COURT OF APPEAL

Neutral Citation Number: [2016] IECA 374

RECORD NUMBER: 642/2015

PEART J.
BIRMINGHAM J.
SHEEHAN J.
BETWEEN:

THE ATTORNEY GENERAL

RESPONDENT/APPLICANT

AND

ERIC EOIN MARQUES

APPELLANT/RESPONDENT

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12th DAY OF DECEMBER 2016:

1. This appeal is against the order made on the 16th December, 2015, by Ms. Justice Donnelly under s. 29 of the Extradition Act, 1965, as amended ("the Act of 1965") whereby she ordered that the appellant be committed to prison to await the order of the Minister for Justice for his extradition, as provided therein.

2. When the application for his extradition came before the High Court, the Appellant raised a considerable number of issues by way of opposition to the Application. However, while there are many grounds of appeal contained in the notice of appeal itself, just a single ground is now relied upon.

3. That single ground essentially is that, if he is extradited, and if he is convicted by a court in the State of Maryland, he will be exposed to a sentencing regime there which, in a particular respect, would be unconstitutional here. That regime has been described in affidavits by US attorney, Joshua L. Dratel, who swore three affidavits on the appellant's behalf in the High Court, as being one where the judge upon a conviction is entitled to, and in fact is obliged to, take account of other uncharged conduct of the convicted person, as well as conduct of which he has been in fact acquitted, and to do so on the basis that such conduct is proven on a standard which he describes as "the preponderance of the evidence test" in other words a test which equates to the civil standard here, namely the balance of probability, rather than the more exacting criminal standard of beyond a reasonable doubt.

4. The appellant submits that to be punished in this manner in respect of either such acquitted conduct, or other conduct not proven to a criminal standard of proof is such a fundamental breach of his constitutional rights, and such a flagrant denial of justice, that his extradition ought to have been refused so that these fundamental rights are protected and vindicated. He submits that the trial judge erred by failing to have proper regard to the egregious nature of the regime to which he will be exposed if extradited and acquitted, as deposed to by Mr. Dratel.

5. I will come to the trial judge's conclusions on that issue in due course, but before I do so, I will refer to some of what is deposed to by Mr. Dratel.

6. In his first affidavit, Mr. Dratel deals with a number of issues, but at part D thereof he deals with the sentencing regime to which the appellant will be subject if extradited and convicted of the offences for which is extradition is sought. He describes the applicable Sentencing Guidelines where numerical values are assigned to conduct and other factors which will influence the trial judge to either increase or decrease the ultimate sentence to be imposed in order to arrive at the appropriate sentence for the offence and for the particular offender.

7. He goes on to describe how the apparently mandatory nature of the Guidelines was ameliorated by the US Supreme Court decision in *United States v. Booker* 543 U.S. 220 (2005) when it ruled that thereafter, the Guidelines would be advisory only, and that sentencing would be governed by the entirety of 18 USC, ss. 3553 (a) which sets out seven factors to be taken into account by a sentencing court, one of which is "the kinds of sentence and the sentencing range established" under the Guidelines. In practice, he states, the sentencing process will commence by correctly calculating the applicable guideline range for the offence. There can then be "variances" from the guideline sentence, but these must be objectively justified by reason to "articulable criteria" and must ensure that the justification for such variance is sufficiently compelling.

8. Mr. Dratel continues at paragraph 61 of his affidavit to state that the appellant "would most likely, if convicted, receive a sentence within his applicable guideline range …" and that "such a sentence would survive challenge on appeal", and that "a guideline sentence is the default position". He refers also to the fact that the charges facing the appellant carry both the minimum sentence of 15 years and a maximum sentence of 30 years. He goes on to state that "absent a motion authorising the court to impose a sentence below the statutory minimum, the appellant faces a mandatory 15 year prison sentence after conviction, regardless of his applicable guidelines range, of which he will be required to serve 13 years, allowing for good conduct time. He expresses his view also in this affidavit that the guideline sentences are based on the offence and not the character of the offender, and that in his experience most District Courts consider the guidelines to be "paramount almost to the exclusion of other s. 3553(a) factors". He supports that statement with statistics. As for the guideline range for the extradition offences alleged against the appellant, he carries out a calculation of the likely guideline sentence in the event that he is convicted of those offences.

9. In that regard, he states that the "base offence level" is 22 which, under the guidelines, would increase to 24 because of the nature of the pornographic materials at issue in this case. He goes on to say that if the prosecution maintained that the motivation

for the offences was monetary gain, the level would increase to 29 at a minimum. In addition, he states that the nature of the pornographic material (i.e. portraying sadistic or masochistic conduct or other depictions of violence) would again raise the level by 4 levels to 33. He deposes also that the offences probably involve a computer and 600 or more images, which in turn would raise the offence level to 35. Finally states that if the criminal activity qualifies for the enhancements for pecuniary gain the level would again increased to 38, and further to 39 if that financial gain were to be proven to exceed $30,000. In addition, he states, there could be an additional raising of the level from 39 by either 2 or 4 levels if the appellant was found to be an organiser, leader, manager or supervisor of the criminal activity, and where the number of participants in the activity is 5 or more.

10. Mr. Dratel goes on to state that a timely plea of guilty could merit a 2 or 3 level reduction. Importantly for the appellant's submission on this appeal, he deposes at paragraph 82 of his first affidavit that in determining the applicability of any adjustments, the sentencing court must take into account all relevant conduct, which includes the conduct of co-conspirators were that conduct was reasonably foreseeable. Importantly also, he deposes at paragraph 85 thereof that in deciding on the sentence to be imposed the sentencing court can consider uncharged conduct or even acquitted conduct, and that the burden of proof in that regard is by a preponderance of the evidence, enabling the sentencing court to find liability even though a jury has failed to find the evidence sufficient beyond a reasonable doubt.

11. Mr. Dratel's view, according to his first affidavit, is that given the lower burden of proof upon the prosecution in relation to uncharged conduct and acquitted conduct, as well as the fact that the normal trial rules of evidence do not apply at the sentence hearing, making it possible for the admission of hearsay and documentary evidence which is not amenable to cross-examination, a defendant's rights at sentencing are "substantially reduced".

12. When calculating what the likely sentence for the appellant would be, taking into account the matters to which he has referred, Mr. Dratel commences by saying that the minimum sentence level is likely to be 35 (i.e. before the end enhancements to which he has referred are applied), but reduced to 32 if there is a timely plea of guilty. That would in his opinion result in a calculated sentence of between 121 – 151 months (*i.e.* between 10 years, 1 month and 12 years, 7 months). But in such circumstances, even before any enhancements are applied, he would be subject to the statutory minimum sentence of 15 years, unless the prosecution moved by motion for a reduction based on the appellant's "substantial assistance".

13. It is deposed also that if the enhancements to which he has referred were applied (which are based on proof "by a preponderance of evidence") then that would result in a sentence of 235 to 293 months under the guidelines (*i.e.* between 19 years, 7 months, and 24 years, 5 months), these being still below the possible statutory maximum of 30 years for the offences. He states that while the sentences for each offence can be ordered to be served concurrently, there is provision for discretion by judges to order consecutive sentences in order to, for example, reflect the seriousness or heinous nature of the crime or the strong risk of recidivism by the offender.

14. Finally, in his affidavit Mr. Dratel states that as a consequence, even if the appellant was convicted on only the two offences for which there is a statutory minimum of 20 years, these could be ordered to run consecutively resulting in a possible 40 year sentence of imprisonment.

15. In his second affidavit, Mr. Dratel expands upon the aspect of the sentencing regime already referred to in relation to the taking into account all relevant conduct by the use of a lower standard of proof, including uncharged conduct, acquitted conduct, the conduct of co-conspirators, and the risk of double counting where the same conduct can be taken into account under different headings of enhancement, and he gives examples of cases where this has occurred in his experience.

16. A replying affidavit was filed on behalf of the Attorney General. This affidavit is sworn by Keith A. Becker who is employed by the United States Department of Justice as an Assistant United States Attorney for the District of Colombia from 2005 until 2010 and thereafter as a Trial Attorney for the United States Department of Justice, Criminal Division, Child Exploitation and Obscenity Section from 2010 to the present date. In his affidavit, he does not take much issue with what Mr. Dratel has stated as to the method of sentence calculation under the sentence guidelines. However, he states that much of the basis on which Mr. Dratel calculates the length of sentence and the basis for the enhancement of sentence under the guidelines is based on pure speculation as to what evidence will not be adduced as part of the prosecution evidence at trial, and therefore evidence which will form part of what the jury will have reached a conclusion upon under the criminal standard, namely beyond a reasonable doubt, before the jury could reach any verdict of guilty (if they were to do so), or therefore what evidence would be adduced only at a sentence hearing in order to ground an argument for enhancement of the guideline sentence and proved to the lower standard of the preponderance of the evidence.

17. In Mr. Becker's view, Mr. Dratel's opinion as to the likely sentence in the case, either after a trial, or on foot of a guilty plea, is purely speculative, and in those circumstances, it is submitted, it cannot form the basis of a conclusion by the Court that the appellant is at a real risk of a breach of this fundamental rights and/or a denial of justice in the event that he is extradited to face trial.

18 At the heart of the appellant's case is the inviolability of the principle that a person is presumed innocent of alleged conduct until it is proven beyond a reasonable doubt that he is guilty. In the High Court the appellant relied, inter alia, upon the judgment of the Court of Criminal Appeal in People (DPP) v. Gilligan (No.2) [2004] 3 IR 87 and, in particular upon the statement of principle referred to therein as having been identified by Lord Bingham of Cornhill in R v. Kidd [1998] 1 WLR 604 in the following way at pp. 606-607 when he stated:

> *"The issue may be expressed as follows: if a defendant is indicted and convicted on a count charging him with criminal conduct of a specified kind on a single specified occasion or on a single occasion within a specified period, and such conduct is said by the prosecution to be representative of other criminal conduct of the same kind on other occasions not the subject of any other count in the indictment, may the court take account of such other conduct so as to increase the sentence it imposes if the defendant does not admit the commission of other offences and does not ask the court to take them into consideration when passing sentence?"*

As noted by the trial judge, Lord Bingham answered this question in the following terms at p. 607:

> *"A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see Reg. v. Anderson (Keith) [1978] A.C. 964. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to*

admit.

It is said that the trial judge, in the light of the jury's verdict, can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the instances specified in individual counts. But this, as it was put in Reg. v. Huchison [1972] 1 W.L.R. 398,.400 is to deprive the appellant of his right to trial by jury in respect of the other alleged offences. Unless such other offences are admitted, such deprivation cannot in our view be consistent with principle."

19. Having expressed her agreement with this statement of principle, and having noted that while counsel for the Attorney General did not seem to take issue with it as being a clear and correct statement of principle he nevertheless had submitted that the sentencing court was entitled to have regard to the overall evidence of the activities of an accused in determining the gravity of the individual charges in respect of which he has been convicted, and *that "in the present case, he points to the fact that the offences took place over a period of some 28 months, that there was clear evidence that these offences were part of organised crime and that indeed the applicant was closely involved in the organisation and that he would appear to have been motivated purely by greed"*.

20. On this particular point she concluded at p.15 of her judgment as follows:

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

21. The Attorney General argued, as noted by the trial judge at para. 5.27 of her judgment, that even in this jurisdiction a wide variety of factors are taken into account by a sentencing judge, and she referred to *People (DPP) v. Loving* [2006] 3 IR 355 in which the Court of Criminal Appeal stated at para. 27 *"the task of the courts is, following the guidance given by the Oireachtas, to measure the seriousness of individual cases, and to fix appropriate penalties"*. The trial judge noted also the Attorney General's submission that "there was no universally knowledge or accepted rule that uncharged or acquitted conduct could not be taken into account as part of the sentencing process", and her reliance on what is stated by Prof. O'Malley in para. 31.12 of the 2nd edition of his work on *Sentencing Law and Practice* where the author notes the differences in approach in terms of the standard and the burden of proof in relation to fact-finding during the sentencing process.

22. Before setting out her conclusions, the trial judge referred to her own decision in Attorney General v. Damache where she stated that "it was necessary for the respondent to establish, on substantial grounds, that he was at real risk of having his sentence enhanced on the basis of any of the impugned categories of relevant, uncharged or acquitted conduct", and that "to establish real risk there must be evidence amounting to more than mere speculation".

23. In her consideration of "relevant conduct" which the appellant complains will be taken into account in calculating any sentence which he may face, if extradited and convicted, the trial judge referred to *People (DPP) v. Gilligan (No. 2)* [2004] 3 IR 87 where the Court of Criminal Appeal stated that *"the court in looking at each individual conviction, is entitled to, and indeed possibly bound to, take into consideration the facts and circumstances surrounding that conviction"*. She went on at paras. 5.31 and 5.32 to state:

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

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

24. The trial judge went on to consider a matter which she stated caused her "some concern", and that was the extent to which the relevant conduct to be taken into consideration in relation to an enhancement of sentence would include that the appellant had earned in excess of $30,000 from the criminal activity. In so far as the amount alleged to have been earned is not part of the information which is provided in the request for extradition, that information could still be provided at the sentencing hearing and proven by the lower standard of proof. However she went on to consider whether it is an egregious breach of fundamental rights to apply that lower standard of proof to relevant matters at a sentencing hearing, constituting a real risk of a flagrant denial of justice.

25. In reaching her conclusion that it would not amount to a real risk of a flagrant denial of justice, the trial judge noted that at sentencing the court is not deciding guilt or innocence, but rather what is the appropriate sentence. In so far as the appellant had argued the presumption of innocence by reference to case law, she noted that all the cases on which he had relied were in the context of a trial and not a sentence hearing. She went on to note that none of the cases to which she had been referred *"demonstrate a universal requirement that all matters at sentencing be determined on the basis of a beyond reasonable doubt standard"*. At paras. 5.37 to 5.40 of her judgment she concludes on the question of the lower standard of proof, as follows:

"5.37 In this jurisdiction, it is highly likely that the court would approach contested matters of relevant fact,

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

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

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

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

26. Having thus concluded, the trial judge then considered whether the prospect of uncharged and/or acquitted conduct being used for the purpose of sentencing was such an egregious breach of fundamental rights that it would amount to a denial of justice such that extradition should be refused. She did not accept that the affidavit evidence adduced by the appellant removed completely the necessary dividing line between sentencing for other offences and taking into account the surrounding circumstances which could include evidence of other offences. She referred to the affidavit of Mr. Becker who had indicated that such conduct is but one factor, along with many others, that the court must consider in exercising its discretion when arriving at an appropriate sentence. She expressed herself as satisfied that *"the sentence that would be imposed on conviction would not be for that other conduct but would be for the offence for which there has been a conviction"*. She reiterated that the sentencing court at the sentencing stage is not determining guilt or innocence on that other charged conduct, and she drew a parallel between the way in which these matters are dealt with in this jurisdiction when surrounding circumstances are taken into account. The trial judge concluded that she was *"not satisfied that there is a universal requirement that, where uncharged conduct is taken into account in determining the appropriate sentence for an offence for which a person has been found guilty, that the conduct can only be taken into account when proven beyond reasonable doubt"*.

27. the appellant, if convicted, she reached a similar conclusion, namely that such acquitted conduct *"is a factor which a judge may consider amongst others, in exercising his or her discretion to determine the appropriate sentence"* and *that "that fact does not of itself establish that there are substantial grounds for believing that [the appellant] is at real risk of having his sentence increased on such a basis."*

28. The trial judge went on then to address the appellant's submission, which was grounded upon Mr. Dratel's affidavit evidence, in relation to what is referred to as "the reality of jury compromise" where the jury might ignore the jury instructions and engage in a process of compromise so that verdicts contrary to the evidence are reached. The trial judge, in my view correctly, rejected these submissions on the basis that such a scenario was based on pure conjecture and speculation, and cannot amount to the establishment of substantial grounds for a real risk that he will be sentenced for acquitted conduct. The trial judge was also satisfied that on the facts of this case, based on the allegations being made against the appellant, there were *"no substantial grounds for believing that there is a real risk of being acquitted on one offence and not the others"*. In other words, she was satisfied that given the nature of these particular offences, there was no reality to the prospect that the jury might convicting on one charge or more than one, but not all charges, and therefore that the perceived risk expressed by him that he could be sentenced by reference to conduct of which he was acquitted lacked reality, and therefore could not provide the basis for the establishment of a real risk.

29. The trial judge also rejected the contention put forward by the appellant that under the applicable sentencing regime which the appellant would face, if extradited, the sentencing judge was not merely entitled to take into account uncharged and acquitted conduct, but was bound to do so. That contention had been put forward on the basis of some affidavit evidence by Mr. Dratel. Mr. Becker, however, in his affidavit had disagreed. In this regard, the trial judge stated at para. 5.49:-

"Moreover, I am satisfied that the evidence of Mr. Becker establishes that there is no requirement for a court to enhance or increase a sentence on the basis of acquitted conduct. The court cannot categorically exclude such conduct from its consideration. However, the acquitted conduct will be one factor amongst many others that a

court may consider in determining the appropriate sentence. In the particular circumstances of this case, the combination of factors demonstrate that nothing more than the mere possibility of having acquitted conduct taken into account in sentencing has been established. Therefore on this basis also, [the appellant] has not satisfied the test that there are substantial grounds for believing that he is at real risk of having his sentence enhanced or increased on the basis of acquitted conduct".

Appellant's submissions:
30. In submissions to this Court, counsel for the appellant submits that the evidence as to the sentencing regime in the U.S. is largely uncontradicted by affidavit of Mr. Becker, and in such circumstances the appellant has established a real and substantial risk of a flagrant denial of justice if extradited. Counsel accepts that the test is whether he has established a real risk of a flagrant denial of justice and submits that he has met that test.

31. The appellant's case is essentially that if extradited the sentence which will be imposed must be calculated in accordance with the sentence guidelines, and accordingly that the sentencing judge will take into account not only other conduct of the appellant besides that which forms the subject of the indictment and with which he has not been charged and the conduct or involvement of co-conspirators, but also the matter of financial gain, for the purposes of enhancing the sentence which is considered appropriate to impose, and that all these matters can be established at the sentence hearing on the basis of the lower standard of proof, namely the preponderance of evidence. In addition, it is submitted that it is undisputed that as deposed to by Mr. Dratel, the normal rules of evidence at a criminal trial do not apply at a sentencing hearing, and that this permits the admission of hearsay and unproven documentary evidence. These matters are submitted to constitute such an egregious breach of fundamental rights of due process that they amount to a flagrant denial of justice.

32. It is submitted that this regime which Mr. Dratel has described breaches not only Irish norms of due process but international norms, and counsel has referred to case law from Australia and Canada as well as from the ECtHR. It is accepted by the appellant that the mere fact that the regime differs from that which pertains in this jurisdiction would not provide a sufficient basis for refusing extradition, but he emphasises the submission that it breaches international norms as well.

33. The appellant accepts that there is nothing objectionable in a sentencing judge taking account of surrounding circumstances, but submits that there is a fine line which must never be crossed between taking such circumstances into account when sentencing on the one hand, and imposing a sentence which takes account of, and thereby punishes unconvicted conduct on the other. Counsel has referred to a number of cases in support of this submission, but it suffices to refer to one such, namely that of Macken J. in *DPP v. Wayne O'Donoghue* [2007] 2 I.R. 336 where she referred to the "definitive" approach to this question as enunciated by McCracken J. in *People (DPP) v. Gilligan* [2004] 3 I.R. 87. She stated in paras. 41-42:-

> *"While the facts and the possible 'other' charges in the latter case were quite different to those which might have arose [sic] in the present case, the difficulties which a sentencing judge faces in balancing the overall context of the crime against the undesirability of sentencing for matters which could have been the subject of a charge but were not … cannot be overstated. The above considered approach of the Court of Criminal Appeal is the definitive approach proposed, and it has been followed by this court in at least one subsequent decision.*
>
> *While a sentencing judge may validly take into account appropriate surrounding circumstances, even those of a cover-up, nevertheless, if, as the above jurisprudence recommends, a sentencing judge must scrupulously respect the appropriate dividing line, he cannot be criticised for doing so in the present case, especially when, on the face of the judgement he has not been blinkered as to the surrounding facts and the cover-up has in any event been taken into account as part of the impact of the death on the boy's family."*

34. Counsel submits that in the present case, that dividing line between what is permissible in regard to taking into account surrounding circumstances and what is not is obliterated on the facts of the present case as averred to by Mr. Dratel where those circumstances will be taken into account but, where disputed, on the basis of a probability rather than beyond a reasonable doubt. In effect the appellant faces being punished for conduct proven only to the civil standard, and that this is unacceptable both in this jurisdiction and by reference to international norms.

35. In answer to the proposition that if the appellant is correct in what he submits there could never be an extradition to the U.S since all convicted persons would face the same sentencing regime, counsel says that such a vista should not deter this Court from viewing the matter from a purely objective standpoint, and if this proven prospect represents such an egregious breach of international norms of due process as to present a substantial and real risk of a flagrant breach of fundamental rights, then so be it, and extradition should be refused, regardless of any wider effect on extradition requests from that jurisdiction.

36. As far as unconvicted conduct is concerned, the main focus of the appellant's submission is upon that part of the trial judge's judgment to which reference has already been made, namely the enhancement which is mandated by reference to whether or not the appellant has gained financially from the offences with which he is charged, and the fact that this may be proven on the preponderance of the evidence test. The trial judge was satisfied that the appellant had established a real risk that if convicted he stood liable to an enhancement on the basis that he had gained financially from the activity. However, she went on to conclude that this did not represent so egregious a matter as to amount to a flagrant denial of justice. I have already referred to her conclusions in this regard at paras. 24-25 above. While focussing his argument on the enhancement by reason of financial gain, the appellant nevertheless relies on the prospect of other uncharged conduct being taken account of also on the basis of proof on that lower test.

Attorney General's submissions:
37. Counsel for the Attorney General submits that the appellant has failed to reach the very high threshold which he must overcome if he is to successfully resist his extradition on the basis advanced. He submits that the appellant has correctly stated the nature of that test as being to demonstrate that the breach of his rights which alleges will occur if he is extradited is of such an egregious nature that it constitutes a real risk that there will be "a flagrant denial of justice". Counsel emphasises that the appellant's task is to establish "a real risk" and therefore not one based on speculation. He emphasises also that "a flagrant denial of justice" will require very extreme facts indeed before it can be established, which is reflected in the fact that in more than two decades since the judgment of the ECtHR in *Soering v. United Kingdom* [1989] 11 EHRR 439, there has not been a single case where the Court has found a violation of Article 6 rights has been established. In *Soering*, while the Court found that the extradition of a German national to the United States to face charges of capital murder would violate Art. 3 (inhuman and degrading treatment) largely because of the length of time that Mr. Soering would have to stressful experience on 'death row', the fact that he would be unable to obtain legal representation in the State of Virginia for his defence since there was no legal aid scheme in that state, was not such a flagrant denial of a fair trial under Art. 6 as to require that extradition be refused.

38. Counsel submits first of all that much of what the appellant fears will happen if extradition is based on pure speculation, given that this is not a case where he has been convicted already and is just facing a sentence hearing. Rather, this is a case where, unless he pleads guilty, he will have a trial, and he does not make any complaint that any such trial itself will amount to a flagrant denial of justice. In other words, before he is convicted the prosecution will have to prove its case beyond a reasonable doubt, as would be the case in this jurisdiction.

39. It is submitted also that where that trial has not taken place, the appellant cannot prejudge what the prosecution's evidence will be. Counsel has emphasised that it cannot be presumed that the extent of the prosecution's evidence will be what is contained in the request for extradition. That submission is relevant to the complaint made by the appellant that the sentencing judge is entitled to take account of uncharged conduct, and in particular in that regard the fact that there could be an enhancement of his sentence by reason of financial gain being proven at sentence hearing on the preponderance of evidence test since there is no allegation of financial gain contained within the request for extradition.

40. Counsel has submitted also that the fact that sentencing in the United States proceeds on a basis which is different to that which pertains in this jurisdiction, or indeed might be found to be unconstitutional, is not a sufficient basis for a finding that it constitutes such an egregious breach of fundamental rights as to amount to "a flagrant denial of justice" justifying a refusal of extradition.

41. In so far as the appellant submitted that the sentencing regime described by Mr. Dratel breached not just the national norm in this jurisdiction but also international norms, Counsel submits that this is not so, and that there is no international norm which emerges from any of the case law to which the applicant has referred, or indeed any known case law. In this regard counsel has referred to Irish Supreme Court and Court of Appeal case law, and to certain cases from the European Court of Human Rights, and he submits that nowhere is there any suggestion that there is an international norm, as it is put by the appellant, that at a sentence hearing all contested factual matters, particularly those which relate to aggravating factors, must be proven beyond a reasonable doubt. Counsel has referred, as did the trial judge, to the fact that at sentencing hearings in this jurisdiction the sentencing will impose a sentence which takes account of all the surrounding facts and circumstances so that sentence is not imposed in a vacuum, and that not everything will be proven as they would be in the trial itself for the purpose of a conviction. Counsel accepts, as stated by Macken J. in *DPP v. Wayne O'Donoghue* that there is a fine line in this regard which the judge must be careful not to cross, but that is to be distinguished from saying that there are no circumstances in which the surrounding facts cannot be taken account of in arriving at the appropriate sentence even where not all those facts are proven beyond a reasonable doubt.

Conclusions:
42. I agree with counsel for the Attorney General that the apprehensions expressed by the appellant in his submissions are based on speculation as to what may happen if he is extradited to face the charges set forth in the request for extradition. His apprehension that, when calculating the appropriate sentence under the applicable Guidelines, the sentencing judge will take account of uncharged conduct, or at least conduct that is not included within the facts giving rise to the extradition offences as these appear in the request for extradition, is based on a speculation that only those facts which are contained in the request will be proven at trial. That of course cannot be assumed. It is not possible for example to say at this stage that the prosecution case at trial will not lead evidence of financial gain from the alleged criminal activity of the appellant. I venture to suggest that it would be highly unlikely that this sort of evidence would not be included as part of the prosecution's case, particularly given the sort of evidence that was given at the appellant's bail hearing which included evidence of bank accounts, and a statement by one F.B.I. officer that the appellant was the largest distributor of child pornography on the planet. If that sort of evidence is available at his trial it will be part of what is before the jury for its consideration. If the jury convicts, that evidence will be assumed to have been accepted and to have therefore been proven beyond a reasonable doubt. Given the nature of any jury verdict it is impossible to know what evidence the jury may not have found to have been proven beyond a reasonable doubt in arriving at its overall verdict of guilty. It is also not possible to speculate as to what facts would be the agreed facts for the purposes of any guilty plea that the appellant may decide to offer if extradited.

43. In so far as the appellant fears that his sentence will be enhanced by reference to uncharged conduct, specifically by reference to him having made a financial gain from the criminal activity if convicted, that fear is entirely speculative, and cannot amount to a substantial or real risk of unfairness such that his extradition should be refused. On that basis alone I would reject the submission.

44. I will come in due course to the appropriate test, namely that of egregious circumstances such that there will be a flagrant denial of justice. But for the moment I would just add that even if the element of speculation to which I have just referred was absent from this case, the possibility that the appellant might be sentenced on the basis of uncharged conduct, such as financial gain, and that this element could be proven at sentencing on the basis of the preponderance of the evidence rather than beyond a reasonable doubt, falls well short of the sort of egregious circumstance which is necessary before it will be considered to constitute a flagrant denial of justice. The fact that it could not happen in this jurisdiction is not the yardstick by which it is to be measured.

45. Similarly, his fear that his sentence will be enhanced by reference to the uncharged or unconvicted actions of his co-conspirators, proven on the basis of the preponderance of the evidence, is also entirely speculative and, similarly, cannot constitute a real risk of unfairness.

46. The appellant fears also that if he is convicted on, say, two of the charges contained in the request, but acquitted on the remaining two charges, the latter acquitted charges will come back into the reckoning at the sentence hearing because the conduct alleged against him on those charges and of which he has been acquitted will be taken account of in the calculation of sentence, and also proven on the lower test. Again, this is also to indulge in speculation as to what may happen. I would have to say also however, as has been submitted by the Attorney General, that given the nature of the charges it would seem unlikely that if he was convicted on, say, two of the charges, he could be acquitted on the remaining two. However, this type of speculation as to what may happen at trial is insufficient to demonstrate a real risk of unfairness, let alone a flagrant denial of justice, and I will come to that test shortly.

47. Let us suppose for a moment that the Court was satisfied that what the appellant fears will happen is factually based and considered as a probability, and not based on mere speculation. I will look at that in two parts; firstly, whether per se there is anything egregious about taking into account all the surrounding facts and circumstances, over and above what has been proven at trial, when arriving at an appropriate sentence; and if not, then secondly whether to do so on the basis of a standard of proof below the criminal standard of beyond a reasonable doubt renders it egregious. In relation to the term 'egregious' I take that to mean what the Concise Oxford Dictionary defines it as, namely 'outstandingly bad or shocking'.

48. As to the first part, as noted already, counsel for the Attorney General has referred to the judgment of Macken J. in *DPP v. Wayne O'Donoghue*. That certainly makes clear that such surrounding facts and circumstances may be taken into account as part of the sentencing process, while acknowledging that there is a fine line between what is allowed and what is a step too far. But in an

extradition context it is worth also noting what Murray C.J. stated in his judgment (ex tempore) in *Attorney General v. Russell*, unreported, Supreme Court, 13th October 2006. In that case Mr. Russell contended that the term "punished" referred to in Art. 11 of the Extradition Treaty between this state and the United States must be taken as having a special meaning to the effect that a court sentencing 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, because, to do so, would be contrary to the rule of specialty. That is a slightly different argument to the argument made in the present case because it was made by reference to the rule of specialty. Nevertheless, what is stated by Murray C.J. in his judgment rejecting that submission has some relevance to the issue argued in the present case. In this regard he stated:

> *"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 'sentence, 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 charge with an offence or sentenced for an offence other than that for which the extradition has been ordered by the High Court.*
>
> *Neither is it 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. For example, when a Court takes into account previous convictions when imposing a sentence, I do not take the view, contrary to what [counsel] has argued, that it is punishment once again for those offences; it is in fact taking into account material factors which enable the trial judge to determine the appropriate sentence for a particular offence in the circumstances of the particular case. That equally applies to the kind of conduct of an accused which, it has been accepted, could be taken into account when imposing sentence. That is the conduct which is germane to the circumstances of the offence. It is quite clear from the findings of fact of the learned High Court judge and the material before the Court, but the sentencing of the respondent, should he in fact be convicted, will 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."*

49. I take note of the particular context in which those remarks are made, namely an argument related to specialty. But it supports also my conclusion that in this case there is nothing objectionable about the prospect that if extradited and convicted of the offences, other matters comprising the general circumstances in which the offences were committed may be taken into account at sentencing.

50. The next question, as I have said, is the broader question whether it is objectionable that such additional matters should be taken into account when proven only on the preponderance of the evidence. Is that of itself something so egregious that it constitutes a real risk of a flagrant denial of justice? In my view it does not.

51. This broader question is at the heart of the appellant's submissions. It is submitted that it is contrary not just to a national norm here, but to international norms, that a person would be punished on the basis of conduct proven to that lower standard. It is submitted that it would be constitutionally impermissible in this jurisdiction, and also that it would breach the guarantee of fairness within Art. 6 of the European Convention on Human Rights. The appellant is supported in this regard by submissions made by counsel for the Amicus Curiae. The Attorney General argues that there is no such internationally recognised norm, and that this is clear from the jurisprudence of the ECtHR.

52. The test as to whether a practice or procedure in relation to sentencing, or more generally in relation to a fair trial, is so egregious that it amounts to a real risk of a flagrant denial of justice is a very high test. It will be met only in the most exceptional and clear circumstances, as is evidenced by the fact that in the 27 years or so since that court's judgment in *Soering* there has been no case in which the facts were found to reach the accepted threshold of being a "flagrant denial of justice". In *Soering* itself, extradition was refused on the basis of Art. 13 of the Convention, but not because of any apprehended and prospective breach of Art. 6. The argument made under Art. 6 was based on the fact that if Soering was extradited he would not be able to secure legal representation to defend against a charge for which the potential sentence was the death penalty, since there was no legal aid scheme in the state of Virginia. The Court ruled as follows at para. 113:-

> *"The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk."*

53. Among the unenumerated rights under Art. 40.3 of the Constitution is the right to fair procedures which in turn assists the fulfilment of the guarantee of a trial on any criminal charge in due course of law under Art. 38.1. In her judgment in *D v. DPP* [1994] 2 I.R. 465 at p. 474 Denham J. (as she then was) stated:

> *"The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right".*

54. The right to a fair trial is a fundamental right which is recognised internationally. In extradition proceedings, or in applications for surrender under the European arrest warrant, this right will be engaged where the requested person raises an issue as to the fairness of the procedures to which he will be subjected if he is extradited to face a criminal trial or sentence hearing. Nevertheless it is clear that there is a very high threshold to be overcome before extradition will be refused because of some apprehended or alleged feature of the trial procedure in the requesting state will lead to a refusal of extradition. It will be only in some exceptional circumstances that such will occur.

55. Criminal procedures will inevitably differ from country to country. For example, not every member state of the European Union has a jury trial for criminal offences. In some states their rules of evidence may be different. This does not mean that a fair trial as that phrase must be understood is not possible. It does not mean that because an Irish citizen is sought for prosecution by such a state under a European arrest warrant, for example, his surrender must be refused under s. 37 of European Arrest Warrant Act, 2003, as amended, because he will be exposed to a criminal trial that would not pass constitutional muster in this country. Fennelly J. in his judgment in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 I.R. 669 stated the following at p. 690:

> *"The learned trial judge was mistaken in seeking parity of criminal procedure in the issuing Member State. It is apparent that, even under the long-established extradition jurisprudence, as it applied between some Member States prior to 2004, and, as it still applies between this country and third countries, such a comparison was not required. Extradition does not demand that there be parity of criminal procedures between contracting states. It*

is notorious that criminal procedures vary enormously between states. Indeed, it is obvious that they approximate much more closely between this country and the United Kingdom than between either of those states and the great majority of Member States practising the civil law system, where, for example, there is no tradition of cross-examination of the sort practised in our courts, and which is here regarded as totally fundamental to the rights of the defence."

56. In his judgment in *Minister for Justice v. Brennan* [2007] 3 I.R. 732 (which predates Stapleton) Murray C.J. albeit in a European arrest warrant case and not a request under Part II of the Act of 1965, had to consider this topic in the context of a mandatory minimum sentence that would be imposed upon the requested person if he was convicted for the offence of escaping from lawful custody following his surrender to the United Kingdom – a sentence that would, in denial of his rights under the Constitution, not take account of the particular circumstances of the case, including the accused person's personal circumstances, so as to ensure that the sentence would be a proportionate sentence. At page 743, Murray C.J. stated:

"35. There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.

36. However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.

37. The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37 (1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.

38. Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.

39. The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as are Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the ground that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

40. That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37 (2) of the Act."

57. More recently in *Minister for Justice and Equality v. Balmer* [2016] IESC 25, O'Donnell J. had to consider a case where Mr Balmer's surrender to the United Kingdom was sought on foot of a European arrest warrant so that he could be brought back to prison to serve the remainder of a life sentence for murder, he having been released on licence after the punitive or tariff element of his sentence had been served. It was clear on the facts of the case that having served that element of the sentence, the remaining element was preventive detention only. Accordingly, it was contended that surrender would constitute a contravention of the Constitution, as well as being incompatible with the European Convention on Human Rights on the basis that the procedures under the law of the United Kingdom did not provide for any hearing before a licence was revoked and the person recalled to prison.

58. O'Donnell J. stated at para. 18:-

"The facts in this case focus the issue with particular clarity, since it is clear that Mr. Balmer, if returned to custody, would be in detention as determined by the assessment of his risk to the public."

59. Having so stated, he went on to state that if Mr. Balmer was correct it would appear difficult to surrender any person to the United Kingdom if charged with murder. In that regard he stated:

"This is obviously of enormous practical importance, but at a broader level, the case is also important because it requires further consideration of an important conceptual question in relation to the extent and nature of the intersection between the guarantees contained in the Irish Constitution and matters occurring abroad pursuant to the laws of states with whom this country has made agreements, whether directly, or indirectly as a consequence of membership of the European Union."

60. Having noted that Mr. Balmer was arguing firstly that the remaining period to be served in prison was preventive detention only, and secondly that this regime could not be introduced in this country because it would be incompatible with the Constitution, he went on to describe the third argument. In that regard he stated at para. 19:-

> *"Third, it is argued that, while it must be conceded, in the light of Minister for Justice, Equality and Law Reform v. Brennan [2007] 3 I.R., 732 and Nottinghamshire County Council v. B [2013] 4 I.R. 662, that an Irish court is not precluded from ordering the surrender of a person to a country which does not have the same constitutionally protected trial system as Ireland, such as for example jury trial for non-minor offences, nevertheless, the prohibition on preventive detention flows from the presumption of innocence, which is a fundamental value of universal application, as found by the judgement of the High Court in Nolan. Accordingly, it was argued that surrender in this case is precluded by s. 37(1)(b) of the EAW Act 2003."*

61. In his judgment, Fennelly J. referred to the judgment of Edwards J. in *Minister for Justice and Equality v. Shannon* [2012] IEHC 91 where he rejected a contention that due to the fact that the prosecution would be entitled to introduce evidence of the respondent's previous convictions in a trial after surrender, the court should refuse to surrender him under s. 37(1)(b) of the EAW Act. In his judgment, Edwards J. stated:

> *"[This argument is] fundamentally misconceived because it asks the Court to engage in a completely artificial, and indeed inappropriate, exercise and that is to exercise a supposed jurisdiction that is premised on the application of the Constitution to the laws of England and Wales and to pore over the issuing state's criminal justice process to determine, as the court is invited to do, that it differs in different respects from what is constitutionally mandated in this jurisdiction. In this Court's view, it is clear from the Supreme Court judgements both in Minister for Justice, Equality and Law Reform v. Brennan, and in Minister for Justice, Equality and Law Reform v. Stapleton that to do so would be entirely inappropriate."*

62. In *Balmer*, Fennelly J. went on to refer to the judgment of McMenamin J. in the Supreme Court in *Minister for Justice and Equality v. Buckley* [2015] IESC 87 with whom all other members of the court agreed. That was a case where surrender to the United Kingdom was resisted unsuccessfully on the basis of the potential right of the prosecution in the United Kingdom to introduce evidence of an alleged co-conspirator's conviction in a trial for conspiracy, and that this would be incompatible with the Irish Constitution since the deployment of those provisions in a trial would be a denial of the respondent's right to hear evidence presented in the context of a trial and to contest such evidence by cross-examination. In rejecting the argument, McMenamin J. stated at para. 24:-:

> *"Both Brennan and Nottinghamshire County Council are authority, therefore, for the proposition that, absent some matter which is fundamental to the scheme and order of rights ordained by the Constitution, or egregious circumstances, such as a clearly established and fundamental defect, or defects, in the justice system of a requesting state, the range and focus of Article 38 must be within the State and not outside it. The court is presented, here, with what, at its height, can only be characterised as a 'different rules of evidence case'; but no more."*

63. In relation to the concept of international norms of universal application, which is an argument that the appellant makes in this case, O'Donnell J. stated at para. 38 of his judgment:

> *"The concept that there are rights of universal application having an international application poses more difficulties. While there might be broad agreement between civilised countries on headline principles (and this is itself a large assumption), there are, at a practical level, significant divergences between states on what those principles require. If, by way of example, the inclusion in a sentence for a crime of any element of detention for the protection of the public is a violation of a principle of universal application, it would be surprising if it was then adopted in countries like the United Kingdom and Germany and was found to be compatible with the European Convention on Human Rights. If it is a right of universal application, then one would expect to see it universally applied. It is no answer to this problem to say that the Irish antipathy to preventive detention in this case is derived from a widely accepted principle: the presumption of innocence. By the same token, it is possible to say that the right to trial by jury for non-minor offences is derived from a principle of due process which is itself of universal application. <u>The issue in every case is what those general principles require in specific circumstances, which is something upon which countries can and do differ</u>. It is not possible to justify the imposition of our choices in this regard on others, or to condemn their choices, simply on the basis that we all adhere to some general principles which are not in dispute. This is particularly so in the case of a right expressed or developed in a singular way in the constitutional jurisprudence of one country. By definition, the right is not universally recognised. Universal applicability cannot be the basis for its application to other countries." [emphasis added]*

64. In the present case then argument is that the presumption of innocence is implicated by the possibility that during the sentencing process, if he is convicted, uncharged or acquitted conduct or indeed the conduct of co-conspirators, may be taken into account when the sentencing judge is arriving at the appropriate sentence. As I have indicated the second limb of that argument is that such matters can be proven on a standard lower than beyond a reasonable doubt, and that these features of the sentencing process would be constitutionally impermissible in this jurisdiction.

65. I have already indicated my view that the fact that these possibilities rely upon much speculation as to what may happen in due course if the appellant is surrendered, is itself fatal to the appeal since mere speculation cannot be the basis of a real or a substantial risk of a flagrant denial of justice.

66. But I am also satisfied, in accordance with the authorities to which the Court has been referred, from some of which I have just quoted, that the fact that the sentencing process in the United States differs, even materially, from that which is in place in this jurisdiction, is not a ground for refusing to extradite the appellant unless the sentencing regime there reaches the very high threshold of being such an egregious breach of fundamental rights that it constitutes a flagrant denial of justice. Where the matters which can be taken into account are similar to what may be taken into account here as being part of the general background or surrounding circumstances in which the offences were committed, it cannot be said that this is such an egregious matter that extradition should be refused. Nor can it be said that the fact that these matters may be proven to a standard below a reasonable doubt, or where hearsay evidence may be received, renders that regime egregious or so exceptional that it all constitutes a flagrant denial of justice. It is different to what would occur here, and would even be impermissible here in the constitutional sense, but, as has been explained in the jurisprudence referred to above, these differences are insufficient in themselves to mandate a refusal of extradition.

67. This Court must, as must the High Court, take judicial notice of the provisions of the European Convention on Human Rights, and,

inter alia, the decisions of the ECtHR, and, as mandated by s. 2 of the European Convention on Human Rights Act, 2003, also take due account of the principles laid down therein, when interpreting and applying the Convention provisions.

68. In so far as the appellant has argued that proof beyond a reasonable doubt is an international norm, and that to prove matters at sentencing to a lower standard fails to observe that norm, he seeks to derive support also from the case law of the ECtHR in relation to Art. 6 of the Convention. Again, he is supported in this respect by counsel for the Amicus Curiae. However, it has to be noted that the cases to which he has referred are for the most part cases in which the discussion of proof beyond a reasonable doubt is in the context of the criminal trial itself rather than the sentence hearing. I do not overlook that the appellant drew the Court's attention to the cases of *T and V v. United Kingdom* [2000] 30 E.H.R.R. 121 and to the fact that the Court stated that Art. 6 applies not just to the trial itself but to the determination of sentence. As a general principle, I suggest that this is uncontroversial. What it means in particular cases is another matter however, and quoting the emphasised passage from O'Donnell J's judgment in *Balmer* above *"the issue in every case is what those general principles require in specific circumstances, which is something upon which countries can and do differ"*. In *T and V* the issue arose in the notorious circumstances where two very young boys were convicted of murder, and where in such cases the Secretary of State was by law the person charged with the fixing of what is called "the tariff", namely the period which the boys would be required to spend in detention. That is the context in which Art. 6 arose in that case, and it was submitted by the applicants that the setting of the tariff by the Secretary of State breached Art.6.1 of the Convention since they were entitled to have sentence determined by an independent and impartial tribunal, and that this excluded the Secretary of State. The Court confirmed that the fixing of the sentence attracted the protection of Art. 6.1 stating at para. 109:

> *"The Court recalls that Article 6.1 guarantees certain rights in respect of the 'determination of… any criminal charge…'. In criminal matters, it is clear that Article 6.1 covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence (see, for example, the Eckle v. Germany judgment of 15 July 1982, Series A no. 51, pp. 34-35, (1983) 5 E.H.R.R. 1, paras. 76-77) …".*

69. That case is of no real relevance to the present case except to the limited extent of confirming, what is in any event uncontroversial between the parties, that the sentence hearing engages Article 6. It does not assist in determining the sort of circumstances that could warrant a finding of a flagrant denial of justice. The trial judge noted the same when addressing the submissions made to her by reference to *T and V.* In that regard she stated at para. 5.36:-

> *"All of the case put forward by Mr. Marques deal with the presumption of innocence in the context of the trial for the offence. Mr Marques made reference to T & V v. United Kingdom … And to the finding by the ECtHR that Article 6 (1) of the ECHR covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence. The finding of the ECtHR in that case does not go so far as to say that each matter at the sentencing (or indeed the pre-trial stage e.g. bail) must be determined on the basis of a standard of beyond reasonable doubt. Indeed, all the common law cases referred to by Mr. Marques appear to concern the burden of proof in the trial as to guilt or innocence of the offence charged. The Court accepts that a standard of beyond reasonable doubt is universal for the trial of offences. None of the cases demonstrate a universal requirement that all matters at sentencing be determined on the basis of a beyond reasonable doubt standard."*

70. I agree with her conclusions in this regard.

71. In the present case, the Court has been assisted by the helpful intervention of the Irish Human Rights and Equality Commission as amicus curiae. It has participated in the appeal being represented by Michael Lynn S.C. He declined to engage with the facts of the case to any great extent, preferring to leave that task to the parties. But his submissions were clearly made against the background of those facts.

72. The Court has been referred to the judgment of the ECtHR in *Othman (Abu Qatada) v. United Kingdom*, (2012) 55 E.H.R.R. 1, Application No. 8139/09, 17th January 2012. That was a case where the applicant was originally sought by Jordan by way of extradition so that he would face trial for offences involving a conspiracy to carry out bombings in Jordan. He was convicted in his absence. The Jordanian authorities then sought his extradition. However, this extradition request was later withdrawn

73. He was later tried again in his absence for different offences. This time they related to a conspiracy to cause explosions at western and Israeli targets in Jordan to coincide with the millennium celebrations. His particular involvement was alleged to be the provision of money for a computer and encouragement through his writings, which had been found at the house of a co-defendant. He was again convicted in his absence and sentenced to 15 years with hard labour.

74. Thereafter certain negotiations took place between the Foreign and Commonwealth Office and certain key countries, including Jordan as to whether they would be willing and able to provide assurances in order to guarantee that potential deportees would be treated in a manner consistent with the United Kingdom's obligations under the Convention. In due course, a Memorandum of Understanding (MoU) was agreed which set out a number of assurances of compliance with international human rights standards, and letters were exchanged between the United Kingdom and Jordanian authorities in relation to various assurances as to compliance with human rights standards.

75. On the day following the signature of the MoU, the Secretary of State served a notice of intention to deport the applicant "in the interests of national security". He appealed the decision to deport him to the Special Immigration Appeals Commission (SIAC) on the basis, inter alia, that there was a real risk that some of the evidence that would be used against him at any retrial, if he was deported, was obtained from witnesses by the use of torture. He alleged that his retrial would be "flagrantly unfair" as not only would torture evidence be used against him, but he would face trial before a military court which lacked independence from the executive. There are numerous issues considered, but I will confine my reference to this judgment to the consideration of the alleged violation of Article 6 of the Convention.

76. The complaints under Article 6 were, firstly, the lack of impartiality of the State Security Court (SSCt) which would consist of three judges, at least two of whom would be legally qualified military officers with no security of tenure, as would be the Public prosecutor; secondly, he would be questioned while in detention and without the presence of a lawyer; and thirdly, evidence obtained by torture would be used against him. SIAC was satisfied that the court lacked institutional independence, though it noted that the judges were legally qualified. But it noted that reasons for decisions are given, and that an appeal was available to the Court of Cassation, though it noted also that the latter's existence could not cure the lack of structural independence of the SSCt. In relation to the use of evidence obtained by torture SIAC stated the following by way of its conclusion:

> *"449. We have discussed at length the approach of the SSCt to the admission of statements to a prosecutor allegedly given as a result of prior ill-treatment. Although we take the view that a contribution of factors would*

probably make the retrial unfair in that respect, they do not constitute a complete denial of a fair trial. The existence of a legal prohibition on the admissibility of such evidence cannot be ignored, nor the fact that the SSCt would hear evidence relating to the allegations. The role of the Court of Cassation in reviewing and at times overturning the conclusions of the SSCt on this issue is material. The want of evidential or procedural safeguards to balance the burden of proof, and the probable cast of mind towards statements made to a prosecutor/judge in civil law system, all within a security court dominated by military lawyers, does not suffice for a complete denial of justice.

450. There is a danger, given the inevitable focus on what is said to be potentially unfair about the retrial, in focusing exclusively on deficiencies when deciding whether there would be a total denial of the right to a fair trial, rather than looking at the picture of the trial as a whole. That is what has to be done however and it is that picture as a whole which has led us to our conclusion on this issue.

451. The various factors which would be likely to cause the retrial to breach Article 6 are to a considerable degree interlinked. Taking them in the round does not persuade us that there is a real risk of a total denial of the right to a fair trial".

77. The applicant appealed the decision of SIAC to the Court of Appeal which unanimously allowed the appeal in respect of Article 6 and the risk of the use of evidence obtained by torture, but dismissed all the other grounds of appeal, including that which was based upon the lack of independence of the SSCt. The Secretary of State appealed to the House of Lords in relation to the conclusion under Article 6, and the applicant cross-appealed in relation to his other Convention complaints. The House of Lords allowed the Secretary of State's appeal in relation to Article 6 in relation to the use of evidence obtained by torture, and dismissed the applicant's cross-appeal in its totality.

78. In his speech in the House of Lords, Lord Phillips considered the nature of the test to be applied. He stated that the test should be whether there would be a "complete denial or nullification" of the right to a fair trial. In this regard he stated:

"136. This is neither an easy nor an adequate test of whether article 6 should bar the deportation of an alien. In the first place it is not easy to postulate what amounts to 'a complete denial or nullification of the right to a fair trial'. That phrase cannot require that every aspect of the trial process should be unfair. … What is required is that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy the fairness of the prospective trial.

137. In the second place, the fact that the deportee may find himself subject in the receiving country to a legal process that is blatantly unfair cannot, of itself, justify placing an embargo on his deportation. The focus must be not simply on the unfairness of the trial process but on its potential consequences. An unfair trial is likely to lead to the violation of substantive human rights and the extent of that prospect of violation must plainly be an important factor in deciding whether deportation is precluded."

79. Lord Phillips went on to state, as noted by the ECtHR:

"The Strasbourg jurisprudence, tentative though it is, has led me to these conclusions. Before the deportation of an alien will be capable of violating article 6 there must be substantial grounds for believing that there is a real risk (i) that there will be a fundamental breach of the principles of a fair trial guaranteed by article 6 and (ii) that this failure will lead to a miscarriage of justice that itself constitutes a flagrant violation of the victim's fundamental rights."

80. It concluded that the Court of Appeal had erred in its conclusion that there was a real risk in relation to the use of torture evidence, and that it had required too high a degree of assurance that evidence that might have been obtained by torture would not be used in a foreign trial. In that regard he stated para. 153-154:-

"The prohibition on receiving evidence obtained by torture is not primarily because such evidence is unreliable or because the reception of the evidence will make the trial unfair. Rather it is because 'the state must stand firm against the conduct that has produced the evidence'. That principle applies to the state in which an attempt is made to adduce such evidence. It does not require this state, the United Kingdom, to retain in this country to the detriment of national security a terrorist suspect unless it has a high degree of assurance that evidence obtained by torture will not be adduced against him in Jordan … The issue before SIAC was whether there were reasonable grounds for believing that if Mr Othman were deported to Jordan the criminal trial that he would their face would have defects of such significance as fundamentally to destroy the fairness of his trial or, as SIAC put it, to amount to a total denial of the right to a fair trial. SIAC concluded that the deficiencies that SIAC had identified did not meet that exacting test. I do not find that in reaching this conclusion SIAC erred in law."

81. The judgment of the ECtHR notes that Lord Hoffmann found that there was no Convention authority for the rule that, in the context of the application of Article 6 to a removal case the risk of the use of evidence obtained by torture necessarily amounted to a flagrant denial of justice. It notes also that Lord Hope agreed and that Lord Browne also agreed, while stating also that if extradition had been found not to be unlawful in the circumstances arising in the case *of Mamatkulov and Askarov v. Turkey,* (2005) 41 E.H.R.R. 25, 494, GC *"in my judgment expulsion most certainly is not unlawful here"*.

82. The ECtHR, after a thorough examination and consideration of the quality of the assurances contained in the MoU entered into between the United Kingdom and the Jordanian government at the highest level was sufficient for it to conclude that the applicant's return to Jordan would not expose him to a real risk of ill-treatment for the purposes of his Article 3 objection. Nevertheless the Court went on to consider the submissions made under Article 6 as to whether there was a real risk of a flagrant denial of injustice arising from the fact that evidence obtained through the torture of two named individuals would be used against him at his retrial.

83. The Court considered the term 'flagrant denial of justice' and stated that it was "synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein". The Court went on to say:

"259. … Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

– conviction in absentia with no possibility subsequently to obtain a fresh determination of the merits of the

charge …

– a trial which is summary in nature and conducted with a total disregard for the rights of the defence …

– detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed …

– deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.

260. It is noteworthy that, in the 22 years since the Soering judgment, the court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that 'flagrant denial of justice' is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article." [emphasis added]

84. applicant in his retrial was a real risk, and that such use would amount to a flagrant denial of justice. It was not satisfied that the assurances given by the Jordanian government were sufficient to remove the risk.

85. It went on to explain why the use of torture evidence should be considered to constitute such a fundamental and flagrant breach of Article 6 rights, explaining as follows:

" … no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial processes is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."

86. The Court went on:

"in the Convention system, the prohibition against the use of evidence obtained by torture is fundamental. Gafgen also confirms the Court of Appeal's view that there is a crucial difference between a breach of Article 6 because of the admission of torture evidence and breaches of Article 6 that are based simply on defects in the trial process or in the composition of the trial court … " [emphasis added]

87. I have spent some time on the *Othman (Abu Qatada)* case because of the extreme facts on which it was based so far as the Article 6 argument was concerned. It is indeed noteworthy that this appears to be the first case in the past three decades since *Soering* that the ECtHR has found facts that were of such extremity that they could meet the stringent test for a prospective breach of Article 6. Referring to the underlined sentence in the previous paragraph, I would not go so far as to say that in the present case the sentence regime constitutes a "defect in the trial process". It is different to what is permitted in this State, but that is not sufficient to constitute even a defect. But even if it was to be seen as a defect in the trial process, it still would fall far short of meeting the stringent test referred to in the case law of the ECtHR. After all, the consequence feared by the appellant is just that as a result of this different sentencing regime, he could receive a sentence that is greater than if the enhancements could not be applied, yet still a sentence within the maximum sentence permitted. I am not for one moment to be taken as downplaying the significance of any period of imprisonment no matter how short. I mention this only in order to compare the apprehension to that at the other end of the spectrum of seriousness, namely the prospect of being convicted on the basis of evidence obtained from others through the use of torture.

88. The facts relied on by the appellant in the present case cannot by any stretch of the imagination be compared to the heinous and egregious prospect of a conviction based upon evidence or confessions of others which has been extracted through the use of torture. That, unlike the apprehended regime in the present case, is something that very clearly breaches an international norm, as explained in great detail in the Court's judgment in *Othman (Abu Qatada*).

89. For these reasons, I would dismiss the appeal.