Neutral Citation: [2014] IEHC 139

THE HIGH COURT

JUDICIAL REVIEW

Record No: 2014/112 J.R.

Between:

ALI CHARAF DAMACHE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

(NO. 2)

Judgment of Mr Justice Edwards delivered the 28th day of February 2014

Introduction:

1. The Court is concerned with an application on notice to the respondents and notice party named above for leave to apply for various reliefs and remedies by way of judicial review. It arises in the context of extradition proceedings pending before the High Court entitled, *The Attorney General -v- Ali Charaf Damache* (Record No. 2013/51 EXT), in which the applicant is before the Court pursuant to a warrant of arrest issued by the High Court on the 15th February, 2013, under s. 26 of the Extradition Act 1965 as amended by the Extradition (Amendment) Act 1994, the Extradition (European Union Offences) Act 2001 and the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, on foot of a request dated the 27th February 2012 made by the United States of America in accordance with Part II of the Extradition Act of 1965 as amended (hereinafter "the Act of 1965 as amended") and the Treaty on Extradition between Ireland and the United States of America signed on the 14th July 2005, seeking the extradition of the applicant in respect of the applicant's alleged involvement in a terrorism-related conspiracy which he is said to have orchestrated from within this State. That warrant was duly executed on the 27th February 2013 and a committal hearing under s. 29 of the Act of 1965 as amended is currently pending. The said committal hearing was formally opened on the 10th September 2013, but presently stands adjourned pending the outcome of related proceedings including, *inter alia*, this application.

2. The present application for leave to apply for judicial review is made against the background of the applicant having made an earlier, but unsuccessful, application for leave to apply for judicial review in proceedings entitled *Damache v. Director of Public Prosecutions and others* (Unreported, High Court, Edwards J., 31st January, 2014) (hereinafter "the first judicial review proceedings"). The issues raised in the present proceedings are not identical, but are in very many respects similar, to those raised in the first judicial review proceedings; the most significant differences being: (a) there is a further alleged decision of the first named respondent now being challenged and this decision post-dates the hearing in the first judicial review proceedings, and (b) the applicant now has available to him, to rely upon in these new proceedings, certain evidence that was not available to him to rely upon in the first judicial review proceedings.

The Relief Being Sought.

3. The draft "Statement Required to Ground Application for Judicial Review" to be filed by the applicant in accordance with Order 84 of the Rules of the Superior Courts in the event of leave to apply being granted to him, claims the following relief:

> (i) An order of *certiorari* quashing the decision of the first named respondent, communicated on the 31st January, 2014, refusing to reconsider her decision taken on 16th March, 2011 not to prosecute the applicant.
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> (ii) A declaration that the failure of the first named respondent to reconsider her 16th March, 2011 decision not to prosecute the applicant, after notification of an extradition request by the United States and after the applicant had raised new considerations relevant to the original decision not to prosecute, amounted to an abdication of her responsibilities as a prosecutor.
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> (iii) A declaration that the decision of the first named respondent that the extradition request made by the United States and the request for reconsideration made by the applicant on the 18th October, 2013 did not provide any basis for her to reconsider her 16th March, 2011 decision was unreasonable, disproportionate and amounted to a failure to vindicate the constitutional and European Convention on Human Rights and Fundamental Freedoms rights of the applicant.
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> (iv) An order of *certiorari* quashing the decision of the first named respondent communicated on the 31st January, 2014, refusing to provide the applicant with reasons for her 16th March 2011 decision not to prosecute the applicant in respect of the alleged offences for which his extradition is now sought by the United States and refusing to provide the applicant

with reasons for her refusal to reconsider the said decision.

(v) An order of *mandamus* and/or an injunction by way of judicial review, requiring the first named respondent to give reasons for her 16th March, 2011 decision not to prosecute the applicant in respect of the alleged offences for which his extradition is now sought by the United States and to give reasons for her refusal to reconsider the said decision.

(vi) A declaration pursuant to s. 3 of the European Convention on Human Rights Act, 2003 that the first named respondent, in failing to consider the impact of extradition on the Applicant's Convention rights, has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5 & 8 of the European Convention on Human Rights.

(vii) A declaration that the failure of the first named respondent to give reasons for the decision not to prosecute the applicant amounted to a breach of his right to fair procedures as protected by Article 40.3 of the Constitution and has unduly hindered the applicant's right of access to the courts, as protected by Article 38.1 of the Constitution.

(viii) A declaration pursuant to s. 3 of the European Convention on Human Rights Act, 2003 that the first named respondent, in failing to provide reasons for her 16th March, 2011 decision not to prosecute the applicant and in refusing to provide reasons for her refusal to reconsider the said decision, has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5, 6, 8 and 13 of the European Convention on Human Rights.

(ix) If necessary, a stay on any further step being taken in the extradition proceedings entitled *Attorney General v Ali Charaf Damache* (Record No. 2013/51 EXT) presently before the High Court pending the determination of these Judicial Review proceedings.

(x) Such further and/or other Order, including such interim and interlocutory relief as to this Honourable Court may seem just and meet.

(xi) A recommendation that the costs of the within proceedings be provided for under the Criminal Legal Aid (Custody Matters) Scheme.

Relevant Chronology

4. Before describing the grounds upon which the relief in question is being sought, it may be helpful to establish some context. The essential underlying facts of the case, and the chronology in which they arise, are not seriously in dispute and can be gleaned from a series of affidavits filed in the first judicial review proceedings by Caroline Egan, solicitor for the applicant, and recited in this Court's judgment in those proceedings. The essential chronology is as follows:

5. In September, 2009, following receipt of intelligence from crime and security authorities in the United States of American, Detective Superintendent Dominic Hayes of An Garda Síochána, South Eastern Region, commenced an investigation into an alleged conspiracy to murder Mr Lars Vilks. Mr Vilks is a Swedish cartoonist who had depicted the Islamic prophet Mohammad with the body of a dog, thereby provoking serious unrest in several Muslim countries. The applicant, a Muslim of Algerian ethnicity who is also an Irish citizen residing in Ireland, was suspected of being involved in the said alleged conspiracy; along with other individuals, resident in Ireland and, also, in the United States of America. It was suspected that the applicant had recruited several people in Ireland to form a 'terror cell' and had sought to bring people to Ireland to train with him.

6. On the 8th March, 2010, Detective Superintendent Dominic Hayes granted a search warrant under s. 29(1) of the Offences against the State Act 1939 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. Numerous items were removed from the property as evidence, including a computer.

7. Six other people were simultaneously arrested in Ireland in respect of the alleged conspiracy, including the applicant's partner, Jamie-Paulin Ramirez. Ms Egan believes that Gardaí suspected that the applicant had recruited or had attempted to recruit all of these individuals.

8. During the course of the applicant's detention in Garda custody which lasted for seven days approximately, emails allegedly found on his computer were put to him in the course of twenty interview sessions. The Gardaí also outlined to the applicant in the course of the very last interview with him a number of possible criminal charges that he was might face in Ireland as a result of his alleged conduct, but they also stated that a decision in regard to that would be a matter for the Director of Public Prosecutions. The possible offences mentioned were: (1) conspiracy to murder Lars Vilks, contrary to s. 71 of the Criminal Justice Act, 2006; (2) threatening to engage in terrorist activity, contrary to s. 6 of the Criminal Justice (Terrorist Offences) Act, 2005; (3) threatening to kill or cause serious harm to one Majed Moughni on the 9th January 2010, contrary to s. 5 of the Non-Fatal Offences Against the Person Act, 1997; (4) performing actions likely to stir up hatred, contrary to s. 2 of the Prohibition of Incitement to Hatred Act, 1989.

9. At the conclusion of his detention, the applicant was charged with an offence contrary to s. 13 of the Post Office (Amendment) Act 1951 as amended, namely that he did on the 9th January, 2010, send a message by telephone which was of a menacing character to Majed Moughni, and he was remanded in custody pending his trial. The applicant believes, and it has since been confirmed by counsel on behalf of the first named respondent, that a file was also sent to Director of Public Prosecutions. That file is believed by the applicant to have contained a recommendation or recommendations from An Garda Síochána that the applicant should be further charged with some or all of the offences put to him in his last interview in detention. While there is no direct evidence as to what recommendation(s) may have accompanied the said file, the applicant contends that the Court may infer from the contents of the last interview that the offences mentioned to the applicant were recommended as charges.

10. In November 2010 the applicant, anticipating possible further charges, initiated judicial review proceedings in the High Court seeking a declaration that s.29 (1) of the Offences against the State Act 1939 (as inserted by S.5 of the Criminal Law Act 1976) was repugnant to the Constitution, as it permitted a member of An Garda Síochána who had been actively involved in a criminal investigation to determine whether a search warrant should issue in relation to the said investigation. The applicant remained in custody on remand awaiting the outcome of the said proceedings, with a stay on the criminal charge pending against him.

11. A United States of America domestic warrant for the arrest of the applicant was issued on 16th November 2010 by a United States magistrate judge for the Eastern District of Pennsylvania. This warrant sought his arrest based upon a complaint filed against

the applicant in the Eastern District of Pennsylvania, alleging that he had conspired to create a terror cell in Europe and that he participated in the attempted theft of United States identity documents for use by a co-conspirator in Pakistan, in violation of Title 18, United States Code §§ 2339A and 1028.

12. On the 16th March, 2011 the Director of Public Prosecutions decided that no further charges should be preferred against the applicant in this jurisdiction.

13. On the 8th August 2011 the Minister for Justice and Equality introduced in Dáil Éireann the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011 (hereinafter "the Bill of 2011"). Section 25 of the Bill of 2011, as initiated, contained a proposed amendment to s. 15 of the Act of 1965 as amended, which proposal was ultimately enacted as s. 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, there having been no amendments to the relevant provision as the Bill of 2011 made its way through Dáil Éireann and Seanad Éireann, respectively.

14. On the 23rd February, 2012 the Supreme Court ruled that s..29 (1) of the Offences against the State Act 1939 (as inserted by s.5 of the Criminal Law Act 1976) was 'repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person'. See *Ali Charaf Damache v The D.P.P. and the A.G.* [2012] 2 I.R. 266. The consequence of this decision was that all evidence generated as a result of the search conducted on foot of the warrant granted by Detective Superintendent Dominic Hayes under s. 29 (1) of the Offences against the State Act 1939 (as inserted by S.5 of the Criminal Law Act 1976) was tainted and would be inadmissible in criminal proceedings against the applicant in Ireland, through operation of the exclusionary rule.

15. On the 24th July 2012, the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (hereinafter "the Act of 2012") was signed into law. Prior to the enactment of the Act of 2012, s. 15 of the Extradition Act 1965 (hereinafter the Act of 1965) had provided:

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

Section 27 of the Act of 2012 substituted for the former s.15 of the Act of 1965 the following:

> "15.— (1) Extradition shall not be granted for an offence which is also an offence under the law of the State if—
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> (a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings for the offence against the person claimed, or
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> (b) proceedings for the offence are pending in the State against the person claimed.
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> (2) Extradition may be refused by the Minister for an offence which is also an offence under the law of the State if the Director of Public Prosecutions or the Attorney General has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence."

16. On the 18th January 2013, Ireland received a request duly made by the United States of America and duly communicated by its embassy, seeking the applicant's extradition.

17. On the 15th February 2013 a warrant of arrest was issued by the High Court under s. 26 of the Act of 1965 as amended, authorising the arrest of the applicant.

18. On an unspecified date in February, 2013 the applicant pleaded guilty before Waterford Circuit Criminal Court to the charge still pending against him of sending a message of a menacing character by telephone contrary to s. 13 of the Post Office (Amendment) Act 1951 as amended. The applicant received a four year prison sentence in respect of this offence backdated to the date he went into custody.

19. On the 27th February 2013 the applicant was arrested in execution of the warrant of arrest issued in respect of him under s. 26 of the Act of 1965 as amended and was brought before the High Court.

20. By a notice of motion dated the 22nd July 2013 issued in the extradition proceedings pending before the High Court and entitled *The Attorney General v. Ali Charaf Damache* (Record No. 2013/51 EXT), the respondent in those proceedings (the applicant in the present proceedings) sought various reliefs including discovery of documents. Following a hearing spanning two days i.e. the 30th and 31st July 2013, this Court refused to grant the reliefs sought for the reasons set forth in my ex-tempore judgment of the 31st July 2013 – see *Attorney General v. Ali Charaf Damache* (High Court, Edwards J, *ex tempore*, 31st July 2013).

21. The first judicial review proceedings were commenced on the 6th September 2013. The High Court declined to deal with the matter *ex parte* and directed that the application should instead be brought upon notice to the respondents and the notice party herein. That was duly done.

22. On the 10th and 11th September 2013 the extradition proceedings entitled *The Attorney General -v- Ali Charaf Damache* (Record No. 2013/51 EXT) were opened before this honourable Court by counsel for the Attorney General and the Court was taken in detail through various necessary, but in this case uncontroversial, proofs; at the end of which the extradition proceedings were adjourned *sine die*, and on a part heard basis, pending the determination of the judicial review proceedings then pending.

23. Also, on the 11th September 2013 this Court commenced hearing the applicant's application for leave to apply for judicial review in the first judicial review proceedings, which hearing continued on the 12th September, 2013, and further continued on the 14th, 15th, 16th, 22nd and 23rd of October, 2013, at the end of which the Court reserved it's judgment.

24. It bears mentioning at this point that at the hearing on the 11th September, 2013, Mr Remy Farrell S.C., who with Ms Cathleen Noctor B.L. represents all of the respondents and the notice party in these proceedings, formally conveyed to the Court on behalf of the first name respondent, the Director of Public Prosecutions (hereinafter "the D.P.P."), in accordance with s. 4(3)(b) of the Prosecution of Offences Act 1974, for the purposes of s. 15 of the Act of 1965 as amended, that:

• the D.P.P is not considering whether or not to bring proceedings for the offences which are the subject of the extradition request as against the respondent;

• no proceedings are pending in respect of the said offences within the State as against the respondent.

Counsel for the respondents further informed the Court that a file had been received by the first named respondent from An Garda Siochána relating to the offences set out in the extradition request and that a direction was issued on the 16th May, 2011, that no prosecution would be brought. On the 28th January, 2014, this date was stated to be incorrect and that the actual date of the decision not to prosecute was the 16th March 2011.

25. By a six page letter dated the 21st October, 2013, the solicitor for the applicant wrote to the first named respondent making a number of requests on behalf of her client. While this letter, being a document of central importance in these proceedings, will be reproduced in its entirety later in this judgment, it should be indicated at this point that it requested, *inter alia*:

• [please confirm] whether or not fresh consideration was given to your decision of the 16lh May 2011, after you became aware of the intention of the United States to seek the extradition of Mr Damache?

• in the event that a reconsideration took place, but that there was no alteration of the original decision, we respectfully call upon you to give us the date of your decision not to alter the original decision and … the reasons for same?

• in case you are unaware of his [Mr Damache's] desire and need that you reconsider your decision, ….indicate if you would be agreeable to revisiting your decision not to proceed with a prosecution in Ireland?

• if you are not agreeable to revisiting your decision, please set out the reasons for same?

• 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?

26. Having heard nothing in response to her said letter of the 21st October 2013, the solicitor for the applicant sent a written reminder to the first named respondent on the 12th November 2013.

27. By a letter dated the 18th November 2013, the first named respondent wrote to the solicitor for the applicant indicating that "the matter is receiving attention".

28. Still not having heard anything further by the 22nd January 2014, the solicitor for the applicant sent yet another written reminder to the first named respondent on that date.

29. By a letter dated 28th January 2014 the first named respondent responded substantively to the applicant's solicitor's correspondence indicating, *inter alia*, that there had (up to that point) been no further consideration of the decision not to prosecute the applicant; that the original decision had been in accordance with the first named respondent's guidelines; that any decision taken by the United States authorities to prosecute or to seek to extradite the applicant was a matter for them; that any such decision would have had no bearing on the earlier decision of the first named respondent not to prosecute the applicant; and that the letter of the 21st October did not identify "any additional matters that would indicate that such consideration should now arise." Again, as this is also a document of central importance in these proceedings, it will be be reproduced in its entirety later in this judgment.

30. On the 31st January, 2014, this Court delivered its judgment in the first judicial review proceedings.

Affidavit Evidence on behalf of the Applicant.

31. In the first judicial review proceedings the Court received and took due account of the contents of a number of affidavits filed on behalf of the applicant, as well as the documents exhibited therewith. These were the affidavits of Caroline Egan, solicitor for the applicant, sworn on the 5th September 2013; on the 15th October 2013 and on the 16th October 2013, respectively. The applicant also relies on those affidavits in the present proceedings. The contents of the affidavits in question, and particularly the correspondence exhibited therewith, are rehearsed and described in some detail in this Court's judgment in the first judicial review proceedings. Accordingly, it is unnecessary to repeat them here.

32. In addition to relying on the affidavits mentioned, the applicant also seeks to rely upon a further affidavit of Ms Egan sworn in the present proceedings on the 24th February, 2014, exhibiting the correspondence exchanged between her and the first named respondent and referred to at paragraphs 24 to 28 above.

The Relevant Correspondence

33. The applicant's solicitor's letter of the 21st October 2013 was in the following terms:

"Dear Madam,

We write to you on behalf of our client Mr Ali Charaf Damache, calling upon you to reconsider your decision of the 16th May 2011 not to prosecute Mr Damache in respect of the offences for which his extradition is now sought by the United States of America.

We acknowledge the independent role of the Director of Public Prosecutions in our criminal justice system and we hope that, as Director, you are in a position to give consideration to the points made below on behalf of our client.

We have previously enquired of the Attorney General in the context of the Extradition proceedings by letter dated the 8th May 2013, whether you intended to prosecute Mr Damache in the event that he is not extradited. Unfortunately, no proper response was received to this request.

We have drawn your attention, in the Judicial Review papers served upon you on the 6lh September last, to undertakings given by Mr Damache that he would not oppose the use of video-link evidence in any prosecution against him in this jurisdiction and would not challenge a fresh decision to prosecute him as being an abuse of process or other such ground.

In the current Judicial review leave proceedings, permission was granted to Mr Damache to add an additional relief to the intended proceedings, seeking to quash the failure to reconsider your decision not to prosecute Mr Damache after the extradition request was made by the United States.

It would be artificial to suggest that we have not raised or drawn to your attention issues which would require reconsideration by your office of your initial decision. Accordingly, we respectfully call upon you now to confirm the following:

- *Whether or not fresh consideration was given to your decision of the 16'h May 2011, after you became aware of the intention of the United States to seek the extradition of Mr Damache.*

We mean no disrespect in stating that it is not accepted that your office was unaware of the intention to extradite Mr Damache prior to your decision of the 16l!l May 201 1. Regrettably, your office has refused to confirm or deny this. Indeed, it was not until after we had initiated Discovery and Judicial Review proceedings that we were finally advised of the date of the Director's initial decision. We do believe the long delay in informing our client of the Director's decision of 16th May 2011 is something which requires explanation on the part of your office.

It is instructive that the decision was taken only three days after the High Court had ruled that the search of Mr Damache's house was lawful. Accordingly, at that point, there was on the State's case a large amount of evidence available to the Director to prosecute Mr Damache, but your office nonetheless decided not to prosecute him. That would suggest the basis of the decision of 16lh May 2011 had nothing to do with the availability of evidence. With due respect, we find it extraordinary that your office was not already aware at that time of the intention of the United States to extradite him.

This was a joint investigation between both jurisdictions, ongoing for over a year and a half at that point, in respect of a major international conspiracy allegedly orchestrated from this country. We note your Office's close supervision of Mr Damache's progress from his arrest in March 2010 to his sentencing at Waterford Circuit Court in 2013. We believe the chronology is such that our client, and indeed the High Court, is entitled to ask: Is it conceivable that your office was not aware that a domestic warrant had already issued in the United States for Mr Damache's arrest? Is it possible that your office was unaware that Ms Colleen La Rose had already pleaded guilty, was a cooperating witness in the United States and would give evidence against Mr Damache if required?

It seems perfectly clear that the decision not to prosecute Mr Damache was not based on evidential grounds, since there was an abundance of admissible evidence here. Rather, it would appear to have been based on the expediency of delegating the case to the United States to prosecute, with Ms La Rose as their star witness. If this was so, and as contended in our client's judicial review papers, we suggest that the Director's decision was disproportionate and unfair to Mr Damache and therefore liable to be quashed.

It has been suggested that there is no onus on the Director to have regard to the effects of extradition on Mr Damache, but we refute this. We acknowledge that this is an issue to be dealt with by the High Court. The United States is rightly respected as a major democracy, but this does not mean that it would be of no consequence to be extradited there, rather than face justice in one's own jurisdiction. One cannot ignore the inadequacies and the harshness of aspects of their criminal justice system; the inordinate zeal with which they have they have prosecuted their 'war on terror'; and the international criticism that has resulted. If, as your Guidelines suggest, your officers can consider the effects of a potential prosecution on the accused person, why would such relevant considerations be excluded from your decision-making process?

- *In the event that a reconsideration took place, but that there was no alteration of the original decision, we respectfully call upon you to give us the date of your decision not to alter the original decision and to outline the reasons for same.*

In particular, we ask you to confirm whether the potential impact on Mr Damache of extradition and incarceration in the United States was taken into account; and whether these considerations were deemed to be relevant factors that could weigh in favour of prosecuting him in this jurisdiction instead.

- *On behalf of Mr Damache, and in case you are unaware of his desire and need that you reconsider your decision, we would ask you to immediately indicate if you would be agreeable to revisiting your decision not to proceed with a prosecution in Ireland. If you are not agreeable to revisiting your decision, please set out the reasons for same. If, having received this request, you require some time to consider your position, please so indicate and we will of course agree to same. As you will appreciate, the matter is urgent, so we will need you to give such indication immediately.*

In favour of prosecuting Mr Damache in Ireland, rather than delegating his prosecution to the United Stales, we rely *inter alia* on the matters set out in our pleadings for the Judicial Review application, previously served upon your office including the exhibited pleadings from the Extradition case and the Discovery application.

We rely, in particular, on the following:

These offences were allegedly committed in Ireland. The State has a duty to prosecute serious offences committed here, so as not to allow our jurisdiction to become a haven for similar offending in future.

Mr Damache is an Irish citizen and he has never set foot in the Requesting State. It is not alleged that he was targeting the Requesting State. As you are aware, seven people were arrested in Ireland and it is alleged that Ireland was to be a base of operations for attacking European targets.

As outlined, Mr Damache would undertake not to challenge a fresh decision to prosecute him in this jurisdiction. Furthermore, there is no difficulty with evidence being given by US witnesses by way of video-link. The Applicant undertakes not to oppose the use of any mutual assistance provisions or the use of video-link. There would appear to be

additional evidence available here, such as the potential testimony of Daniel Orsos, who gave evidence against Mr Damache at his Waterford trial.

If extradited, Mr Damache may face a sentencing regime which includes coercive plea-bargaining and the taking into account of unindicted conduct when sentencing. He will be held *incommunicado* pre-trial, under 'special administrative measures', in conditions which will significantly hamper his attempts to defend himself. In this regard, we rely on the testimony of a leading Federal Defence lawyer, Joshua Dratel, who has acted in many similar cases.

In addition, Mr Damache faces the prospect of being detained in horrendous prison conditions in the United Stales, including being held in complete solitary confinement for a period of years. The Requesting State has already declined the opportunity to deny that Mr Damache would be held at the ADX Prison in Colorado, where enhanced forms of solitary confinement are the norm.

We refer you to the expert report of Professor Laura Rovner, dealing with prison conditions in the ADX prison in Colorado and the exhibits thereto, particularly the exhibited report of the eminent Psychology Professor, Craig Haney, in relation to the effects of prolonged solitary confinement on prisoners. These materials are already in the possession of the Attorney General.

We note in passing that Mr Damache has been held in Irish prisons for over three and a half years, without the need for any such conditions. But he will undoubtedly be subjected to such conditions if extradited and convicted.

> • *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.*

If the Court and the Minister were able to address the issue of forum within the current extradition proceedings, as is routinely the case in the United Kingdom, they might conclude that it would be disproportionate to extradite in circumstances where Mr Damache could be tried in this jurisdiction. We note that under the new extradition regime in place by reason of S.27 of the 2012 Act, the Minister can refuse extradition notwithstanding that there has been a previous decision not to prosecute the extradition offences in this jurisdiction.

However, if the Court and Minister do not have your reasoning available to them, no such determination will be possible. We suggest, therefore, that a failure to provide your reasons in the context of the extradition proceedings would not only be unjust but also unlawful.

It is not unusual for a reconsideration of an earlier prosecutorial decision to take place during the course of a Judicial Review challenging the merits of that earlier decision. Indeed, you may recall that reconsideration of a decision not to prosecute was offered to the Applicant in the case of H(H) v DPP Unrep. High Court (Peart J.) 31 January 2012.

We suggest that it would be undesirable, and not an efficient use of court time and resources, if Mr Damache was required to issue further proceedings (solely for the purpose of challenging the on-going failure to revisit your 16th May 2011 decision after the leave application was commenced last September), some time after Judgment has been delivered by Edwards J in the current leave application.

We suggest that the most appropriate course is for you to indicate now whether you have revisited and reconsidered your decision not to prosecute Mr Damache and if you have done so, what the outcome is. Alternatively, as stated, if your office requires further time to consider the position, please so indicate. We are not unmindful of the workload pressures and draw on resources faced by your office. We would ask that you engage meaningfully with our client's correspondence. The issue has enormous implications for his position and for his future.

In the event that you fail to engage with this letter, we will take it as a refusal to reconsider the decision taken on the 16lh May 2011 and a refusal to entertain our client's other requests contained within this letter.

Yours faithfully,"

34. The substantive reply from the first named respondent to that letter, and dated the 28th January 2014, was in the following terms:

"Dear Madam,

I refer to your letter of 22 January 2014 and earlier correspondence.

I should first of all correct an error. The direction letter issued in this case on the 16 March 2011 not May as previously stated.

I note you refer to the long delay in notifying your client of that decision. You will of course be aware that this Office would not as a matter of course inform a suspect of a decision not to prosecute him. This would be a matter for the Garda Siochana. If of course a suspect had written to this Office we would confirm the decision made in his case. While your client did write on a number of occasions to this Office we are not aware of any enquiry by him in relation to a decision to prosecute or not to prosecute him.

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.

Yours faithfully"

Grounds Upon Which Relief is to be Sought

35. The draft "Statement Required to Ground Application for Judicial Review" identifies the grounds upon which the specified relief will be sought in the event of this Court granting the applicant leave to apply for the said relief by way of judicial review. These run to 32 paragraphs as follows:

> 1. On the 21st October 2013, a letter was sent by the Applicant's solicitor to the First Named Respondent, requesting that she reconsider the decision taken on the 16th March 2011 not to prosecute the Applicant in respect of certain offences which later became the subject of an extradition request by the United States. An expert report with multiple exhibits was sent with the letter, in respect of prison conditions at a Federal Prison, ADX Colorado, where the Applicant is likely to be held if he is extradited to the United States and convicted there.
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> 2. A substantive response to this request was sent on the 28th January 2014 from the Office of the First Named Respondent and received on the 31st January 2014. As would appear there from, the First Named Respondent has not reversed her 16th March 2011 decision and has, in fact, refused to reconsider it at all.
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> 3. The First Named Respondent has asserted that the intended extradition of the Applicant is irrelevant to the prosecutorial function that she performed in March 2011. It would appear, therefore, that no consideration has been given by her to the changed circumstances brought about by the extradition request made by the United States. It is also denied therein that the material forwarded by the Applicant ought to have led to a reconsideration of the decision taken by First Named Respondent in March 2011.
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> 4. In the replying letter of the 28th January 2014, the First Named Respondent contends that *'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'*. It would appear, therefore, that the First Named Respondent denies that forum conveniens is a relevant consideration for her when considering whether or not to prosecute an individual who is also sought by another Jurisdiction. The implication of this statement is that the First Named Respondent rejects that proposition that the rationale of her original decision needs to be reassessed, based on the potential new considerations arising from an extradition request.
>
> 5. The original March 2011 decision, as with any decision of the First Named Respondent, must have been based on evidential grounds, on public interest grounds or on a combination of both. The First Named Respondent seems to contend, however, that these considerations were to be assessed solely on the limited grounds expressly set out in her Guidelines. Irrelevant issues such as *forum conveniens* and the impact of extradition on the individual concerned did not and could not have been considered, either then or now.
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> 6. In the learned Judgment of Edwards J, refusing leave in the previous proposed judicial review proceedings, it was held that as a matter of fact, there was no evidence of knowledge on the part of the First Named Respondent of the intention of the United States to prosecute the Applicant. Therefore, there could have been no knowledge on the part of the First Named Respondent of the allegedly probative evidence in the possession of the United States authorities; nor any weighing of whether it was more appropriate to prosecute the Applicant in Ireland rather than the United States.
>
> 7. It is submitted that if the original decision was made on evidential grounds and the First Named Respondent was indeed unaware of the intention to seek extradition, then there now arises a duty on the First Named Respondent to reconsider her March 2011 decision in light of the new circumstances. More broadly, it is submitted, if Section 15 of the 1965 Extradition Act as amended is designed to allow the First Named Respondent first refusal on a prosecution, it is insufficient that her Office would merely check whether they had made a previous decision in respect of an individual sought for extradition and then notify the Third Named Respondent of the outcome of that previous decision.
>
> 8. Instead, as the Applicant herein asserts, and as Walsh J put it in *State (McCormack) v Curran* 1987 ILRM 225 at p.238.:
>
> > *'The enforcement of the law of this State and the prosecution and punishment of the perpetrators of criminal acts within this jurisdiction must be given precedence over the actual or constructive surrender of such persons to another jurisdiction for the same or any other crime and it is the duty of the appropriate prosecuting authority to act accordingly'*
>
> 9. It is submitted that under such a clear duty, the First Named Respondent ought to have reassessed her earlier decision in light of the new developments since the extradition request was made and in light of the Applicant's submissions to her on the 21st October 2013.
>
> 10. If the March 2011 decision was based on a lack of evidence, there must be considerable significance to the fact that the United States now appears to have evidence in their possession which shows *probable* cause that the Applicant is guilty of offences *identical* to those investigated in Ireland: sufficient relevance, it is submitted, to at least merit a fresh assessment by the First Named Respondent.
>
> 11. It has always been contended by the Applicant that the decision of First Named Respondent taken in March 2011 was made in the full knowledge that the Requesting State intended to seek the Applicant's extradition. Notwithstanding the finding of fact to the contrary in the learned Judgment of Edwards J, it is respectfully submitted that it is extremely unlikely that this decision was made on evidential grounds simpliciter. There was an abundance of evidence available to An Garda Siochána at that time, as is set out in the affidavits and exhibits in the previous proposed judicial review application.
>
> 12. It is contended on behalf of the Applicant that the March 2011 decision of the First Named Respondent was simply, and in substance, to let the United States prosecute the Applicant; for reasons that the First Named Respondent thought

proper, but without having had regard to the full range of relevant factors including the impact on the Applicant.

13. On this analysis, *forum conveniens* was in fact considered in March 2011, albeit only in a partial way and with an unfair and unsatisfactory outcome. It is for this reason that the Applicant has claimed that the said decision was unreasonable and that it ought to be quashed. If this proposition is accepted, then the assertion in the replying letter that the extradition request could have *'no bearing on the earlier decision'* should be construed as a reference to the fact that forum had already been considered, albeit in a summary way, in March 2011 and that the United States had been deemed the appropriate forum. Accordingly, in the view of the First Named Respondent, there was nothing new to consider arising from the extradition request.

14. The First Named Respondent advises the Applicant's solicitor in her replying letter *'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'*. The Applicant denies that there is any merit to the claim of the First Named Respondent that there is nothing in the Applicant's letter or in the material sent with it that would warrant a reconsideration.

15. Since the extradition request had already been deemed irrelevant by the First Named Respondent, a review of the material furnished, whether it was cursory in nature or exhaustive, could only have resulted in the March 2011 decision remaining unaltered. In such cirucmstances, the new material furnished by the Applicant could not be properly considered in the context for which it was intended. In the circumstances, the denial of material's significance in the replying letter would appear to be have been included merely as a 'saver'.

16. The First Named Respondent has failed to properly engage with the material furnished and has acted unreasonably in so doing. If however, contrary to the position apparently taken in the replying letter, the First Named Respondent recognised that she had a duty to assess whether she should prosecute the Applicant having regard to the potential impact of extradition upon him, then it was unreasonable for her to conclude that the material *'does not provide any additional matters that would indicate that such reconsideration should not arise'*. At a minimum, it is submitted, the said letter and materials disclosed a *prima facie* basis to conclude that proper consideration and a full engagement with the issues was required.

17. It is submitted that given the unsatisfactory and troubling nature of the reply by the First Named Respondent, a duty to provide the reasons for her refusal to reconsider her March 2011 decision now arises. The stated rationale of the First Named Respondent not to reconsider her decision would amount, on its face, to a clear and unequivocal renunciation of the duty referred to by Walsh J in *McCormack v Curran*.

18. In support of the need for reasons to be provided, there is now evidence that the First Named Respondent has denied the relevance of material that would appear to be highly relevant and has unreasonably concluded that the legitimate matters raised by the Applicant were not worthy of full consideration.

19. The First Named Respondent has erred in concluding that she has no function to consider issues of forum and, it would appear, that there was no onus on her to consider whether the original basis for her 2011 decision still stood, having regard to developments in respect of evidential matters and potential public interest issues. Accordingly, there is evidence that the First Named Respondent has abdicated her responsibility and applied a policy that was predicated on a significant error as to the ambit of her function and duty.

20. While it might be argued that the First Named Respondent could have reconsidered the matters arising from the extradition request and from the Applicant's submissions and to have come to the conclusion that she still should not prosecute as it was more appropriate for the United States to do so, it is submitted that her response evinces a complete lack of engagement with these important issues.

21. The Applicant acknowledges that if a significant breach of his constitutional and Convention rights in the Requesting State was apprehended by this Honourable Court, it would refuse extradition. In addition, extradition would be refused if there was a clear breach of requirements of our Extradition law, such as breach of speciality requirements.

22. In extradition proceedings however, the Court will sometimes have to rely, despite lingering concerns, on the presumption that the Requesting State will uphold the rights of the extradited person. Such trust in the *bona fides* of the Requesting State is at the root of the principle of comity in extradition proceedings. It also reflects the concern that to refuse extradition might be a disproportionate result, having regard to the public interest that crime be detected and punished.

23. Some cases involving a breach of constitutional and Convention rights are borderline in nature. It is clear that from European Court of Human Rights perspective, a breach of Convention rights will not automatically result in the refusal of extradition. Although this Honourable Court in the decisions of *AG v Martin*, unrep Edwards J, 2nd October 2012 and *AG v O'Gara*, unrep, Edwards J, 1st May 2012 rejected a general relativist approach to assessing Article 3 breaches in the context of extradition, it noted the comments of the European Court of Human Rights in *Harkins and Edwards v The United Kingdom* [2012] 55 E.H.R.R. 19 which were also reproduced in full in the subsequent case of *Babar Ahmad & Ors v United Kingdom*, Judgment of the 4th Section of ECtHR of the 10th April 2012:

> *177....' this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case.'*

24. *Babar Ahmad* is a decision which has a direct relevance to the Applicant's case, as the Applicant may face imprisonment in the same facility referred to therein, ADX Colorado, if he is extradited. The arguments about conditions made in *Babar Ahmad* were ultimately rejected, despite the concerns and misgivings of both the Domestic UK Courts and the European Court of Human Rights. It would appear to be implicit in the said judgment that the extreme gravity of the offences alleged and the consequences of non-extradition were important factors in deciding that the otherwise deplorable conditions alleged did not meet the threshold for a refusal of extradition on Article 3 grounds.

25. Accordingly, it can be seen that the refusal to reconsider the decision by the First Named Respondent not to

prosecute makes extradition a more likely outcome, as it leaves to the Court and the Minister for Justice the unappealing option of refusing to extradite and, thereby, to grant immunity to an individual suspected of committing offences of the highest order of gravity. It is artificial to suggest that a decision of the First Named Respondent not to prosecute is merely, or not even, a step in the extradition process. It is submitted that having regard to the provisions of S.27 of the 2012 Act, the First Named Respondent should have weighed all of the relevant factors in light of the fact that the Applicant could be extradited in the event that the First Named Respondent decided not to prosecute him.

26. The decision of the First Named Respondent not to prosecute and her refusal to reconsider this decision both fail a proportionality test and are unreasonable; as they expose the Applicant to extradition to another jurisdiction where his constitutional and Convention rights would clearly receive less protection, and in circumstances where there was and is sufficient evidence to put the Applicant on trial here without excessive cost or difficulty for the First Named Respondent. In this regard, Section 3 of the European Convention on Human Rights Act 2003 enjoins the organs of State, including the First Named Respondent, to carry out their functions in a manner which is compatible with the State's obligations under Articles 3, 5 & 8 of the European Convention on Human Rights.

27. The First Named Respondent cannot assert that the consequences of extradition for the Applicant were not within its function to consider. If the First Named Respondent has not considered the consequences of not prosecuting the Applicant, there will be no opportunity at any stage of the extradition process to properly weigh the issue of appropriate forum. Moreover, under the test set out in *Babar Ahmad*, once the decision not to prosecute has been taken, the potential impact on the rights of the individual concerned will have be weighed against the fact that the human rights issue arises in an extradition context, as opposed to a domestic one; and with regard to the corresponding need for trust in the *bona fides* of the Requesting State despite the concerns that may still exist.

28. In order that S.27 of the 2012 Act might be operated in a constitutional manner, it may also in be necessary for the First Named Respondent to ensure that forum issues are addressed properly by her, since otherwise *forum conveniens* would never be properly considered at any stage of the process.

29. Under the extradition procedure as envisaged in the judgment of Edwards J in the previous proposed proceedings, only the Minister for Justice can consider the issue of the appropriate forum, but after the decision not to prosecute has been taken and after the Court has concluded that extradition was not prohibited on human rights grounds. In reality, there may be nothing left to consider at that point.

30. The Minister would have little choice but to extradite, in order to prevent a person charged with a serious offence from gaining immunity from prosecution. The issue arises as to how the Minister and the Applicant could possibly address the forum issue at that point, if neither has an understanding of how the decision of the First Named Respondent was reached in the first place; of why the impact of the extradition request on the rationale for original decision was discounted without further consideration and of why the human rights concerns raised were deemed to be either irrelevant or else *prima facie* insufficient to warrant full consideration.

31. For this reason, it is contended that the failure of the First Named Respondent to give reasons for the decision not to prosecute the Applicant and the failure to provide reasons for the refusal to reconsider both amounted to a breach of the Applicant's right to fair procedures as protected by Article 40.3 of the Constitution. The absence of reasons will unduly hinder the Applicant's right of access to the Courts and to an effective remedy, as protected by Article 38.1 of the Constitution and 13 of the European Convention on Human Rights respectively.

32. In summary, it can be seen that there are very significant harmful consequences for the Applicant arising from the failure of the First Named Respondent to consider the issue of *forum conveniens*, to assess whether the rationale of the original decision still stands or to have regard to the impact of extradition upon the Applicant. It is respectfully submitted that it was unreasonable and disproportionate, given the consequences of her original decision not to prosecute the Applicant, for the First Named Respondent not to have given fresh consideration to such matters and not to have concluded, upon so considering, that she ought to direct a prosecution of the Applicant in this jurisdiction.

Threshold for the Granting of Leave

36. There is no controversy as between the parties as to the applicable law which is well settled. The threshold to be met by an applicant for leave to apply for judicial review was considered in detail in the case of *G. v The Director of Public Prosecutions* [1994] 1 IR 374 at p.377, Finlay C.J., stated:

> "An applicant must satisfy the Court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:
>
> (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).
>
> (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.
>
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.
>
> (d) That the application has been made promptly and in any event within the three months or six months time limits provided for in Order 84, r.21(1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the *ex parte* application satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with rule 21(1) were subsequently not established the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should consider leave as a specific issue to the hearing, upon notice to the respondent the question of compliance with the requirements of promptness and of the time limits.

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

37. The applicant is therefore required to establish that he has made out a stateable case or an arguable case in law. This initial process was described by Lord Diplock in *R. v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] A.C. 617 at pp. 643-644 where he stated:-

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

38. In the present case the High Court directed that this application for leave should be brought on notice. In *Agbonlahor v Minister for Justice, Equality and Law Reform* [2007] 1 I.L.R.M. 58 the High Court held that, even though the application was made on notice, the test remained one of arguability.

39. In *D.C. v The Director of Public Prosecutions* [2005] 4 IR 281 the Supreme Court confirmed that the applicable threshold, even in an on-notice leave application, is that of arguability. Denham J. (at p. 289) spoke against "the danger of developing a multiplicity of different approaches" and proceeded to apply the arguability test notwithstanding that the application was on notice to the Director of Public Prosecutions.

40. Finally, it has been urged by counsel for the applicant, and the Court accepts, that it should bear in mind that the standard for obtaining leave has been described as "light" (by Denham J in *G. v The Director of Public Prosecutions* [1994] 1 IR 374 at 381); and that it should also bear in mind the purpose behind the filter that the leave procedure represents. In regard to the latter, it is noted that Denham J. further observed in *G. v The Director of Public Prosecutions* (at p. 382) that the aim of the "preliminary process of leave to apply for judicial review... is... to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily".

Submissions and legal argument

41. In the present proceedings the parties were content to rely upon their written legal submissions filed in the first judicial review proceedings as to the jurisprudence applicable to the various matters in controversy, and merely to present oral arguments as to how, having regard to the evidence now before the Court, that jurisprudence ought to be applied in this case. As the written submissions hereinbefore referred to are rehearsed in great detail in this Court's judgment in the first judicial review proceedings (vide *Damache v. Director Public Prosecutions and others* [2014] IEHC 114 (Unreported, High Court, Edwards J, 31st of January 2014)), it is unnecessary to repeat them in this judgment. The Court will refer, where necessary, to counsel's arguments in the course of its determination of the issues on this leave application.

The Court's Analysis

42. As a sovereign nation Ireland operates a police and criminal justice system. It has criminal courts in which persons accused of crimes, in respect of which the State claims jurisdiction to prosecute, may be prosecuted and, if convicted, sentenced. Like most countries, Ireland claims criminal jurisdiction primarily according to the territoriality principle. There are of course some exceptions to this but it is unnecessary to consider them for present purposes.

43. In the case of most indictable crimes occurring within the territory of the State, again with a few exceptions irrelevant for present purposes, the decision as to whether or not the suspected perpetrator should be prosecuted is conferred by the Prosecution of Offences Act, 1974 exclusively upon the first named respondent. The first named respondent is an officer of the State who is entirely independent of government and, to a large extent, of the courts.

44. Although the first named respondent has the decision making power, in most cases, with respect to whether or not a person will be prosecuted on indictment before the Irish courts, she enjoys considerable discretion in that regard. There is no rule that everyone known or suspected to have committed a criminal offence should be prosecuted. It has simply never been the law that every suspected offence must be prosecuted. Moreover, even where prosecution is considered appropriate there is no rule requiring the first named respondent to prefer the most serious charge that the available evidence might support.

45. The courts have traditionally shown great respect for prosecutorial discretion and are generally disinclined to interfere with it save in exceptional circumstances. Possibly the clearest enunciations of this in recent times are to be found within the judgments in *State (McCormack) -v- Curran & Ors* [1987] ILRM 225; *H -v- Director of Public Prosecutions* [1994] 2 I.R. 589 and Eviston –v- Director of Public Prosecutions [2002] 3 IR 260, all of which were reviewed in some detail in my judgment in the first judicial review proceedings.

46. In particular, in *State (McCormack) -v- Curran & Ors* Finlay C.J stated at p 237:

> "In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court."

47. The point was reiterated by Keane C.J. in *Eviston –v- Director of Public Prosecutions* where he remarked at p. 294:

> "It is an important feature of the decisions in the *State (McCormack) v. Curran* [1987] I.L.R.M. 225 and *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589 that, in each case, the court was concerned with (a) a decision not to prosecute in a particular case and (b) a challenge to the merits of that decision. The decisions, accordingly, go no further than saying that the courts will not interfere with the decision of the respondent not to prosecute where:-
>
> (a) no *prima facie* case of *mala fides* has been made out against the respondent;

(b) there is no evidence from which it could be inferred that he has abdicated his functions or been improperly motivated; and

(c) the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the person concerned.

They also make it clear that, in such circumstances, the respondent cannot be called upon to explain his decision or to give the reasons for it or the sources of the information upon which it is based."

48. Both in the present application, and in the first judicial review proceedings, it was strongly urged upon this Court that it would be erroneous to regard the Supreme Court as having set out, in *State (McCormack) -v- Curran & Ors*, a comprehensive and exhaustive list of the grounds on which a decision of the D.P.P. might be challenged. I have already expressed the view that that very limited point is certainly an arguable one in so far as it goes.

49. It was acknowledged by counsel on behalf of the applicant in the first judicial review proceedings that there is no "right to be prosecuted", whether in Ireland or elsewhere, known to Irish law.

50. Much reliance was placed in the present case upon the following passage from the judgment of Walsh J in *State (McCormack) -v- Curran & Ors* [1987] ILRM 225 at p. 238:

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

51. The applicant relies upon this passage in support of his contention that, while he accepts that he has no "right" to be prosecuted, now that the United States is seeking his extradition with a view to prosecuting him in their federal courts, the first named respondent owes him a duty to reconsider her decision not to prosecute him in this jurisdiction. He further insists that this duty arises because, a decision that he is not to be prosecuted in this jurisdiction, in circumstances where he is now the subject of an actual extradition request, leaves open, by virtue of the amendment effected to s. 15 of the Act of 1965 as amended, by s. 27 of the Act of 2012, the possibility that he might in fact be extradited and that therefore renders him an "affected person". He further contends that in any reconsideration of her decision the first named respondent would, in circumstances where the applicant is now the subject of an actual extradition request, be obliged to take account of what his counsel characterises as "forum considerations". These are understood by the Court to refer to those considerations bearing on where a case might be heard most suitably for the interests of all the parties and the ends of justice, in circumstances where there is more than one forum available in which it might be heard.

52. I consider that the applicant's said contentions are based upon unsound reasoning for the following reasons.

53. It certainly used to be the position that if a case was capable of being prosecuted in Ireland because it was regarded under the law of the State as having been committed in the State, that was a total bar to extradition. To correctly characterise it, s. 15 of the Act of 1965 as amended, which so provided, created a "territoriality bar". That territoriality bar was in place when the first named respondent took her decision of the 16th March, 2011. In circumstances where the applicant could not be extradited on the basis of the law as it stood at that time, the first named respondent could never have been concerned with the possibility that the applicant might be tried abroad. The law as it was simply did not allow for it. Section 15 of the Act of 1965 as amended made it impossible for Ireland to yield jurisdiction in the matter to the United States.

54. It was for this reason that, in my judgment in the first judicial review proceedings, I characterised the first named respondent's decision of the 16th March, 2011 as being entirely beneficial to the applicant. It meant that he would not have to face trial in Ireland for the offences in question. Moreover, that was in circumstances where the law as it then was also precluded his extradition to any other state to face trial for the same offences. It was, and remains, my view that the first named respondent was under no obligation to furnish reasons to the beneficiary of an entirely favourable decision, and that no arguable ground to the contrary had, or has since, been advanced.

55. The legislative landscape has been altered by the recent amendment to s. 15 of the Act of 1965 as amended. It is now the position that the absolute territoriality bar is gone. The position is now that where there is a concurrency of possible jurisdiction between this State and a requesting state, extradition may be possible if the Director of Public Prosecutions has decided either not to institute, or to terminate, proceedings in this jurisdiction against the person concerned. This Court held in the first judicial review proceedings that, in practical terms, this means as follows:

"…the DPP is given a right of first refusal on prosecution where the offences are regarded as having been committed in the state and the offender is also wanted for prosecution for the same offences in another state, which has requested, or it is anticipated may request, that person's extradition. The DPP does not get to choose as between potential fora in which an offender might be prosecuted. The position now is that where a decision is made by the DPP to prosecute for the same offences as those comprising an extradition request, this amounts to a total bar on surrender under s 15(1)(b) of the Act of 1965 as amended. However, even if the DPP decides not to prosecute that does not have the automatic effect of clearing the way for the offender's extradition. On the contrary, it is then up to the Minister to decide whether or not to extradite the offender."

(Although nothing turns on it, to have been comprehensive, the Court should perhaps have also explicitly acknowledged that s. 15(1)(a) of the Act of 1965 as amended provides for a temporary bar to extradition where the first named respondent is considering a possible prosecution, but has not yet made any decision.)

56. It seems to this Court that in circumstances of concurrency of jurisdiction, where a decision to prosecute in Ireland would operate to bar any possible extradition, an arguable case can be made that the first named respondent has a duty to at least consider possibly prosecuting the person concerned in Ireland. The applicant would certainly have had an arguable basis for complaint if that had never occurred. However, in this case the first named respondent did consider prosecuting him in Ireland, and decided against doing so. Moreover, this Court has already held in the first judicial review proceedings that no arguable case had been advanced to suggest that that decision was irrational. Nothing further has been put forward in regard to that in the present proceedings, and the Court remains of the view that there is no basis for challenging the decision of the 16th March 2011.

57. It is further contended, however, on behalf of the applicant that the change in the law renders it incumbent on the first named respondent to reconsider her decision not to prosecute the applicant. I do not consider that that is so, because the mere fact that the absolute territoriality bar to extradition has been replaced by a more limited bar arising only where the Director of Public Prosecutions has decided to prosecute for the same offences as those comprising an extradition request could not conceivably have any implications for the validity or rationality of the original decision by the first named respondent not to prosecute the applicant, or in itself provide a basis for a reconsideration of that decision. If it was not considered appropriate to prosecute the applicant in this jurisdiction at a time when trying him in Ireland was the only conceivable means by which he might be brought to justice, the case for trying him in Ireland could hardly be said to have improved by virtue of a legislative change that would still operate to bar his extradition in the event of a different decision now being taken.

58. Moreover, it is quite simply a non sequitur to suggest that the mere fact that the applicant is now the subject of an extradition request, and might in fact be extradited if the decision not to prosecute him were to remain the same, could in and of itself, and without more, justify reconsideration of the original decision. On the contrary, it would be wholly improper for the Director of Public Prosecutions to direct a prosecution now just to assist the requested person in avoiding extradition. Consistent with this, the letter of the 28th January, 2014, asserts that "*[a]ny 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*" ; and in the circumstances of this particular case treats the fact of an extradition request having been received since the original decision was made as irrelevant to whether or not there should be a reconsideration.

59. Apart from the change in the legislative landscape, and the fact that since the original decision a request has actually been received for the applicant's extradition to the United States, the applicant has not been able to demonstrate, or to bring to the attention of the first named respondent, the existence of any new or changed circumstances.

60. The letter of the 28th January, 2014, indicates that the first named respondent has in fact refused to reconsider her decision not to prosecute the applicant.

61. In circumstances where nothing has been advanced tending to foreclose upon the reasonable possibility that the first named respondent has made a proper and valid decision not to reconsider her decision not to prosecute the applicant, it is well settled law that she cannot be compelled to explain her decision

62. Be that as it may, and although under no legal obligation to offer any explanation, the first named respondent has in fact furnished some explanation in the penultimate paragraph of her letter of the 28th February, 2014, where it is stated that "*[y]our letter* [i.e., Ms Egan's letter of the 21st October 2013] *does not provide any additional matters that would indicate that such reconsideration should now arise*." In circumstances where it is clear that the matters put forward by Ms Egan were indeed considered, and it was concluded that they added nothing in the way of new or changed circumstances bearing on the correctness of the original decision, there is simply no basis for arguing that the refusal to reconsider was irrational or unreasonable in any respect, or that it was an abdication of duty.

63. It cannot be gainsaid that any person facing prosecution is, by virtue of the circumstances in which they find themselves, likely to be labouring under a heavy burden of worry, anxiety and uncertainty as to their fate. It also cannot be gainsaid that that burden is likely to be significantly greater and harder to bear where such a person, being an Irish citizen, resident in Ireland, faces extradition to another country for the purposes of being prosecuted there. Quite clearly, these were not considerations that the first named respondent could, on any view, have been obliged to have regard to when making her decision of the 16th March 2011. Extradition of the applicant was simply not a possibility and so any consideration of "forum issues" would have been entirely otiose at that point. The applicant seeks to argue that by virtue of the change in the law "forum issues" are no longer otiose and are in fact potentially relevant in any case of concurrent jurisdiction where the extradition of a suspect is actually being sought, or it is reasonably to be anticipated could yet be sought, by another state. That being so, says the applicant, he is entitled to a reconsideration of the decision not to prosecute in his case that takes account of "forum issues".

64. In the Court's view the case that the applicant seeks leave to make is unarguable for the following reasons.

65. The Court recognises that in the new legislative landscape forum considerations might potentially have some relevance in the first named respondent's decision making process in certain cases. However, it is very important to fully appreciate the dynamic in which that might occur, and the significant limitations involved.

66. The first named respondent does not in law enjoy any choice of forum as between the courts of separate states with concurrent jurisdiction. Her range of decision, and the extent of her discretion, is either to prosecute or not to prosecute in this jurisdiction.

67. Before directing a prosecution in this State the D.P.P. must be satisfied that there is a *prima facie* case against the suspect based on credible and reliable evidence, that it is in the public interest to prosecute in this State, and that the necessary evidence is either in her possession or will be available and forthcoming at the trial. If all of these requirements are met the first named respondent has no choice. Her duty is to prosecute in this jurisdiction. That duty was what Walsh J. was referring to in the quotation from the *State (McCormack) -v- Curran & Ors* [1987] ILRM 225 reproduced at paragraph 42 above, and upon which the applicant has placed some reliance.

68. Accordingly, it would be wholly wrong of the first named respondent to refuse to prosecute a suspect in Ireland simply because in her view the courts of another state that happened to be requesting, or it was anticipated might yet request, the extradition of the suspect, represented the *forum conveniens*.

69. Having said that, however, some forum considerations could in theory impact on at least some of the requirements of which the first named respondent must be satisfied before she would be regarded as being subject to a duty to prosecute - particularly the public interest requirement, and the availability of evidence requirement. Whether they would in fact do so and, if so, in what way, is a matter to be assessed by the first named respondent in considering her decision in any particular case.

70. Be that as it may, in the present case it is simply not open to the applicant to argue that the first named respondent should be required to reconsider her decision so as to take account of forum considerations, because in this Court's view they could never inure to the benefit of this particular applicant. The first named respondent has decided as far back as the 16th March, 2011, that a domestic prosecution would not be appropriate. For the reasons already stated, whatever the reasons for that particular decision might have been, forum considerations could not have been a factor at that time because of the territoriality bar that then existed. Even if the decision taken on the 16th March, 2011, were now to be reconsidered in the light of forum considerations such matters could not conceivably tip the scales in favour of a domestic prosecution at this point. If it was not appropriate to prosecute the

applicant in Ireland when his extradition was not possible, for example by reason of insufficient public interest, the mere fact that there is now a possibility that he could face extradition after all could not in any way change that. If there was not enough evidence to render it appropriate to prosecute the applicant in Ireland on the 16th March, 2011, the mere fact that he might now end up being tried elsewhere is not going to change that. Even if the first named respondent regarded the courts of the requesting state as being very definitely a *forum non conveniens*, the mere possibility that the applicant might be extradited to face trial in those courts unless he was prosecuted in this state would not, in and of itself, justify her in reversing her earlier decision that it was not appropriate to prosecute the applicant in Ireland.

71. Finally, the point requires to be made that the applicant may himself be able to raise forum issues in certain circumstances within the context of his extradition case. In that regard it is appropriate to re-iterate the view expressed in this Court's judgment in the first judicial review proceedings that while Irish law does not provide for a general forum bar that can be raised before an Irish court for the purpose of opposing an extradition, it is theoretically possible to raise forum considerations before an Irish court on the basis that they are collateral to, and relevant in the context of, some other recognised potential bar to extradition.

72. For example, a requested person could seek to make a case that the consequences of his or her extradition would be so profound and far reaching in that person's particular circumstances as to breach the family rights guaranteed under Article 41 of the Constitution and/or the right to respect for family life guaranteed under Article 8 E.C.H.R. It is well established that the High Court would not be justified in making a committal order under s. 29 of the Act of 1965 as amended if it is of the opinion that the extradition of the requested person would involve a breach of any of that individual's personal rights as guaranteed under the Constitution of Ireland, or that it would be incompatible with this State's obligations to him/her as guaranteed under the European Convention on Human Rights. If a case such as that in the hypothetical example just postulated was raised before this Court, it would be incumbent on the person raising it to satisfy the Court that the proposed extradition measure, would, if carried into effect, and notwithstanding any legitimate aim being pursued, constitute a disproportionate interference with the person's said rights, thereby giving rise to the breaches apprehended. It is easy enough to appreciate that *forum non conveniens* type considerations might, in some such cases, have a bearing on whether the proposed extradition measure would be regarded as proportionate or disproportionate having regard to the legitimate aim being pursued. However, fundamental rights issues, when raised as a possible bar to extradition, are a matter for the Courts, and possibly the Minister. They will never be a relevant concern for the D.P.P. who has no direct role in regard to extradition.

73. For all of these reasons, I do not consider that the applicant has met the arguability threshold that he must meet in order to be granted leave to apply for judicial review on any of the grounds that he has proposed. I therefore refuse this application for leave to apply for judicial review.