, if extending further months and certainly years, amount to a violation of his constitutional rights.

11.11.6. The provision of in-cell stimulation in the form of television, radio and reading materials, while helping a detained person to interact with his facilities of sight and sound, cannot compensate for the risk of psychological anguish and psychiatric disturbance where prisoners are being held in isolation under the conditions outlined over a long period of time. The provision of in-cell stimulation is a matter to which the ECtHR had great regard in *Babar Ahmad*. With the greatest respect to the ECtHR, I come to the conclusion that the fact that such televisions and services provided went beyond what was provided in many prisons in Europe is immaterial. The issue is not the provision of those services, or the right to the provision of those services, but it is whether the provision of those services ameliorates the lack of meaningful human and social interaction in a solitary confinement setting. The fact that those services are provided with a view to ameliorating what would otherwise amount to almost total sensory and social isolation within the blank walls of a small cell for 22 to 24 hours a day is not decisive nor even necessarily the tipping point in considering whether prolonged solitary confinement amounts to inhuman or degrading treatment.

11.11.7. The contact that Mr. Damache will have through visits will be limited. The evidence before the Court is that Florence is located in a remote part of Colorado, which itself is located in the interior of the U.S.A.. Access for family members will always be difficult to such a spot. In the case of *Ramirez Sanchez*, the ECtHR had placed great emphasis on the large amounts of visits that the applicant had received during his periods of solitary confinement. Inmates at the ADX appear unlikely to have visits of such frequency. On the evidence, Mr. Damache will have limited visits.

11.11.8. Of some concern to this Court is the issue with the visits of the Imam. Professor Rovner has indicated that the Imam does not visit as frequently as that indicated in the affidavit of Mr. Fulton. More importantly, however, she averred, and it is not contradicted, that the consultations with the Imam take place through the steel door and must therefore be carried out without privacy. Furthermore, it is not clear why it cannot take place in a visiting box which, although having a screen, would at least provide a measure of face to face contact. In conjunction with the other restrictions but not on its own, this denial of meaningful and respectful contact with the religious counsellor is a consideration in the assessment of whether the overall conditions are inhuman and degrading.

11.11.9. Out of cell opportunity is extremely limited. Indoor recreation appears to take place in isolation. There is some provision for

interaction with other inmates while out of cell given the grouping of the single cell recreation areas on the large recreation yards. I do note that the implication of the evidence from Ms. Williams is that not all those single cell recreation areas are situated within the large recreation yards. If isolated outdoor recreation applies to an inmate, all or even some of the time, that further limits his opportunity for interaction with other inmates. That is even greater isolation from what may be termed the normal isolation that I find exists at the ADX.

11.11.10. What is of particular concern to the Court is that out of cell outdoor activity could be temporarily stopped for violating institutional rules such as "suicidal attempts or gestures". To stop outdoor activity on such a ground is undoubtedly inhuman and degrading – a mentally ill or psychologically disturbed person who is driven to a suicide attempt or gesture deserves intervention and not punishment. It is entirely inappropriate to equate suicidal attempts or gestures with rule infraction without at the very least distinguishing between acts borne out of psychological disturbance and those calculated to cause disruption to the institution. I am also satisfied on the evidence provided by the State that the U.S. authorities focus on mental health issues is limited to severe mental health problems rather than on the infliction of psychological damage through the prolonged exposure to solitary confinement.

11.11.11. I am satisfied on the evidence of Professor O'Donnell that long-term administrative segregation (such as detention in the ADX) is where the challenge of isolation is greatest. Punitive or protective segregation is less psychologically threatening because the reason for its imposition is clear. There are usually much more clear limits on duration of punitive or protected segregation than apply to administrative detention. Furthermore, in the circumstances of punitive or protected segregation, there are usually boundaries around duration together with a variety of due process safeguards.

11.11.12. It is the denial of meaningful human relations which is inherently destructive of the individuals' identities as per Professor O'Donnell's evidence. I am also fully satisfied that by being denied the opportunity for meaningful contact with others, the prisoner in solitary confinement is prevented from being fully human. To prevent another from being fully human is by definition inhuman and degrading treatment. It is abusive of psychological welfare and a breach of the right to bodily integrity. In Professor O'Donnell's view, this is an affront to the dignity of the person. More importantly, it is the view of this Court that it is an affront to the dignity of the person. From the foregoing paragraphs it is clear that detention in the ADX results in the denial of meaningful human relations. In all the circumstances of the detention which I have taken care to set out I am satisfied that detention under the conditions operational at the ADX amounts to prolonged solitary confinement.

11.11.13. In considering whether such prolonged solitary confinement amounts to inhuman and degrading treatment it is also necessary to consider the procedural safeguards which attach to it. The decision to transfer a prisoner to the ADX carries with it a decision that he will spend a minimum of 12 months in the most severe isolation at Phase One of what is called the Step-Down Programme. Another minimum of 6 months must follow in Phase Two which is also in conditions of severe isolation. Thereafter, there are two 6 month periods of progressively less severe conditions. A slip at any stage sends a person back and the entire process has to commence again. I am satisfied that if detained at the ADX prison, Mr. Damache would face a minimum of eighteen months incarceration in these conditions of solitary confinement (being Phase One and Phase Two where conditions of isolation are greatest). Indeed, I am satisfied that on the evidence before me, the more usual length of detention in ADX extends far beyond the minimal time outlined in the Step-Down Programme. Detention in the most isolating parts of the ADX will almost certainly be for a period of years rather than eighteen months.

11.11.14. Our constitutional law does not permit a determination to be made in advance that such excessively long periods of solitary confinement will apply to an individual. Our law does not permit such prolonged solitary confinement to be determined without reference to the individual circumstances of the individual prisoner. In *Killeen* and in *McDonnell*, such a period of time is clearly identified as excessive and amounts to a failure to provide both the internal and external review necessary if such solitary confinement is not to be considered arbitrary.

11.11.15. The length of the initial, already prolonged, period of solitary confinement is not tailored to the individual requirements for an individual prisoner – individual tailoring being of critical importance when one is not dealing with punitive segregation. In the ADX, formal pre-determined requirements for length of detention trump consideration of the continued necessity for such detention in an individual's case. The prescribed periods are set at minimum ones – no amount of change in the individual circumstances can overcome them. Given the minimum length of those periods of solitary confinement (12 months and six months), there is an absence of proportionality between the impact on an individual and the apparent necessity for the solitary confinement. There is a lack of procedural safeguard in having such fixed minimum periods.

11.11.16. Having considered the evidence provided by the U.S. authorities, it is accepted that an internal administrative process of review exists. There is also a process regarding entry onto and progress on the Step-Down Programme. However, I am not satisfied that those procedures, as outlined by the U.S. authorities, indicate that as time goes on, the decision to keep the prisoner in solitary confinement is based upon more compelling and detailed reasons. That is a requirement if prolonged detention in solitary confinement is not to be arbitrary and a breach of fundamental rights. On the contrary, I find that the U.S. procedures are focused upon the prisoner's ability to reach the standards set for progress rather than on the authorities proof that continued solitary confinement is justified by compelling and detailed reasons.

11.11.17. On request, two "plausible avenues" of judicial review as to the placement in the ADX and the progress through the Step-Down process were identified by the U.S. authorities. These were reviews under the Fifth Amendment due process clause and the Eighth Amendment cruel and unusual punishment clause. It is interesting that neither avenue corresponds with the avenue of a Fourteenth Amendment judicial review identified by the ECtHR in *Babar Ahmad* to cure any defects in the review process. Neither of the avenues presented by the U.S. government provide any real review of the merits of and reason for the prolonged detention. The Eighth Amendment review is limited in its scope in so far as there must be a denial of "*the minimal civilised measure of life's necessities*". The Fifth Amendment review is also limited to circumstances where the detention is seen to be "*extreme*". Conditions of detention at the ADX have, on the evidence produced by the U.S. authorities, been judicially determined not to be extreme or a denial of life's necessities. These judicial review avenues require that the conditions of detention be determined as a particular breach of the U.S. Constitution – there is no focus on reviewing the *merits of* and *reasons for* the continued detention of an individual prisoner at the ADX.

11.11.18. It is therefore clear that there is no meaningful judicial review of the conditions of detention and the necessity for same in the U.S.A.. I say this recognising that due deference must be given to decisions that the executive makes regarding the administration of prisons. I am also conscious that there does not have to be an equation of judicial review in the requesting state with that which applies in this jurisdiction. Nonetheless, the judicial review has to meet certain minimal levels which amount to an independent judicial authority reviewing the merits of and reasons for a prolonged measure of solitary confinement. The level of scrutiny by the U.S. courts does not, on the evidence presented by the U.S. authorities, reach that minimal standard.

11.11.19. In all of the circumstances set out above, the institutionalisation of solitary confinement in the ADX with its routine isolation from meaningful contact and communication with staff and other inmates, for a prolonged pre-determined period of at least 18 months and continuing almost certainly for many years, amounts to a breach of the constitutional requirement to protect persons from inhuman and degrading treatment and to respect the dignity of the human being. Arbitrary deprivations of outdoor recreations for the actions of what may be mentally disturbed persons add further to the breaches. Even if those matters were insufficient on their own to amount to a violation, the lack of meaningful judicial review creates a risk of arbitrariness in the detention of the person in solitary confinement and therefore confirms that the prolonged detention in solitary confinement amounts to a breach of constitutional rights.

11.11.20. I have reached the above decision without having to consider the effect that SAMs has on the issue of solitary confinement. However, given that SAMs place an inmate under greater isolation than the conditions in the General Population Unit at the ADX, it follows that detention there under SAMs also constitutes inhuman and degrading treatment. I note that on the evidence it appears that inmates with SAMs will have an even greater period of time in the initial stages of the Step-Down Programme. In any event, those specified periods appear truly aspirational given the lengthy periods such inmates have to serve prior to the SAMs being modified and eventually removed.

11.11.21. It is clear from the foregoing that I have reached a decision that being subjected to detention in the ADX would amount to a fundamental breach of the constitutional right to bodily and mental integrity, to the right to human dignity and violates the prohibition on inhuman and degrading treatment. In those circumstances, it is not necessary to consider whether, on the evidence before me, there is a breach of his Article 3 rights.

11.11.22. In all the circumstances, there are substantial grounds for believing that Mr. Damache will be at real risk of being subjected to inhuman and degrading treatment if extradited to the U.S.A.. Therefore, I refuse to commit Mr. Damache to prison to await the order of the Minister for his extradition.

12. The Judicial Reviews

12.1. Introduction

12.1.1. Mr. Damache sought orders by way of judicial review in respect of the failure of the Director of Public Prosecutions ("the DPP") to direct his prosecution in this jurisdiction and the subsequent failure to reconsider that decision. In both sets of proceedings Edwards J. refused leave to apply for judicial review. The details of the judicial reviews and the reasoning of Edwards J. are set out in the judgments he delivered in those cases in *Damache v DPP* [2014] IEHC 114 and *Damache v DPP (No. 2)* [2014] IEHC 139. Those judgments and orders were appealed to the Supreme Court and on the 3rd November, 2014, the Supreme Court gave Mr. Damache leave to apply for judicial review in each case on two net grounds as follows:-

- (i) Whether the decision of the Director of Public Prosecutions in the circumstances of this case is reviewable; and,
- (ii) Whether the Director of Public Prosecutions is required to give reasons for her decision in the circumstances of this case.

12.1.2. On enquiry of the parties, I was informed that it was accepted by the parties that the above was, in summary form, the nature of the grounds that had been set out by Mr. Damache in his statements of claim.

12.1.3. For the purposes of this judgment, it is appropriate to treat the judicial reviews as a composite whole. Essentially Mr. Damache is claiming:-

- (i) An order of certiorari quashing the decision of the DPP not to prosecute Mr. Damache in respect of the alleged offences for which his extradition is sought by the U.S.;
- (ii) An order of certiorari quashing the decision of the DPP refusing to provide Mr. Damache with the reasons for the decision not to prosecute the applicant in respect of the alleged offences for which his extradition is sought by the U.S.;
- (iii) An order of certiorari quashing the decision of the DPP refusing to reconsider her initial decision not to prosecute him;
- (iv) An order of mandamus and/or an injunction by way of judicial review requiring the DPP to give reasons for her initial decision not to prosecute him in respect of the alleged offences for which his extradition is now sought by the U.S. and to give reasons for her refusal to reconsider the said decision;
- (v) A declaration that the decision by the DPP not to prosecute him was unreasonable, disproportionate and made without proper regard to the impact that his extradition would have on his constitutional and Convention rights;
- (vi) A declaration pursuant to s. 3 of the European Convention on Human Rights Act 2003 ("the ECHR Act") that the DPP in failing to consider the impact of extradition on his ECHR rights has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5 and 8 of the European Convention on Human Rights ("the ECHR");
- (vii) Other declaratory reliefs related to the above claims.

12.1.4. In line with authority, strictly speaking, if the substantive reliefs of *certiorari* or *mandamus* are to be granted, the above declarations are unnecessary. Indeed, it was submitted by counsel for Mr. Damache that the other declarations sought were more akin to statements of grounds.

12.1.5. As originally moved, the application for judicial review sought declarations of unconstitutionality of s. 15 of the Extradition Act 1965, as amended ("the Act of 1965"). During the course of the oral hearing, counsel for Mr. Damache informed the Court that he was not pursuing the claim that s. 15 of the Act of 1965 was unconstitutional.

12.1.6. Counsel for the DPP informed the Court at the opening of the case that in light of the terms of s. 15(1) of the Act of 1965 that the DPP wished to convey to the Court that she was not considering whether to bring proceedings in this jurisdiction and no proceedings for the offence were pending in this jurisdiction. That is sufficient communication to the Court of the DPP's position in accordance with s. 4(3) of the Prosecution of Offenders Act 1976.

12.1.7. Apparently on an earlier occasion, counsel for the DPP had informed the Court that the decision not to prosecute Mr.

Damache in this jurisdiction had been taken on the 16th May, 2011. The DPP, in a letter dated 28th January, 2014, to Mr. Damache's solicitor, said she wished to correct an error. The DPP stated that the direction letter issued in the case on the 16th March, 2011, and not 16th May 2011 as previously indicated.

12.2. The Context

12.2.1. At the time of the original decision not to prosecute Mr. Damache, he could not then have been extradited to the U.S.A.. This was because s. 15 of the Act of 1965 as enacted operated as a complete bar to his extradition in the circumstances of his case. Section 15 as originally enacted stated:-

"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."

12.2.2. Mr. Damache's case is that the offences for which he is being sought are offences which are regarded as having been committed in the State. The State, while not conceding this, never contested that the offences were to be so regarded. The manner in which this issue should be assessed was dealt with by Edwards J. in *Attorney General v. Garland* [2012] IEHC 90. Unlike s. 10 of the Act of 1965, there is no definition of "offence" contained in s. 15. However, Edwards J. held, at para. 7.3., that the word offence:-

"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...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."

12.2.3. There can be no doubt that the allegations set out above against Mr. Damache, would, if true, be actions and conduct regarded under the law of this State as having been committed in the State. I, therefore, find that the offences are to be regarded as having been committed in the State. It is on that basis that the Court will proceed to deal with these judicial reviews.

12.2.4. Relying on the substitution of a new s. 15 by s. 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 ("the Act of 2012"), the State contends that there is now no bar to extradition. The amended s. 15(1) provides:-

"Extradition shall not be granted for an offence which is also an offence under the law of the State if—

(a) the Director of Public Prosecution or the Attorney General is considering, but has not yet decided, whether to bring proceedings for the offence against the person claimed, or

(b) proceedings for the offence are pending in the State against the person claimed."

12.2.5. Under the amended s. 15, there would only be a bar to the extradition if the DPP decides to bring charges. In those circumstances, either an acquittal or a conviction would amount to a bar to extradition as s. 17 states that *"[e]xtradition shall not be granted if final judgment has been passed in the State..."* It is also the case that while the DPP (or Attorney General, as appropriate) is considering whether to bring proceedings, or while such proceedings are pending, there can be no extradition.

12.2.6. Under s. 15(2), the Minister for Justice and Equality is given a discretionary power to refuse extradition for an offence which is also an offence under the law of the State in circumstances where the DPP, or the Attorney General, if relevant, has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence. It appears to be the case that this is a decision that would have to be made by the Minister after a determination is made that the court is satisfied in accordance with the provisions of s. 29(1) that the proper procedures have been complied with and that the extradition is not prohibited under the Act.

12.3. The Claims of Mr. Damache

12.3.1. Mr. Damache submitted that he is undoubtedly a person now affected by the administrative decision not to prosecute him. He stated that clearly he does not wish to be extradited and that he wishes to have the case against him prosecuted here. Counsel for Mr. Damache made the following observations:-

(i) This is not a matter that has been litigated before;

(ii) As far as he is aware the DPP's Guidelines do not address this situation i.e. the impact on a person who is the subject of an extradition request;

(iii) It cannot be correct to say that Mr. Damache is not entitled to challenge the decision of March 2011 not to prosecute him because it was in his favour as the Act of 2012 has reversed that position;

(iv) This is exceptional territory. It involves a much smaller category of persons than might otherwise claim the right to be given reasons, and that all of the particular concessions that Mr. Damache has made makes this exceptional, e.g. his offer to co-operate with any prosecution brought against him here in respect of not raising objections to time issues, not objecting to mutual assistance or to video evidence. Counsel submitted that in the circumstances it is unfair and unsatisfactory to have the DPP immune or almost immune from giving reasons.

12.4. The Factual Background

12.4.1. It is worth reviewing the factual background of the investigation into these matters insofar as that has been placed before the Court. From information set out in a statement of evidence of Detective Superintendent Dominic Hayes, contained in a book of evidence served on Mr. Damache in proceedings before Waterford Circuit Court for a separate offence, it appears an investigation into an alleged conspiracy to murder Mr. Lars Vilks began in this jurisdiction in September 2009. That investigation began on receipt of intelligence from U.S. authorities. Detective Superintendent Dominic Hayes was aware that Ms. LaRose had travelled to Ireland via Holland in September 2009 in furtherance of the conspiracy to murder Mr. Vilks with a firearm. He commenced an investigation into the conspiracy and established an incident room at Waterford Garda Station. He says that he received a number of intelligence

reports and briefings in relation to the investigation.

12.4.2. It may be of some relevance that Detective Superintendent Hayes also became aware of a threat to kill a Mr. Majeb Moughni, an attorney living in Detroit, Michigan, U.S.A., who had received a phone call from a male who threatened to kill him. Detective Superintendent Hayes received a recording of that conversation on disc from a member of the Dearborn Police Department in Michigan. Ultimately, Mr. Damache was charged with two offences: a threat to kill contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997 ("the Act of 1997") and making a menacing telephone call contrary to s. 13 of the Post Office (Amendment) Act 1951 ("the Act of 1951"). During the course of his trial for those offences, he changed his plea to guilty in relation to the making of a menacing telephone call and a *nolle prosequi* was entered in respect of the count alleging the threat to kill. He was sentenced to four years imprisonment. That was effectively time served and he was immediately arrested on the warrant issued in these extradition proceedings.

12.4.3. In furtherance of his investigation into the alleged conspiracy to murder Detective Superintendent Dominic Hayes granted a search warrant under s. 29(1) of the Offences Against the State Act 1939 ("the Act of 1939") on the 8th March, 2010, in respect of the applicant's dwelling. It was executed on the 9th March, 2010, and the applicant was arrested in relation to the offence of conspiracy to murder Mr. Vilks contrary to s. 71 of the Criminal Justice Act 2006 ("the Act of 2006"). Six other people were simultaneously arrested in Ireland including Mr. Damache's wife Ms. Ramirez. The Gardaí suspected that Mr. Damache had recruited or had attempted to recruit all of these individuals.

12.4.4. During the course of Mr. Damache's detention, e-mails which were allegedly found on his computer were put to him in interview. Gardaí outlined to him multiple criminal charges that he was facing in Ireland as a result of his alleged conduct. The memos of interview taken while in custody have been exhibited in the affidavit of the solicitor of Mr. Damache.

12.4.5. Mr. Damache initiated judicial review proceedings in November 2010 seeking a declaration that s. 29(1) of the Act of 1939 was repugnant to the Constitution. He remained in custody on remand awaiting the outcome of those proceedings with a stay on the criminal charges to which he later pleaded guilty. The solicitor for Mr. Damache averred that he was advised that the judicial review proceedings could impact on the decision of the DPP on whether to charge him with the conspiracy offences relating to Mr. Vilks and on whether he would be convicted in respect of them if he was ultimately charged. It is said that this is the primary reason that Mr. Damache was advised to bring these judicial review proceedings. In its well-known decision in his case *Damache v. Director of Public Prosecutions & Ors.* [2012] IESC 11, the Supreme Court struck down s. 29 of the Act of 1939 as unconstitutional.

12.4.6. The decision not to prosecute Mr. Damache was taken by the DPP prior to the decision in favour of the constitutionality of the section by the High Court and obviously therefore prior to the decision of the Supreme Court on appeal.

12.4.7. The Supreme Court decision was given on the 23rd February, 2012. During the course of these extradition and judicial review proceedings, it is clear that the parties operated under the understanding that all evidence generated as a result of the search is tainted by the unconstitutional seizure and would be inadmissible in evidence against Mr. Damache in line with the principles outlined in the case of *People (DPP) v. Kenny* [1990] 2 I.R. 110. In particular, the U.S. authorities have given an affidavit in which they state that neither the superseding indictment nor the extradition request relied upon evidence "obtained during unconstitutional searches in Ireland". The decision in *People (DPP) v. J.C.* [2015] IESC 31 may alter a view as to the possible impact of "unconstitutional searches", certainly in so far as regards criminal proceedings in this jurisdiction. In any event, Mr. Damache never pursued any issue concerning the unconstitutional search in the course of the hearing before me.

12.4.8. On the 24th July, 2012, the above-mentioned Act of 2012 was enacted thereby amending s. 15 of the Act of 1965. On 11th January, 2013, the request for the Mr. Damache's extradition was made by the U.S. to the Irish authorities. Mr. Damache claims that in view of the early date of the application for the warrant issued in Pennsylvania for his arrest (November 2010), at a time when he was in custody in Ireland, it can be inferred that the U.S.A. intended to seek his extradition. In earlier affidavits, his solicitor queried the basis upon which the prosecution could have been declined and referred to issues set out in the DPP's guidelines for prosecution.

12.4.9. Ultimately the only "explanation" that the DPP has given in relation to the decision not to prosecute is that it was made in accordance with the DPP's guidelines.

12.4.10. The solicitor for Mr. Damache says that, given the timing of the decision, it seems that the Director must have had sufficient evidence to justify a prosecution. She does this by relying on the memos of interview containing the references to the e-mails allegedly found on Mr. Damache's computer and to the questions put to him by Gardaí. There is also a reference to the availability of other witnesses for example witnesses such as Ms. LaRose who could give evidence from the U.S. She also refers to another individual based in Ireland who was arrested at the same time and gave evidence in the trial of Mr. Damache in relation to the threat to kill.

12.5. The Guidelines for Prosecutors

12.5.1. The DPP has published Guidelines for Prosecutors ("the DPP's Guidelines"), revised in November 2010. Chapter four of those Guidelines is entitled "[t]he Decision whether to Prosecute". The DPP's Guidelines state:-

"[t]he decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence."

12.5.2. The DPP's Guidelines distinguish between decisions not to prosecute based on the public interest or based on insufficiency of evidence, although undoubtedly correctly the DPP's Guidelines state that it is generally in the public interest to prosecute any crime where there is sufficient evidence to justify doing so absent a countervailing public interest. Moreover, the DPP's Guidelines state that there is a clear public interest in ensuring that crime is prosecuted and that the wrongdoer is convicted and punished.

12.5.3. The nature of the public interest considerations is further addressed in the DPP's Guidelines. The DPP's Guidelines state that the more serious the offence and the stronger the evidence to support it, the less likely that some other factor will outweigh that interest. Issues strongly in favour of prosecuting in the public interest are where there is likely to be a significant penalty in the event of a conviction; where the accused is a ring leader or organiser of the offence; where the offence is pre-meditated; or where the offence was carried out by a group; and, where the offence was carried out pursuant to a plan in pursuit of organised crime. Those matters would appear to apply to the alleged offences in this case.

12.5.4. The DPP's Guidelines refer to mitigating factors which would tend to reduce the seriousness of the offence. They also refer to

other matters such as the availability and efficacy of any alternatives to prosecution. Matters which could also be relevant are whether the prosecution could put at risk confidential informants on matters of national security or whether there were circumstances existing that would prevent a fair trial from being conducted.

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

12.5.6. The DPP's Guidelines permit a review of the decision not to prosecute (Chapter 12 of the DPP's Guidelines). However, s. 12 is headed "[t]he Rights of Victims and Victims' Relatives". It seems clear that the DPP's Guidelines were not drafted with reference to the position that now obtains where, since the amendment of the Act of 1965 in 2012, a requested person may be negatively affected by a decision not to prosecute. That is not surprising as the DPP's Guidelines were only revised in November 2010. At that stage, Mr. Damache and others in a similar position could not have been extradited.

12.5.7. An obvious issue arises from the foregoing: on what basis did the DPP review the decision not to prosecute? The DPP's Guidelines which it is said were in play for the initial decision not to prosecute had no apparent relevance to the reconsideration of that decision. Nothing in the DPP's Guidelines specifically addresses it as the review is under the section of the Rights of Victims and Victims' Relatives. If, for example, the DPP had originally decided in accordance with the DPP's Guidelines that there was insufficient evidence due to the potential unavailability of witnesses who might be in custody in the U.S. and therefore not compellable in this jurisdiction, is their apparent availability and willingness to testify as averred to by Ms Williams on behalf of the U.S. attorneys office, coupled with the concessions as regards video evidence, sufficient now to overcome that problem? Is that now a matter which in turn could lead to an increased public interest in the prosecution of what is undoubtedly an allegation of a serious crime perpetrated in this jurisdiction?

12.5.8. The problem with much of the above is that it amounts to speculation. Counsel for Mr. Damache submitted that his client is left with speculation. He submitted that this can only be answered by some proper engagement with his request for reasons.

12.6. The Correspondence with the DPP

12.6.1. On the 21st October, 2013, Mr. Damache's solicitor wrote a lengthy letter to the Director of Public Prosecutions seeking:-

- (i) An answer as to whether or not fresh consideration was given to the decision of the 16th May, 2011 after she became aware of the intention of the U.S. to seek the extradition of Mr. Damache;
- (ii) In the event that a reconsideration took place but there was no alteration of the original decision, the date of that decision and the reasons for same;
- (iii) That the matter be revisited, if the matter was not to be revisited the reasons for that refusal were also sought; and,
- (iv) The reasons for not prosecuting Mr. Damache so that they could be considered by their client and by the court in the extradition proceedings and by the Minister in the context of the extradition proceedings.

12.6.2. In the course of that letter, the solicitor for Mr. Damache referred to various matters. These included a refutation of a suggestion that there was no onus on the DPP to have regard to the effects of extradition on Mr. Damache. They suggested that the DPP's Guidelines referred to the effects of a potential prosecution on an accused person and argued that those could and should include the effect of extradition to the U.S.A. as distinct from facing justice in one's own jurisdiction. They referred to the harshness and inadequacies of the U.S. criminal justice system, with particular reference to the sentencing regime which includes "coercive plea bargaining" and the taking into account of unindicted conduct when sentencing. They made reference to the special administrative measures ("the SAMs") which they say will be applied to him (relying on the testimony of Mr. Joshua Dratel who in fact did not say that he *will* have the SAMs applied to him). They also relied upon what was termed the prospect of Mr. Damache being detained in "horrendous prison conditions". They referred to the evidence of the effects of prolonged solitary confinement on prisoners.

12.6.3. The DPP replied by letter dated 28th January, 2014. The operative part of that letter says as follows:-

"I would advise that no further consideration was given to the question of your client's prosecution after the 16 March, 2011. The decision then made was in accordance with this office's guidelines. Any decision by the authorities in the United States to prosecute or seek your client's extradition is a matter for them. Such a decision would of itself have no bearing on the earlier decision taken.

I would advise that prior to the receipt of your letter no further consideration of the decision not to prosecute was taken. Your letter does not provide any additional matters that would indicate that such reconsideration should now arise.

In accordance with well established case law, of which I am sure you are aware, it is not proposed to give reasons for the decision taken in your client's case."

12.6.4. The reference to decision in the final paragraph is argued by counsel for Mr. Damache to mean both decisions. The reference to "your letter does not provide any additional matters that would indicate that such reconsideration should now arise" is, in the submission of counsel for Mr. Damache, not a reason or a sufficient reason that accords with the principles set out in case-law concerning the giving of reasons.

12.6.5. In para. 12.3 of the DPP's Guidelines, the DPP had given certain *undertakings* in relation to victims of crime. These undertakings include examining:-

"any request from a victim of crime for a review of a decision not to prosecute and in appropriate cases to have an internal review of the decision carried out by an officer other than the one who first made the decision."

In my view, the above letter from the DPP to Mr. Damache's solicitor is curious in that, despite stating that no further consideration of the decision not to prosecute was taken, there must have been some review. This is because the letter of Mr. Damache was considered to the extent that the DPP then stated that the letter revealed nothing to show that reconsideration should take place.

12.6.6. It is simply unclear whether the reference to reconsideration means that there was a review or simply that no consideration at all was given to the matter. It must of course be noted that the word reconsideration comes from the letter of the solicitor for the applicant. However, it is also clear from the letter on behalf of Mr. Damache that the word "reconsider" was used in the context of a review as the following quote demonstrates:-

"Please provide us with your reasons for not prosecuting Mr. Damache, so that they can be considered by our client, by the Court and by the Minister in the context of the extradition proceedings. If you agree to reconsider the decision, please provide us with reasons for your ultimate decision."

12.6.7. Ultimately, the letter from the DPP makes clear that her position is that she is not giving a reason because she says that the law does not require her to give reasons.

12.7. Submissions

Submissions on behalf of Mr. Damache

Forum Issues

12.7.1. Counsel submitted that a reasonable explanation for the decision not to prosecute is that the DPP was aware that the U.S. wanted to prosecute the appellant and felt it was more appropriate that they do so, but was unaware of the fact, or did not avert to the fact, that extradition was impermissible having regard to s. 15 of the Act of 1965. Counsel referred to the weight of the evidence in the possession of the Gardaí at the time of the arrest in this jurisdiction which was the same day that Ms. LaRose had been indicted in the U.S.

12.7.2. It was submitted that it was only subsequent to the DPP's decision in March 2011 that the High Court had ruled in the case of *Garland* that an alleged international conspiracy directed from Ireland could not be the subject of extradition proceedings. It was submitted that prior to that case, the former provisions of s. 15 had never been invoked in an extradition case. In *Garland*, the State fully contested the case. Accordingly, Mr. Damache submitted that it could not be said that the implications of the then provisions of s. 15 were so notorious that the DPP *must* have adverted to them.

12.7.3. Counsel referred to the mass of incriminating e-mails in the possession of the Gardaí and to the fact that the U.S. authorities had co-operating witnesses in custody. Counsel submitted that this must have been submitted to the DPP when the file was submitted. In light of that counsel rhetorically submitted, if the DPP really was aware of the implications of s. 15 how could she not have considered utilising this evidence in furtherance of an Irish prosecution?

12.7.4. In respect of what counsel for Mr. Damache termed the refusal of the DPP to revisit her March 2011 decision, it was submitted that there was a substantial change in circumstances for reconsideration by the DPP. Mr. Damache submitted that the extradition request setting out the evidence available to use against him, and which the U.S. says demonstrates probable cause that the offences charged were committed by him, was a new matter. Mr. Damache also said that he has given undertakings not to object to the use of this evidence in an Irish court and to facilitate whatever practical steps and mutual assistance provisions were required in order to make that prosecution a reality. Therefore, Mr. Damache is submitting that if a prosecution against him was not possible before it certainly is now.

12.7.5. In relation to that second decision, it was submitted that there was a clear duty on the DPP to consider a prosecution in this jurisdiction over and above the possibility of a prosecution in another jurisdiction. Counsel referred to the dicta of Walsh J. in the case of *State (McCormack) v. Curran* [1987] I.L.R.M. 225 that at p.238:-

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

That case concerned an applicant who was being prosecuted in Northern Ireland for an offence committed on the island of Ireland. He wished to opt for trial in this jurisdiction but could not do so because no warrant had been issued for his arrest here. He requested that such a warrant be issued and when that was refused he challenged that decision by way of judicial review.

12.7.6. Insofar as the decision in *McCormack* was in favour of the State, counsel sought to distinguish it on the basis that the facts were entirely different from the facts here. The written submissions on behalf of Mr. Damache say that the offence in *McCormack* had occurred in Northern Ireland. That however is not the true picture: the explosion was due to occur in Northern Ireland but the alleged role of the accused was to be positioned south of the border on high ground and to provide the signal for the detonation. Thus in the words of Finlay C.J., at p. 237, "[i]t is an offence which is alleged to have occurred within the jurisdiction of this State."

12.7.7. In seeking to distinguish that case counsel also submitted that in the present case there was an onus on the DPP to consider the issue of *forum conveniens* and have regard to the effect of the extradition on Mr. Damache; firstly, so that the DPP can come to a fair decision about the appropriate forum for prosecution and, secondly, so that Mr. Damache could have an effective remedy before the Court and the Minister in the context of the extradition case. In *McCormack*, this was not at issue because there were no extradition proceedings in being. Counsel relied upon the fact that s. 15 of the Act of 1965 could not have applied as the applicant in that case was already in the UK. At this juncture, it is appropriate to point out that s. 15 never applied to extraditions to the UK. Persons could have been extradited to the UK even where there were facing offences deemed to have been committed in this jurisdiction.

12.7.8. Counsel also submitted that in *McCormack*, the DPP had notified that applicant of the decision not to prosecute and stated that his decision was taken in light of the depositions and the Northern Ireland book of evidence provided by Mr. McCormack's solicitor. The court hearing the judicial review inferred that there was insufficient evidence available to the DPP to prosecute. Counsel submitted that in this case there is sufficient available and admissible evidence to prosecute Mr. Damache in Ireland. It is not strictly correct to say that the court inferred in *McCormack* that there was insufficient evidence as Walsh J. clearly states at p. 238 that the court does not know the reasons why it would be inappropriate to prosecute here. Walsh J. went on to say that while it may be the view that there was insufficient evidence, the situation was that there was nothing from which the court could reasonably infer perverse or improper motives.

12.7.9. Counsel submitted that *McCormack* is entirely distinguishable because in *McCormack* the DPP engaged with the forum issue and the concerns of that applicant. Therefore, in *McCormack*, the right question had been asked by the DPP and the only issue was

one of *mala fides*. The submission in the present case is that the right question was never asked.

The Duty to Give Reasons

12.7.10. Mr. Damache acknowledged that the DPP traditionally enjoyed quasi-immunity from having to give reasons for her decisions by reason of her special position in Irish law. Mr. Damache distinguished the present situation from previous cases on a variety of grounds. Counsel made reference to developments in case law, such as *Murphy v Ireland* [2014] IESC 19. He also referred to the commencement of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ("the EU Victims' Directive"). Although it is referable to victims, counsel submitted that this Directive will soon require the DPP to set out in straightforward terms the basis for a prosecutorial decision not to bring charges.

12.7.11. Counsel submitted that Mr. Damache's situation was exceptional and would not give rise to a flood of cases. He submitted that reasons were necessary to ensure that scrutiny can take place of the DPP's decision to ensure she had taken into account the correct matters. It was submitted that the duty to give reasons was bound up with the possibility of review.

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

12.7.13. Counsel submitted that Mr. Damache's grounds for seeking the reasons of the DPP are:-

- (i) To ensure that the DPP has had regard to what is asserted as a highly relevant consideration, namely the impact on Mr. Damache of extradition to the requesting State;
- (ii) To assess whether the DPP has taken into account relevant criteria and whether she has "asked herself the correct question";
- (iii) To deploy, if appropriate, the reasons for the non-prosecution in his extradition proceedings and in any process before the Minister, if such a process should arise.

12.7.14. Counsel complained that it is unclear whether the DPP accepts that she has a function to consider the impact of extradition on Mr. Damache.

12.7.15. Counsel submitted, in support of his argument that the forum was a matter that must be considered by the DPP, that he had no effective remedy unless that took place. It was submitted that while the Court can assess whether Mr. Damache's rights would be breached by extradition, the fairness, proportionality or necessity of the intended extradition could not be assessed by the Court.

12.7.16. Mr. Damache accepted that if a significant breach of his constitutional and convention rights in the U.S. was apprehended by this Court it would refuse extradition. However, counsel observed that on occasions the Courts have to rely upon the presumption of good faith that a requesting State will uphold the rights of an extradited person. It was submitted that such trust in the bona fides of the requesting State is at the root of the principle of comity in extradition proceedings and it also reflects the concern that to refuse extradition might be a disproportionate result having regard to the public interest that crime be prosecuted and punished.

12.7.17. Contrary to the submissions above, it was also submitted that the Court had a function in regard to forum issues. It was submitted that a court should be in position to assess the necessity and proportionality of an extradition. Reliance was placed upon the Baker Review Committee report, *A Review of the United Kingdom's Extradition Arrangements* (2011), which led to the statutory scheme now in place in the United Kingdom.

Submissions on behalf of the State

12.7.18. Counsel for the State commended the judgments of Edwards J. in both Damache decisions and in the case of *Marques v DPP* [2014] IEHC 443 to the Court, subject to one reservation as to findings in the *Marques* decision about the applicability to the DPP's Guidelines. At the outset, counsel submitted that Mr. Damache's submissions under this heading were full of speculation and supposition. He took issue with the submission that Mr. Damache was arrested and detained in this jurisdiction for the same offences. He submitted that he was arrested for a particular conspiracy to murder a particular person. He submitted that the U.S. investigation concerned a much broader conspiracy. He said there was no perfect symmetry. However, counsel did not contest that the facts set out in the warrant amounted to offences in this jurisdiction and admitted that if the original s. 15 still applied, he would have an uphill struggle to convince a court that extradition was permitted.

12.7.19. In relation to the first decision of the DPP, counsel asked rhetorically how can the DPP be criticised for not taking into account a statutory position that did not exist? With respect to the later decision, the subject of the second judicial review he submitted that she gave her reason in an attenuated manner. The DPP's view was that nothing contained in the letter of Mr. Damache's solicitor was appropriate to consider.

12.7.20. The overall thrust of counsel's submissions was that the issue of giving reasons or not giving reasons was irrelevant in the particular circumstances of this case. He submitted that the true issue was whether the DPP had to take account of forum issues or not. He submitted that the DPP did not take into account the forum matters. Counsel queried how Mr. Damache could be in any doubt about that. Indeed, counsel went so far as to say that if the DPP had an obligation to take into account forum matters then clearly the decision was wrong and should be quashed.

12.7.21. In relation to her letter of 28th January, 2014, counsel submitted that the DPP had given reasons.

12.7.22. Counsel addressed the issue of the nature of s. 15 of the Act of 1965. He submitted that extraterritoriality was not a feature of the Act. Section 15 was based on territoriality. He submitted that the new s. 15 is *ne bis in idem* and not based on territoriality. He submitted that s. 15(1) gives a role to the DPP. This is not predicated on territoriality or extra-territoriality. It simply precludes someone from being sent to another State where proceedings are brought against them here.

12.7.23. Counsel also submitted that, contrary to Mr. Damache's submissions that his case was somehow unique or exceptional, to hold that the DPP had to take forum into account would in fact open the floodgates. Counsel raised a number of different scenarios,

for example, the drugs mules arriving at the airport. If the DPP has to consider whether to prosecute does she have to consider whether they would be prosecuted in their country of origin in Peru? Does the DPP have to consider prison conditions in Peru? It was also submitted that many countries operate on a passive personality principle in so far as they will prosecute their own nationals for offences occurring abroad, for example, Germany. He submitted in that case the DPP would have to engage in an extraordinary fact-finding process.

12.7.24. Counsel submitted that the new s. 15 itself creates a forum bar to surrender.

12.7.25. He submitted that as regards a forum bar, one is not automatically entitled to argue a forum bar as a matter of fairness. In the European Arrest Warrant ("the EAW") context, the forum bar is left to the legislature. He submitted that as regards fairness, there is nothing to suggest you cannot argue Article 8 of the ECHR matters. He made reference to the many cases that have been determined by the court in accordance with Article 8. In that respect he said it was still open to agitate matters of forum. He referred to the decision of the Supreme Court in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24 which touched on proportionality. In that case, the circumstances of the appellant had meant that it was difficult to trigger Article 8.

12.7.26. Counsel submitted that one of themes being advanced in relation to the absence of a forum bar is that it is unfair if it did not exist. Yet nationally and internationally there is nothing Mr. Damache can point to suggest there must be such a forum bar. Counsel submitted that the UK legislature enacted a forum bar in a limited form after a great deal of contemplation. He submitted that they did not have a forum bar prior to that.. He submitted that one does not have to have a forum bar.

12.7.27. Initially it appeared that the State was submitting that the Minister could make the decision with regard to extradition at any point. However, at a later point during the hearing that submission was clarified. It was submitted that such a decision would only be made after the entire court proceedings. No definitive position was being submitted to the Court as to whether the Minister's decision was reviewable as no decision had been made on it in this particular case.

12.7.28. With regard to the chronology of the decisions, it was submitted that it was highly significant that a decision was made 15 months prior to the legislative provision that gave the DPP a role. It was submitted that the various interpretations contended for by Mr. Damache could not be given credence. This was an inherently favourable decision to him and nothing set out in the affidavit on behalf of Mr. Damache gives cause for doubt.

12.7.29. In respect of the Supreme Court decision in *Murphy*, counsel for the State contended that *Murphy* in fact underlines the earlier decisions which permitted only limited review of the DPP's decision.

Submissions of behalf of the Amicus Curiae

12.7.30. The *amicus curiae* submitted that it was fundamental to a country based on the rule of law that all administrative organs of the State act within the law and so be subject to the scrutiny of the courts. The *amicus curiae* recognised that the exercise of discretion by an administrative body and the nature of that discretion may narrow considerably the scope for judicial review. As a specialist decision maker the range of grounds upon which a decision of the DPP can be reviewed will be narrow. In the view of the *amicus curiae*, it is unlikely that a decision of the DPP will be successfully reviewed by an applicant unless it is shown to be based on a misunderstanding of the law, or is inconsistent with the DPP's own rules or guidelines, or is contrary to the fundamental rights of an affected person.

12.7.31. It was submitted that in order for the DPP to be the subject of judicial scrutiny she must provide reasons for her decision. Reliance was placed upon *Mallak* for the principle that an examination of the legality of a decision may require analysis of the reasons for that decision.

12.7.32. It is the position of the *amicus curiae* that the DPP is obliged in law to furnish Mr. Damache with the reasons for her decision not to prosecute him or, at a minimum, provide a justification for not providing those reasons. It is submitted that failure to do so deprives the applicant of any possibility of knowing if the DPP has carried out her function in respect of this case lawfully.

12.7.33. The *amicus curiae* also raised the question of whether the possibility of Mr. Damache being extradited was a relevant consideration in the DPP's decision not to prosecute. Counsel focused more on the second decision of the DPP in this regard. The *amicus curiae* points out that the DPP's letter to the Mr. Damache's solicitor dated 28th January, 2014, indicates that no new issues had arisen which would merit reconsideration of the earlier decision not to prosecute. The *amicus curiae* points to para. 2 of the DPP's statement of opposition which stresses that the terms of s. 15 of the Act of 1965 indicate that the Oireachtas did not intend that the DPP "would have the role of deciding on issues of forum for the purpose of extradition." In the view of the *amicus curiae* the DPP's position on whether forum can ever really be a consideration is largely unknown due to the opacity of the DPP's decision-making process.

12.7.34. Counsel referred to the DPP's Guidelines which list as a relevant consideration when considering whether the public interest requires a prosecution the question of "*whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender*". It was submitted that logically if the risk of a disproportionately harsh or repressive outcome for the suspect is to be a concern for the DPP, then the question of whether there is a risk of such an outcome arising from a decision not to prosecute should be an equally valid consideration, all be it one which will arise less frequently. It was submitted that if there is such an obligation then that requires consideration of the entire factual matrix; that matrix would include the existence of an extradition request because otherwise there would be an incomplete assessment of the suspect's circumstances.

12.7.35. The main thrust of those submissions concerned the fact that it remains unclear whether the DPP views the existence of a request for the extradition of an Irish citizen as a factor which can or should be taken into account when deciding whether to prosecute that citizen. However, as was stated directly by counsel for the State, the DPP does not consider that she has any role in forum.

12.7.36. The *amicus curiae* submitted that the DPP had to take into account forum issues. It was submitted that forum issues play a role in extradition particular in relation to EAW cases. The *amicus curiae* also brought the Court's attention to the Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA) ("the Framework Decision on Combating Terrorism"). This was another framework decision brought into force in the aftermath of the event of 11th September, 2001. This was to ensure that there was greater approximation of laws of Member States in relation to terrorism offences and a greater commitment to prosecuting these offences. As the Framework Decision on Combating Terrorism required Member States to prosecute certain extraterritorial offences of terrorism the question of jurisdiction (or forum) was dealt with. Where the offence falls within the jurisdiction of a number of Member

States, then Article 9 and, in particular, para. 2 thereof provides for sequential account to be taken of the following:-

- (a) The Member State shall be that in the territory of which the acts were committed;
- (b) Member State shall be that of which the perpetrator is a national or resident;
- (c) The Member State shall be the Member State of the origin of the victims;
- (d) The Member State shall be that where the perpetrator is found.

12.7.37. That reference by counsel for the *amicus curiae* was helpful, as further research established that the Framework Decision on Combating Terrorism had been implemented in this jurisdiction by the provisions of the Criminal Justice (Terrorism Offences) Act 2005 ("the Act of 2005"). During the course of the hearing no other party referred to the Framework Decision on Combating Terrorism or that Act of 2005 and indeed it was not immediately clear to the Court if the Framework Decision could have any relevance covering as it did relations between Member States of the European Union.

12.7.38. It should be noted that sections of the Act of 2005 were relied upon by counsel for the State for the purpose of establishing correspondence with offences in this jurisdiction. They are referred to in Part 3 of this judgment dealing with that issue. It is somewhat surprising that the Court was never referred to s. 6(9) which provides:-

"[w]here the Director of Public Prosecutions considers that another Member State of the European Communities has jurisdiction to try a person for any act constituting an offence under this section, the Director—

(a) shall co-operate with the appropriate authority in that other Member State, and

(b) may have recourse to any body or mechanism established within the European Communities in order to facilitate co-operation between judicial authorities,

with a view to centralising the prosecution of the person in a single Member State where possible."

12.7.39. Furthermore, s. 43 of the same Act permits the DPP to consider prosecution for offences committed outside the State (extending beyond offences over which this State ordinarily claims jurisdiction under the Act) if extradition or surrender has been refused under the provisions of the Act of 1965 or the European Arrest Warrant Act 2003.

12.7.40. Counsel for Mr. Damache made reference to the DPP's liaison with Eurojust on forum matters in the wake of the submission by the *amicus curiae*.

12.8. The Court's Analysis

Forum Considerations and Terrorist Offence

12.8.1. The State's written submissions to the Supreme Court (and to this Court) quoted approvingly the dicta of Edwards J. in the second leave application in this case that the DPP does not enjoy any choice of forum between the courts of separate states with concurrent jurisdiction and that "[h]er range of decision, and the extent of her discretion, is either to prosecute or not to prosecute in this jurisdiction." That position, as can be seen from s. 6(9) of the Act of 2005, is not universally correct. Apparently those provisions were not drawn to the attention of either the High Court or the Supreme Court during the contested applications for leave and the resulting appeals.

12.8.2. I considered whether I should bring the parties back for further argument on this matter as I had done in respect of the matters arising in the extradition proceedings. For a variety of reasons I felt it either inappropriate or unnecessary. In light of the decision I am making in the extradition matter, it is far more appropriate to deal with this matter without any further delay. Furthermore, it was an issue the genesis of which was raised in the course of the proceedings namely by the *amicus curiae*. In particular, the existence of a framework decision creates legal obligations on each Member State and the extent of those obligations could have been addressed by the State if they so wished. Moreover, as it is a legislative provision directly impacting upon the legal obligations of the DPP, the Court is obliged to apply that provision to the consideration of the matters at issue.

12.8.3. The provisions of s. 6(9) of the Act of 2005 regarding jurisdiction (or forum) are limited to matters concerning concurrent jurisdiction in Member States. The Framework Decision on Combating Terrorism does not apparently apply to offences of conspiracy (that may or may not be because conspiracy offences are predominantly common law constructs which are not to be found in many civil law jurisdictions). On the other hand, the Act makes clear that attempts to engage in terrorist activity or threaten to engage in terrorist activity are offences under the Act.

12.8.4. Section 6(9) places an onus on the DPP to cooperate with another Member State with a view to centralising the prosecution of a person in a single Member State where she considers another Member State has jurisdiction to try the person. When applying and interpreting that provision which gives effect to the Framework Decision on Combating Terrorism, the Court "...must do so as far as possible in light of the wording and purpose of the framework decision in order to attain the result which it pursues..." (*Criminal Proceedings against Maria Pupino* (Case C-105/03) [2005] E.C.R. I-5283, para. 43). The recitals to the Framework Decision on Combating Terrorism identify terrorism as one of the most serious violations of the founding principles of the European Union, namely, universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms, democracy and the rule of law. Recital 7 provides "[j]urisdictional rules should be established to ensure that the terrorist offence may be effectively prosecuted." Article 9 para. 2 provides that:-

"[w]hen an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offences with the aim, if possible, of centralising proceedings in a single Member State."

12.8.5. As set out in Article 9 para. 1, the Framework Decision on Combating Terrorism clearly requires Member States to establish a wide jurisdiction in the prosecution of terrorist offences. Thus, it is clear that where an offence is aimed against the people of a Member State that Member State must take the necessary measures to establish jurisdiction.

12.8.6. Furthermore, Article 9 para. 2 requires cooperation on prosecution decisions where the same facts show jurisdiction

elsewhere. In circumstances where there is an EU transnational element to the terrorist offence, there is an onus on each Member State to engage in the process of centralising proceedings.

12.8.7. I have considered the meaning of the phrases such as “an offence falls” or “the basis of the same facts.” They cannot mean that the offence must already be proven before it must be considered. This is because an offence may only properly be referred to as proven at the conclusion of a trial resulting in a verdict of guilt. Therefore these must be understood as references to the alleged offence or the alleged facts.

12.8.8. In those circumstances, I am of the view that s. 6(9), when read in accordance with Article 9 para. 2, requires the DPP to consider this issue of jurisdiction at the point at which she herself is considering prosecution. It is the alleged facts and the alleged offence which give rise to the duty of the DPP to consider whether another Member State has jurisdiction to try the person for the alleged offence and to the requirement for cooperation with the relevant authorities.

12.8.9. It is not for this Court, however, to decide if the allegations met the criteria under those provisions. That is a matter for the DPP. Undoubtedly however in the circumstances of this case it is a matter which at the very least requires her consideration. It is clear from all the information placed before the Court that, at a minimum, the possibility arises on the facts alleged against Mr. Damache that terrorist offences may have been committed and that at a minimum they may give rise to a claim of jurisdiction by Sweden. It appears that no consideration has been given by the DPP as to whether another Member State has jurisdiction to try this matter. That is a reasonable inference to make in circumstances where the DPP has submitted to this Court that she does not have any jurisdiction to consider forum matters. Moreover, the DPP’s Guidelines do not provide for dealing with the situation where forum considerations might come into play under the Act of 2005. Perhaps if the DPP is of the view that the alleged facts simply do not amount to credible evidence of an offence, then she is not required to revert to any other Member State with a view to a prosecution being centralised. However, in this case we do not know if the DPP took her decision based upon lack of evidence or on public interest grounds. All we know is that she does not consider that she has any choice of forum as between the courts of separate states with concurrent jurisdiction and therefore she never considered the question of jurisdiction by another Member State.

12.8.10. In my view in light of the provisions of s. 6(9) of the Act of 2005, the DPP was at least required to address her mind to whether she considered another Member State had jurisdiction to try Mr. Damache on the basis of the alleged facts. In light of the existence of the Framework Decision on Combating Terrorism, the DPP must be on notice that it is highly likely, if not a certainty, that Sweden has implemented the Framework Decision and put in place laws which permit it to exercise jurisdiction over a terrorist offence aimed against its people.

12.8.11. I am conscious that conspiracy is not within the Framework Direction on Combating Terrorism and that the extent of the evidence placed before the DPP is unknown. However, it must be assumed that, at a minimum, the memoranda of interview with Mr. Damache during his detention for investigation of the alleged offence of conspiracy to murder Mr. Vilks was sent to her. This included the Gardaí putting to Mr. Damache that he and Ms. LaRose had obtained the passport of K.G. “to get another person into Sweden” “to carry out a terrorist attack or possibly murder Lars Vilks or a Swedish journalist”. Presumably this questioning of Mr. Damache was based upon alleged facts which the Gardaí viewed as giving rise to a reasonable suspicion that he was engaged in that activity. At the very least the DPP was under an obligation to consider whether Sweden might view those same alleged facts as an attempt to commit a terrorist offence.

12.8.12. Furthermore, counsel for the State submitted that for the purposes of establishing a corresponding offence the facts alleged amounted to the commission of a terrorist offence contrary to section 6 of the Act of 2005 i.e. on the actual facts there was an attempt to engage in a terrorist activity, namely the murder of Mr. Lars Vilks, a Swedish citizen. This is dealt with in Part 3 of the judgment.

12.8.13. Moreover, at the point at which the DPP was asked to reconsider the situation with regard to a prosecution of Mr. Damache, she clearly had the information set out in the extradition request and supporting documentation concerning the allegations made by the U.S. authorities against him. In all the circumstances, the DPP was obliged to at the very least address whether she considered on the facts alleged that another member state, and in particular Sweden, might have jurisdiction to try Mr. Damache. The superseding indictment sets out a number of overt acts allegedly carried out by Ms. LaRose regarding contact with Swedish authorities and the seeking out of information regarding the location of RS#1, who in the context of the extradition request when viewed as a whole, can only be Lars Vilks but who is identified as a resident of Sweden.

12.8.14. The Act of 2005 concerns forum issues between Member States of the European Union. Does that mean it is of no relevance to the forum issue raised in this case? In my view, that does not follow. As I have indicated, it may well be that Sweden for example might assert jurisdiction to prosecute any person who might be involved in an attempt to murder its citizen or any resident of its state. In circumstances where the person is high profile or indeed where the attempted murder is being carried out with the intention seriously to intimidate a population or to seriously destabilise the social structures of the State, it would amount to a terrorist offence under the Framework Decision on Combating Terrorism. The attempted murder of a cartoonist because of his cartoons might well be viewed by Sweden as an intention seriously to intimidate a population or to seriously destabilise the social structures of that Member State.

12.8.15. If Mr. Damache was to be surrendered to Sweden for prosecution, the legal position would be that he could not thereafter be extradited to the U.S. for prosecution for the same offence.

12.8.16. The first issue raised by the Supreme Court was whether the DPP’s decision was reviewable. The DPP submitted that she did not have to consider forum at all as she had no choice of forum between separate states with concurrent jurisdiction. The DPP submitted that if she was wrong then the decision was reviewable. There is a legal requirement for the DPP to consider forum albeit in relation to EU Member States. Mr. Damache’s principle aim in these proceedings is to avoid being sent to the U.S.A. for trial. In furtherance of that, he argued that *forum conveniens* was an appropriate consideration for the DPP. If a review of forum issues was undertaken by the DPP and ultimately Sweden, this at least raises the possibility that Mr. Damache may not be sent to the U.S.A..

12.8.17. In light of all of the foregoing, it is clear that this is a situation where the DPP abdicated her function to consider forum (albeit unwittingly), or acted under an improper policy (the policy being that forum will not be considered). The matter is therefore reviewable within the well settled parameters of review of DPP decisions. I will consider further below *if* I should issue an Order of *certiorari*.

12.8.18. In light of the above and in circumstances where the central issue raised by the DPP has been decided against her it is not necessary or appropriate that I deal with the remaining issues that have been raised by the parties in these judicial reviews..

Are Orders Required?

12.8.19. Although both parties were in general agreement that all issues should be decided by me especially as either side might appeal, there was divergence as to whether that meant I should grant orders for judicial review if I had already refused to order extradition. Counsel for Mr. Damache was of the view that if the matter of extradition was decided in his favour, there was a question over whether it was appropriate to decide on the question of judicial review. I take this as really a question over the propriety of granting Orders of judicial review where on the basis of the case he has made they are no longer necessary. The State view was that I should proceed to make Orders if I find the decision of the DPP reviewable no matter what decision was made in the extradition.

12.8.20. Orders by way of judicial review are discretionary. They are only made after a process in which an applicant has been granted leave to apply for such orders and after a subsequent hearing before the court. I have had regard to the ambit of the remedy of *certiorari* (and by extension the remedy of injunction when sought by judicial review) contained in the illuminating passage in *State (Abenglen Properties Ltd.) v. Corporation of Dublin* [1984] I.R. 381 by O'Higgins C.J. at pp. 392-393, where he states, *inter alia*:-

"[t]his discretion remains unfettered where the applicant for the relief has no real interest in the proceedings and is not a person aggrieved by the decision ...Where, however, such applicant has been affected or penalised and is an aggrieved person, it is commonly said that certiorari issues ex debito justitiae."

12.8.21. In the extradition proceedings, I have held that Mr. Damache should not be committed to prison to await the Minister's order to extradite him. He is therefore not a person with a real interest in these judicial review proceedings as he is no longer aggrieved by the decision not to prosecute him in the true sense of that word. He no longer wishes to be granted that order and he is not truly aggrieved by that decision as its consequences no longer affect him. Should the extradition matter be appealed by the State and this decision overturned, it is only at that stage will he be an aggrieved party.

12.8.22. I have considered therefore whether the proper Order is to make no Order. However it seems to me that to do so may leave Mr. Damache in a difficult position if there is such an appeal by the State solely in relation to the extradition proceedings and it is successful. I consider that there could be a *lacuna* in the protection of his rights should I not make a conditional order in terms as follows:-

(i) An Order of by way of injunction quashing the decision of the DPP, communicated on the 31st January, 2014, by letter dated 28th January, 2014, refusing to reconsider her decision taken on the 16th March, 2011, not to prosecute the applicant, such Order not to issue in the event that there is no appeal by the State in the matter of the extradition proceedings against Mr. Damache or in the event that such an appeal is taken but is unsuccessful.

12.8.23. This is an Order for an injunction as that is the more appropriate remedy directed at the DPP. If necessary, the precise format of the Order may be agreed on hearing the parties further.

12.8.24. I make no comment on whether the DPP is entitled to, or is barred from, a reconsideration of the prosecution in the absence of the injunction quashing her decision not to reconsider. The Supreme Court has given its views in relation to a number of cases that have come before it relating to the reconsideration of prosecutorial decisions. Section 43 of the Criminal Justice (Terrorist Offences) Act of 2005 may or may not be a provision of some relevance.

¹ Professor Rovner in her affidavits referred to a Thomas Silverstein who has spent approximately 30 years in solitary confinement, the last ten of them in ADX and whom she represents in a civil action before the Federal Courts. Professor Ian O'Donnell referred to Mr. Silverstein as prisoner Zero insofar as it was his killing of a correctional officer that directly led to the widespread use of solitary confinement in US prisons. Interestingly Professor O'Donnell utilised Mr. Silverstein as an example of how exceptionally and exceptional prisoners can overcome the cruelty and inhumanity of solitary confinement. During the course of the hearing, counsel for the State handed to the court a decision of the US Court of Appeal's Tenth Circuit in Mr. Silverstein's case in which the court rejected his appeal against the District Court's grant of summary judgment in favour of the BoP. They did this for the purpose of asserting that his complaints were groundless, whereas counsel for Mr. Damache replied by stating that this proved the lack of protection in the US system against solitary confinement. I simply comment that the court at p. 34 of the judgment noted that he could communicate with others (albeit by yelling from cell to cell or during adjacent recreation). It may well be that the court was taking Mr. Silverstein's case at its highest in terms of this being an appeal in relation to a summary judgment.