THE HIGH COURT

[RECORD NO. 2018 462 JR]

BETWEEN

DANIEL MULLAN

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS IRELAND AND THE ATTORNEY GENERAL

JUDGMENT of Ms. Justice Aileen Donnelly delivered on the 22nd day of October 2018

Introduction

1. The applicant in these judicial review proceedings is the subject matter of an extradition request from the United States of America (the USA). Proceedings in respect of that application are in being. His main concern in the present application for judicial review is to have the Director of Public Prosecutions (DPP) consider him for prosecution in this jurisdiction in respect of offences for which he is sought for prosecution in the USA.

2. In the extradition proceedings, the USA seek the applicant for prosecution in respect of four alleged offences ("the extradition offences"): -

> (i) A count of sexual exploitation of a child in effect the production of child pornography between January 1999 and December 2006;

and

> (ii) A count of transportation of a minor with intent to engage in sexual activity in or about December 1999;

and

> (iii) Two counts of possession of child pornography (between January 17 2014 and August 17, 2017).

3. The first two counts are alleged to have occurred in New York, USA and elsewhere (outside the USA). The child pornography counts are alleged to have occurred in New York, USA. In the provisional request for extradition made by the US authorities, the applicant is stated to be a citizen of the USA and Ireland.

4. The applicant was arrested in this jurisdiction on the 16th October, 2017 pursuant to a warrant of arrest issued by the High Court under s. 27 of the Extradition Act 1965 as amended (the Act of 1965). He was arrested on his release from the Midlands Prison, Portlaoise. He had just served a sentence of imprisonment that had been imposed upon him following his extradition from the USA to Ireland for the purpose of prosecution in respect of child sexual assault and possession of child pornography in Ireland between 2000 and 2005.

The time line leading to the application for leave

5. The initial arrest of the applicant was made on the basis of a provisional request for extradition. Following receipt of the appropriate request from the USA, the Minister issued a certificate that the request had been made. By the 1st November, 2017, all of the extradition papers were served on the applicant. These outlined the nature and contents of the extradition offences alleged against him. The extradition proceedings were adjourned from time to time to permit the applicant prepare his defence to those proceedings. On the 6th December 2017, the applicant's solicitor filed a Notice of Objection to those proceedings.

6. On the 13th February 2018, the applicant's solicitor wrote to the DPP requesting that she consider prosecuting the applicant in this jurisdiction in respect of the extradition offences. The legislative basis for asserting that the DPP could prosecute him in this jurisdiction was not set out therein. In his statement grounding the application for judicial review, the applicant relied upon the Sexual Offences (Jurisdiction) Act, 1996. His solicitor avers in the grounding affidavit that his client is an Irish citizen. The extradition papers identified him as both a U.S and Irish citizen. An Irish national who commits certain sexual offences abroad, including sexual assault on a child and possession of child pornography, commits an offence contrary to Irish law.

7. It is worth observing that at the hearing of the application for leave to apply for judicial review, it appeared to be suggested by counsel that there was an issue with whether the sentence he had served in Ireland was for all or part of the extradition offences. That latter aspect was not pursued at the hearing of this application. It is extremely surprising that at the time of the application for leave, and despite the time that had elapsed since his arrest, the applicant's lawyers were not in a position to be certain about the past and present offences their client faced and to advance their legal case with precision.

8. The backdrop to the applicant's request is to be found in the provisions of s. 15(1) of the Act of 1965. This subsection provides that extradition shall not be granted for an offence which is also an offence under the law of this State, if the DPP (or where appropriate the Attorney General) is considering but has not yet decided whether to bring proceedings for the offence or proceedings for the offence are pending in the State against the person. Therefore, even where no proceedings are pending for the extradition offences in this State, if the DPP was considering the bringing of proceedings, the extradition of the applicant could not be granted.

9. By letter dated 19th February 2018, the DPP replied that she had not received a file concerning the specified offences in the extradition request from An Garda Síochána. The DPP stated that her office was not considering bringing proceedings against the applicant for the specified offences nor were criminal proceedings pending in the jurisdiction. She went on to state that the office does not have any investigative function. She also stated that before the office could consider a prosecution they would need to have received an investigation file. She stated that this was without prejudice to the question as to whether all of the offences alleged against the applicant could be the subject of a prosecution in this jurisdiction. Finally, the DPP stated that they had forwarded a copy of the applicant's letter to the Chief State Solicitor's Office who had carriage of the case and requested that all future correspondence be addressed to that office.

10. On 5th March 2018, solicitors for the applicant wrote to the Chief State Solicitor stating that their client was advancing in years

and in ill-health. The letter stated that, given he had already been extradited from the USA, if he was now to be prosecuted for the matters outlined in the US extradition request, he desired to be prosecuted in this jurisdiction. The letter went on to say: -

> "As is evident from the DPP's response, the investigation file needs to be considered there before any such decision can be made by that office. In the circumstances we would be obliged if you would promptly make arrangements with the US authorities or otherwise to facilitate the procurement of the file and its furnishing to the DPP so that the DPP can give due consideration to our clients' request."

11. The Chief State Solicitor replied on the 13th March 2018, stating that the solicitors for the applicant appeared to have misunderstood the situation. She stated that the applicant was the subject of a pending prosecution in the US arising on foot of an investigation by law enforcement authorities there. She said that An Garda Síochána has never investigated the alleged offences in question nor has any file ever been submitted to the office of the DPP by them. The letter went on to state: -

> "It is not the role of the DPP to seek investigation files from law enforcement agencies in other jurisdictions where criminal proceedings have already been instituted. Nor is it the role of the Attorney General to do so on behalf of the DPP or your client."

12. It appears that there was a further letter from the applicant's solicitors to the Chief State Solicitor on the 23rd March, 2018 but that is not exhibited. The Chief State Solicitor sent a further letter dated 26th April, 2018 reiterating that she had made clear both the role of the Attorney General and of the DPP in her earlier letter. She stated that: -

> "In effect, your client would appear to be endeavouring to procure an investigation and prosecution of himself in Ireland, notwithstanding the fact that proceedings are at a very advanced stage in the United States. We have already made it clear that neither the Attorney General nor the DPP has a role in bringing about such a state of affairs."

13. The extradition proceedings were listed for mention before the High Court on a number of dates during that period. On the 30th May 2018, counsel for the Attorney General again sought a hearing date as he had on previous occasions. Counsel for the applicant objected on the basis that judicial review proceedings were being contemplated. Counsel for the Attorney General made reference to the delay that had already occurred.

14. Despite the objection, I fixed the 17th June, 2018 as the hearing date as there was an obligation to act without delay and it appeared that the extradition proceedings were ready to proceed. I indicated that if any application for judicial review was to be brought, it should be brought in the ordinary course before the judicial review judge. This is the usual procedure where judicial review applications are brought in respect of matters which touch or relate to a pending extradition request, as another High Court judge is assigned to deal with judicial review applications. I indicated however that the judge hearing the *ex parte* judicial review could be told that any hearing in the matter could be transferred to me, if the judicial review judge so wished. At the hearing of the action, senior counsel for the State implied that by making the application before Noonan J there may have been an attempt to take matters from the extradition list. That is not the case and such an implication should not have been levelled by counsel for the State respondents. It appears that senior counsel had not been present before me at the earlier hearing.

15. On the 11th June 2018, an *ex parte* application for judicial review was made before Noonan J who was assigned to hear such cases. Through media reports, the Chief State Solicitor became aware of the application for judicial review and sought information in relation to same from the applicant's solicitor. In particular, she sought information as to whether there was any implication for the date for hearing of the extradition matter. As will be outlined further below, ultimately the judicial review proceedings were transferred to my list.

The proceedings after leave for judicial review was granted

16. It appears that although leave to apply for judicial review was granted, no stay on the hearing of the extradition matter was ordered. Instead, liberty to apply on notice for a stay was granted. No application for a stay was sought, instead the applicant applied to vacate the hearing date for the extradition proceedings. That was objected to by the second and third respondents ("the State respondents"). I determined that the matter should proceed in the absence of any application for a stay.

17. In due course, the State respondents sought to set aside the leave order. The basis of their application was that leave to apply had been sought out of time and also there was an abuse of process insofar as relevant case law had not been brought to the attention of the judge who granted leave. The applicant thereafter sought a stay on the hearing for the extradition. The judicial review matter was returned to Noonan J. who, on the application of both parties, adjourned the motion to set aside the grant of leave that had been granted to the date of the hearing of the extradition. He also directed that the substantive judicial review be made returnable for that same date. The applicant's motion for a stay was returnable to Monday the 16th July, 2018. On that date it was agreed with the consent of the parties that the application for a stay would be struck out. It was also agreed that the motion to set aside the order granting leave and the substantive judicial review would in effect be "telescoped" and heard together.

18. On the 17th July 2018, the date listed for hearing, the applicant was not present because he was in hospital. Despite the objection of counsel for the applicant, I proceeded to hear the application for judicial review. There is no requirement for the presence of the applicant at that hearing. It is not usual that persons in custody attend judicial review proceedings and there had been no application to have him present at the leave application. Furthermore, no specific grounds were advanced as to why his presence was required. The extradition proceedings were adjourned.

19. In opposing the application for judicial review, the State respondents have made three central objections. These are: (i) due to the delay in making the application, the leave ought to be set aside, (ii) that during the making of the leave application, the applicant did not draw the attention of the High Court to relevant legal authority; and (iii) that the application does not disclose any substantive right for which the applicant must be entitled to the orders of judicial review that he seeks. The DPP opposes the application for judicial review on the basis that the application was (i) made out of time and was not moved promptly nor within the limitation periods (ii) that the application ought to be refused for lack of candour in respect of relevant, binding and recent decisions and (iii) that there is no legal basis for the entitlement to the reliefs sought. Although only the State respondents sought to set aside the leave, both sets of respondents rely on essentially the same grounds in opposing the application. As this is a telescoped hearing, the Court will approach the matter on the basis of considering the grounds of opposition.

20. At the outset of the hearing before this Court, counsel for the State respondents and the DPP both filed written submissions. The fact that written submissions were going to be filed by the State respondents had been notified to the Court when the matter was mentioned the previous Monday. Counsel for the applicant did not file written submissions. At the end of the hearing counsel sought time to put in written submissions but I refused liberty at that time. It was my view that it was his application, that he had had

plenty of time to file such submissions if he so wished and furthermore that he was aware that written submissions were to be filed by the State respondents.

21. At the end of the hearing I reserved judgment, putting both the extradition proceedings and the judicial review proceedings back to the 30th July, 2018. On that day I indicated I was not in a position to deliver judgment. Counsel for the applicant requested that he be given permission to file written affidavits. He submitted that scandalous material had been raised by counsel for the State respondents on the previous date and that there were personal matters he wished for an opportunity to address. Although State counsel queried the use of the word scandalous he did not object to the filing of submissions. I gave permission to file submissions.

The Rules of the Superior Courts
22. O. 84, r. 21 provides: -

> "(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.
>
> (2) …. (3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that: -
>
> (a) there is good and sufficient reason for doing so and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by

the applicant for such extension.

> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub rule might have on a respondent or third party.
>
> (5) An application for an extension of referred to in sub-rule (3) can be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1), and shall verify any facts relied on in support of those reasons.
>
> (6) Nothing in sub-rules (1), (3) or (4) shall prevent the court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub rule 3) has caused or is likely to cause prejudice to a respondent or third party."

Delay
23. In order to determine if this application for leave was made within three months from the date when grounds for the application first arose, it is necessary to understand the reliefs actually sought in these proceedings. The first relief sought is an order of *mandamus* requiring the DPP to consider the prosecution of the applicant in this jurisdiction and to take all necessary steps towards that end. The second relief sought is an order of *mandamus* requiring the State respondents to procure or to assist in procuring the investigation file in relation to the applicant for consideration by the DPP. The third relief is a declaration that the applicant is entitled to have consideration given to the prospect of his prosecution in the State in circumstances where the alleged offences are also offences under Irish law. The final reliefs that were sought were ancillary reliefs and are not relevant to this issue.

The Relief against the DPP
24. The applicant had full knowledge that the DPP was not considering prosecuting him in this jurisdiction when he received the letter dated the 19th February, 2018. While the applicant does not state precisely when he received this letter, the evidence establishes that it was in his possession before the 5th March, 2018 because that is the date that he wrote to the Chief State Solicitor. It is evident therefore that the DPP had made her position clear at that point and that at a minimum he had three months from a date prior to the 5th March, 2018 to seek leave to apply for judicial review. The applicant did not do so. On that simple basis he is out of time.

25. Furthermore, on a consideration of the facts of this case, it is also clear that the grounds for the application arose at a far earlier time than when he received confirmation from the DPP that she was not considering his prosecution on the extradition offences. The applicant had been aware of the predicament in which he finds himself, namely that his extradition was sought by the US authorities in respect of these particular extradition offences, since November 2017. The documentation in the extradition request, of which he was on full notice, unambiguously clarified that the investigation leading to the charges being preferred against him in the USA arose out of an investigation in New York, USA. If he wished to have the DPP consider any prosecution, he would have known he had to bring this matter to her attention. This is because it was perfectly obvious that neither An Garda Síochána, nor the office of the DPP, would have had any role in the investigation/prosecution of the offences for which his extradition was sought. The grounds for application arose as soon as he had received the details of the extradition request and he is out of time to apply for judicial review.

26. Furthermore, on a reasonable interpretation of his solicitor's letter of 13th February 2018, there is an acknowledgement that the DPP was not considering a prosecution at that time because the solicitor requests that the DPP make such a consideration. The letter also states that the applicant's solicitors would assist with information and that further papers may be procured from the Chief State Solicitor. That was also an acceptance that no consideration could possibly occur without the DPP being in receipt of an investigative file.

27. Despite the clear knowledge that his prosecution was not under consideration by the DPP, the applicant never made any enquiries nor sought to bring on these judicial review proceedings for a period of months. It was only eight months after he knew the details of the extradition offences and the investigation into them that he sought leave to apply for judicial review. He should have brought proceedings against the DPP within 3 months from November 2017 when the grounds for this application first arose. He was not being

considered for prosecution at that time.

28. Furthermore, since November 2017, the applicant knew or ought reasonably to have known that the grounds for the application arose. It was at that time, when he was aware of the details of the offences for which his extradition was sought, that he was aware or ought reasonably to have been aware that no prosecution was being considered in this jurisdiction. At the very least he had a duty of enquiry at that time, if in fact he needed any clarification on the point. An applicant is not entitled to engage in or to rely upon acts of wilful blindness or negligent inaction so as to extend the three month time limit. The applicant was aware of all the details and I am satisfied from the contents of his letter to the DPP and the facts of the case that he was aware that the DPP was not considering prosecuting him from the point he received the extradition papers. The applicant is therefore out of time for taking this judicial review against the DPP based upon his knowledge since November 2017 that the grounds for making this application were in existence at that time.

The relief against the State respondents

29. As regards the State respondents, it is clear that on the 13th March 2018, the Chief State Solicitor's Office wrote to the applicant setting out her position that it was not the role of the DPP or the Attorney General to seek to procure investigation files from foreign law enforcement agencies. That letter was sent within a three-month period prior to the application for judicial review.

30. Nevertheless, the position is that the applicant is also out of time in respect of his proceedings against the State respondents. This is because the applicant has been aware of the predicament in which he finds himself, namely being sought by the US authorities in respect of these offences since November 2017. The extradition request, of which he was on full notice, made it abundantly clear that the investigation leading to those charges being preferred against him arose out of an investigation in New York, USA. If he wished to have the DPP consider any prosecution, he would have to bring this matter to her attention, it being perfectly obvious that neither An Garda Síochána nor her office would have had any role in the investigation/prosecution of the offences. His own letter of the 13th February 2018, acknowledged that the DPP may procure further papers from the Chief State Solicitor. Despite these facts, the applicant never made any enquiries nor sought to bring on these judicial review proceedings in any way. Instead eight months later the applicant sought leave.

31. Furthermore, in relation to the State respondents, the application is clearly one that is ancillary to his application against the DPP. The applicant's main objective in the proceedings is to seek to have the DPP consider prosecuting the extradition charges against him. The relief against the State respondents is being brought on the basis that if the order is made against them, then the DPP will be obliged to consider a prosecution. In circumstances where the substantive relief is against the DPP, receipt of the letter of 19th February, 2018 must also be considered the starting point for the claim against the State respondents. Since that date it would have been clear to the applicant that a file had to be obtained by or on behalf of the State respondents if the DPP was to be able to consider a prosecution. In those circumstances, he is also outside the time limit to claim against the State respondents.

Extension of Time

32. It is clear that the time has expired for claiming relief against both the DPP and the State respondents. The question then arises as to whether the court should extend the period within which an application for leave to apply for judicial review may be made. It is notable that the jurisdiction to extend time provided for in O. 84, r. 3 is premised upon an application for that relief. It is a curious feature of the case that the applicant has never sought to have time extended, but has filed an affidavit in which his solicitor denies that there has been any unconscionable delay or that the application has been made outside time. Even in his written submissions, the applicant did not seek an extension of time, despite being well aware of the case made by all respondents in both written and oral submissions. In those circumstances, the Court is not entitled to extend the time, there being no application before it to do so and I therefore refuse the application for judicial review.

33. Despite the lack of application for extension of time, I have considered the contents of the affidavit of the solicitor of the applicant in search of reasons as to why there may have been delay on the part of the applicant in making the application. The solicitor never gives a reason as to why it took until 13th February, 2018 to send the letter to the DPP (which was 3 months after he had received the extradition request). Moreover, in that request it is essentially acknowledged that the DPP was not considering a prosecution.

34. The solicitor for the applicant also relies in his affidavit on the reply of the DPP which he interprets as not closing the door on the possibility of considering a prosecution. He says that he had to make further enquiries to have a file sent to the DPP before she could consider the prosecution. He says that it was only by letter dated 26th April, 2018 that the Chief State Solicitor emphatically asserted that neither the DPP nor the AG had any role in facilitating the applicant in his endeavour to be prosecuted in the State. In my view, that letter of the 26th April was simply a reiteration of what had been contained in the Chief State Solicitor's letter of the 13th March 2018.

35. The applicant's solicitor asserts that he had fully explored all avenues open to the applicant prior to initiating the judicial review. Again this does not explain the three month delay before sending the letter to the DPP. He says that he instructed counsel to draft judicial papers but does not say when he did so. The solicitor does not say when the papers were drafted and returned to him. He says that that he travelled to Portlaoise to visit the applicant in custody for the purpose of discussing the case with him and having him swear a verifying affidavit. He says on one occasion no authorised person was available to witness him swear the affidavit and on another occasion he was too ill to be produced.

36. The solicitor for the applicant says it was not possible to have his affidavit sworn in advance of the 30th May, 2018 when the extradition proceedings were next listed before the High Court. In fact, it is a curious feature that the application was ultimately moved on the affidavit of the solicitor for the applicant and there has been no explanation for that or any indication that it may be deficient and that a personal affidavit of the applicant was required. No personal affidavit of the applicant has ever been filed. Thus, there never was any real issue about an affidavit being required to be sworn personally by the applicant. The requirement in the Rules of the Superior Courts is to have an affidavit verifying the facts. The only possible fact that might only have been verifiable by the applicant and not the solicitor was his citizenship. In truth however that was never an issue as even the U.S. request for extradition acknowledges that he is an Irish citizen and the applicant had sworn an affidavit in the bail proceedings asserting his Irish citizenship.

37. Moreover, in the written submissions filed by the applicant he does not address the issue of an application for an extension of time. He persists in his submissions that his application was made within time but does not seek to extend the time. In particular, he does not offer or seek time to offer any explanation as to why there was such a delay from in or about November 2017 in writing to the DPP. Instead, in his submission the delay could only possibly run from the date his letter of 13th February, 2018 which was replied to by the DPP. In this submission, it is clear that the applicant is of the view that he could commence time running at any point simply by making the request to the DPP that she consider prosecuting him. I reject that submission as groundless as the true position is that the ground first arose when he was aware of the offences for which his extradition was being sought It was at that point that

the issue of the DPP considering his prosecution first became a live one for the applicant. He had three months from that point in which to bring his application for leave to apply for judicial review.

38. In my view, thee later delays in attending with the applicant in prison do not excuse or amount to a good and sufficient reason to extend. They do not demonstrate that the failure was due to events outside the control of the applicant or that they could not reasonably have been anticipated by the applicant. Even if an extension had been applied for, there would be no good reason to extend time.

Breach of duty of good faith – application for leave
39. The State respondents plead that the applicant failed to bring to the attention of the High Court relevant legal authorities in this area. It is a well-established rule that all parties making *ex parte* applications – including applications for leave to apply for judicial review – are subject to a duty of utmost good faith. (See e.g. Judicial Review of Criminal Proceedings, Dunne, Round Hall 2011, para. 303).

40. The State respondents rely upon the decision of *Dean v. DPP* [2008] IEHC 87 in which Hedigan J. refused the reliefs sought on the basis of non-disclosure of relevant information to the court on the application for leave to apply for judicial review. In that case, Hedigan J., stated:

> "The "leave to apply" provision in the rules is an essential part of the system of Judicial Review and is what makes it all work. But without confidence on the part of any Judge hearing the application that all relevant matters and law both for and against the application are before him or her the essential *ex parte* nature of the "leave to apply" system cannot continue."

41. In *Dean v DPP*, Hedigan J. was concerned with an omission of fact from the information placed before the judge at leave stage, but it is clear that the principle of candour applies to issues of both law and fact. Furthermore, Hedigan J. stated that what was required to be placed before the judge was information that: - "might have led him to refuse leave to apply." Hedigan J. also stated that even where no application had been brought by a respondent to set aside the grant of leave, it would not prevent the court from acting "*proprio motu*" as it must be the master of its own procedures."

The Application for Leave
42. The State respondents obtained permission from Noonan J. to access the Digital Audio Recording ("the DAR") of the leave application. A transcript was prepared and presented to the Court. It is short at six pages long. Even then, the final page of the transcript concern issues that arose consequential on the decision to grant leave.

43. While it is acknowledged that *ex parte* applications for leave to apply for judicial review are often truncated and not every aspect of the factual and legal considerations are opened to the court, this was an unusually short application in the context of the relief sought therein and the manner in which the application proceeded. The transcript shows that Noonan J. made twelve interjections/questions prior to his decision to grant leave. It is particularly striking that Noonan J., in his opening interjection, said as follows: - "Sorry, just remind me, Mr. K, I haven't done extradition for quite some time, what is the requirement for consideration of the prosecution?" That question was a clear indication by the judge hearing the application that an explanation of the legal parameters relevant to this area of extradition law was required from counsel.

44. Counsel for the applicant then replied by referring to this as "an American request", under Part II of the Act of 1965. Counsel went on to state: -

> "The issue is that if the DPP considers a prosecution here, then the party, in this case Mr. Mullan could be prosecuted here. If he is prosecuted here, then he is tried and sentenced here, if there is to be a sentence, and then just a bar on his surrender to the United States. He is contending that at the very least he is entitled to have that matter considered by the Director of Public Prosecutions, particularly in circumstances where the offence is an offence under Irish law in terms of the specific statutory jurisdiction which offences of that nature are given when committed abroad by Irish citizens. S. 15 of the Extradition Act was amended in the midst of the . . . he is charged with three offences."

45. Noonan J. then interjected again and stated "Sorry Mr. K, is there a requirement for the Director to consider the prosecution at the insistence of the applicant, it would be quite an unusual . . ." Counsel interjects by stating "That I suppose (is) the arguable case I am asking to make. The DPP has said we haven't got a file, we are not an investigative agency, we have no facility to procure the file, please deal with the Chief State Solicitors' Office who have carriage of the extradition proceedings. The Chief State Solicitors' Office were engaged with and they have no prosecution function and they say that it is not their role to get involved. So the difficulty for Mr. Mullan is that he is falling between two stools, he is an Irish citizen, the offences that are alleged against him, some of which occurred in the US, and some occurred abroad, as in abroad from the United States, *he wants to be prosecuted here,* or at least have the manner of his prosecution here considered and so far he hasn't been facilitated in that regard. Section 15 of the Act . . ." (Emphasis added)

46. Noonan J. then interjected as follows: - "Are the offences alleged to have taken place in the United States?" Counsel for the applicant went on to say that they were offences alleged to have place in New York State and elsewhere including abroad. He told Noonan J. that it appears that the applicant was extradited from the US to Ireland for his prosecution here arising out of similar type offences which occurred here in the past and "He wants at the very least the DPP to assess the allegations in the United States to say well, maybe some or all of them have been embraced by the previous prosecution here. He has been prosecuted here in the past." Counsel went on to say "I will just hand up a copy of the legislation just in terms of where we were at. The Court will see that s. 15 of the Act in its earlier format was a complete bar on extradition if it was an offence under Irish law and then the person was either tried here or not. Under the amended version it allows the DPP to consider prosecution and then that can have an effect on s... 15". There was then a brief interjection clarifying that it was s. 15 that was at issue, and counsel went on to say that this was a variation on what was the case in terms of the categorical prohibition which existed prior to that amendment.

47. At that point, Noonan J. interjected to state "That simply says that extradition shall not be granted where proceedings are being considered isn't that right?" Counsel indicated yes and then Noonan J. stated "There is no mandatory requirement obviously to consider." Counsel for the applicant then stated as follows: - "No, but the effect of consideration is that at least if the DPP considers and says yes, OK, I am happy that there is an offence committed in Ireland, or I am happy to direct on the issue, then that will resolve these issues. But in terms of s. 15, it does have a pivotal role in the context of the . . ."

48. Again Noonan J. interjected to say "So, are you saying that gives rise to an obligation on the part of the Director to at least consider whether or not . . ." Counsel for the applicant interrupted to say as follows: - "I am saying it is at the very least arguable

that the DPP should consider the question of his prosecution, Judge. That is all I have to say at this juncture but I think it may be more profound than that. But at this stage I would simply ask the court to conclude that I at least meet the threshold of arguability with regard to that contention. Because if it were the case that the DPP weren't required or shouldn't be . . .".

49. At that point Noonan J. raised the issue about whether he was looking for a stay and counsel replied that he was looking for a stay on the Attorney General presenting the request for his surrender. A discussion followed about the jurisdiction of the High Court to put a stay on proceedings before the High Court, but counsel for the applicant insisted that he was seeking to stay the Attorney General presenting the case. Noonan J. indicated that he was not prepared to grant a stay *ex parte*, and essentially gave leave with permission to seek a stay on notice to the respondent.

The case-law not opened at the application for leave

50. The singular feature of the exchanges between counsel and the judge above is that at no stage during the leave application was the judge ade aware that claims of entitlement to be prosecuted in this jurisdiction had been the subject matter of two cases related to requests by the US for extradition in respect of offences which were also offences in Irish law. Indeed, in those cases the links to Ireland with the offences and the requested persons were far stronger than in the present proceedings. No person who practices in the area of extradition law could have been unaware of those cases. Counsel and solicitor in the present case are habitual practitioners in the extradition court. They have not claimed to be unaware of these cases. Instead, in correspondence subsequent to the grant of leave, and on affidavit, the solicitor for the respondent has stated "I am advised and I believe that the reliefs sought in *Marques* and *Damache* were different and that they were not on point."

51. The two cases referred to therein are the cases of *Attorney General v. Damache* [2015] IEHC 339 and *Marques v. DPP* [2014] IEHC 443, [2016] IECA 373. In *Damache*, the requested person sought various reliefs including that the DPP was required to prosecute him in circumstances where it was argued that it was proportionate to do so. The reasons of the DPP for not prosecuting him were sought in the judicial review. In Damache no concluded decision was required to be made in respect of the application. In the case of *Marques*, the High Court and Court of Appeal gave judgments addressing those issues.

52. In *Marques v. DPP*, the High Court and Court of Appeal rejected the application for judicial review of the DPP's decision not to prosecute the applicant despite the fact that he indicated that he would plead guilty in this State to the offences for which his extradition to the USA was sought. The Court of Appeal concluded that no right to be prosecuted in the State was known to the law. Peart J. observed at para. 22: -

> "There is no doubt that since *State (McCormack)* a number of decisions of the DPP have come before the courts by way of challenge, and indeed some have been successful – for example, *Eviston* and *Murphy*. But what is noticeable about those cases, including *State (McCormack),* whether successful or not, is that the applicant for judicial review enjoyed some legal right, be it statutory or constitutional, which was affected in some way by the impugned decision, and insofar as it may have been decided that reasons should be given, it was in furtherance of the entitlement to challenge the decision made affecting that right. By way of example, in *Murphy*, the decision removed what was otherwise the applicant's right to a trial by jury. In *State (McCormack)* it was a potential entitlement pursuant to statute to be tried in this State rather than in Northern Ireland. In *Mallak* the applicant was entitled to apply for a certificate of naturalisation under s. 15 of the Irish Nationality and Citizenship Act 1956 (as amended), and upon refusal, to reapply. He was found to be entitled to the reasons for the refusal of his first such application so that he could usefully make a second application. But, in the present case one must look at the appellant's complaint as to the adequacy reasons given for the decision not to prosecute, in the context where, as he conceded, and as is clearly the case, he has no right, be it statutory, constitutional or otherwise, to be prosecuted for an offence here, even where he offers a plea of guilty. There is simply no such right known to the law. It has always been thus, as is stated by Finlay C.J. in *State (McCormack)* when he stated: 'the constitutional right of access to the courts is a right to initiate litigation, not a right to compel suit or prosecution'. The fact that the DPP is responsible for deciding whether or not to prosecute an offence, and the fact that s. 15 prohibits surrender as provided therein, does not create a right in favour of somebody such as the applicant whose extradition is sought to be prosecuted here for the offence for which that extradition is sought.
>
> 23. The decision not to prosecute the appellant affects no recognised right in law. In my view it follows that he has no free-standing right to be given the reasons for the decision not to prosecute. The right to reasons must relate back to the type of decision under scrutiny and to some right actually engaged. If he has no right even to request what he is requesting, he has no right to reasons why his request is refused. This is clear from the authorities to which the Court was referred both in the High Court and on this appeal, and is encapsulated in the short passage already quoted above from Clarke J.'s judgment in Rawson. None of the well-known authorities which have been relied upon by the appellant even suggest that a decision made which affects no right to which a person has an entitlement must be explained by the giving of reasons for it"

53. The Supreme Court did not grant leave to appeal the decision of the Court of Appeal. The decision of the Court of Appeal therefore represents an authoritative statement of the law in this jurisdiction. It is perhaps unsurprising that the Supreme Court in its determination was not satisfied that the matters relied upon by Mr. Marques met the constitutional threshold for appeal to the Supreme Court. This was because the decision in the case involved the application by both the High Court and Court of Appeal of established principles in law in relation to the review of prosecution decisions and any obligation to provide reasons.

54. Following the decision of the Supreme Court not to grant leave to appeal, the Minister for Justice and Equality was asked by Mr. Marques to refuse his extradition pursuant to s. 15 (2) of the Act of 1965. The Minister did not refuse his extradition and Mr. Marques challenged that refusal. He sought an order of *certiorari* quashing the order of the Minister to surrender the applicant to the United States of America and also declaratory relief that the Minister had a duty to request the reasons of the DPP for not prosecuting the applicant in this jurisdiction. In the course of rejecting the application for reliefs, the High Court held that it was not necessary for the Minister to obtain the DPP's reasons for non-prosecution prior to exercising her discretion under s. 15 (2) of the Act of 1965 (*Marques v Minister for Justice and Equality* [2017] IEHC 579). That decision was appealed to the Court of Appeal and was subsequently upheld The decision upholding the High Court was delivered after the application for leave in the present case. Since the commencement of these proceedings the Supreme Court has granted leave to appeal, on the issue of the meaning of s.15(2) of the Act of 1965 and the Minister's role thereunder. Based upon the different factual and legal issues, that appeal is not relevant to the issue in the present proceedings.

The applicant's written submissions

55. In his written submissions, filed after the hearing, the applicant takes issue with the State respondents' assertion of abuse of process and lack of candour stating that it "is as ill-founded as it is misconceived". Counsel for the applicant says that it is misconceived because his argument was not an assertion of a right to prosecution but of a right to be considered for prosecution.

Counsel submitted that the State's submissions to the effect that "the Applicant seeks to assert precisely the same entitlement which Mr. *Marques* sought to unsuccessfully assert – namely a right to be prosecuted in the State" demonstrated a clear misunderstanding of his position.

56. Counsel for the applicant accused counsel for the State respondents of "purport[ing] to proffer personal opinion and mak[ing] unfounded derogatory comment touching upon the motivation of fellow counsel" and states that "regrettably, it is necessary to engage further, lest a reluctance to stoop to the level might be considered as an acceptance." Counsel for the applicant then invites the court to consider this "as a diversionary tactic *by the State* where the Attorney General is conflicted in the exercise of his many functions." (emphasis added).

57. Counsel also pointed to the Code of the Bar of Ireland and says that a barrister "when conducting a case must not assert their personal opinion of the facts or the law and must not make statements that are merely scandalous or are intended only for the purpose of vilifying, insulting or annoying another person." The applicant's written submissions expressly state that the manner in which the case was run was "a scandalous implication that counsel contrived to hide authority from the High Court". He submits that it is a matter for the court as to whether it should be considered as scandalous.

58. The written submissions also rely heavily upon the fact that the letter from the Chief State Solicitor had referred to the decision in *AG v Damache* as well as determination of the Supreme Court. The *Damache* case had not decided the point concerning the prosecution of the offences in this jurisdiction and Supreme Court determinations are not to be regarded as precedent. Counsel for the applicant submits that this is evidence of lack of candour on the part of the State in these proceedings.

59. In the view of the Court, the written submissions of the applicant unfortunately misstate the nature of the case being made by the State respondents (and indeed the DPP) as regards lack of candour. The case being made by the respondents is that the *Marques* line of authority dealt comprehensively with the question of entitlement to prosecution (arising from similar circumstances where the applicant faces extradition) and that any decision as to the entitlement to be considered for prosecution "can only exist in the event that he has identified an established right to be prosecuted in the State". It is in that context that the State respondents asserted that the right the applicant sought, namely consideration for prosecution, was precisely the same as a right to be prosecuted. There is no ill-founded statement on the part of the State respondents. This aspect of the case will be explored further below.

60. The applicant's complaints that the State relied on case law which was not relevant or had no precedent value is based upon the letter written by the Chief State solicitor.. However, at the outset of the hearing, counsel for the State respondents clarified that it was the *Marques* decisions which were relevant and not *Damache*. In relation to the Supreme Court determinations, it may also be correct to say that they may have no precedent value, but in the *Marques* case, the reference by the State was a clear indication that the Court of Appeal decision was final. Overall, the State respondents were always clear that this matter had been covered by judicial decision and when this Court was moved to decide the issue, there was no lack of candour or mis-description of relevant authority by State counsel.

61. In relation to accusations of "scandalous" assertions, it again appears that counsel for the applicant has misunderstood the legal meaning of scandalous. That is a legal word generally confined to situations where unnecessary material which contains an imputation on another party is sought to be put before a court. It is entirely appropriate for counsel to make a case that there has been a lack of candour at an *ex parte* hearing where to do so is arguable. That is a matter which is relevant to the opposition put forward by the respondents. Even at the hearing before me, counsel for the applicant accepted that the issue for the Court to decide was whether *Marques* covered the situation. It is not "scandalous" to make such an assertion where it is clearly a relevant issue to be decided in the context of the proceedings. It will be for the court to determine whether the respondents' case has been made on or not.

62. Counsel for the applicant has perhaps understandably reacted to what he perceived as a personal attack on him by counsel for the State respondents. The reality is that the case being put forward by the respondents, hinges upon what counsel for the applicant told the court at the *ex parte* stage. It is directly because of that fact, that the words and the possible explanations of the words of counsel for the applicant, have had to be examined. Counsel for the State respondents may have questioned motivation of counsel in doing so, but his basis for doing so was grounded upon his interpretation of the evidence provided by the transcript. This was not a "scandalous" assertion by counsel for the State respondents.

63. On the other hand, counsel for the applicant, in his written submissions, unfortunately has strayed into the area of personal attack on both counsel and the Attorney General in his attempt to defend himself. In particular, he submits without any apparent basis, that the reliance by the State on the lack of candour "is a diversionary tactic" because the Attorney General is conflicted in his many functions. That is an accusation of a deliberate action by the Attorney General and those acting for him to divert the Court from making an appropriate determination in the case simply on the basis that the Attorney General has too many functions to carry out. The applicant does not put forward any specific evidence or indeed any detailed submission to back up that claim.

64. The best way to deal with that aspect of the case however, is simply to make a determination on the central claims made by the respondents as to lack of candour. This will reveal whether the respondents case is entirely devoid of merit, arguable (but not proven) or well-founded. It would be only a finding of the former that would merit any further enquiry into the motivation of the State. It must also be noted that the DPP is not directly implicated in the applicant's allegation of this being a mere diversionary tactic. This is unsurprising as the DPP has only one main function to carry out, that of public prosecutor. The fact that the DPP has persisted in her claim of lack of candour by the applicant, undermines the applicant's assertion that it is argument that is only pursued by the Attorney General as a diversionary tactic.

The grounds on which the application for judicial review was brought

65. It is important to return to the applicants' statement grounding his application for a judicial review. At para. (e) of the Statement Grounding the Application for Judicial Review, the grounds upon which the relief is sought are set out. The first four paragraphs simply recite the facts as regards the request for extradition and the subsequent correspondence with the DPP and the Chief State Solicitor. At para. 5 there is a statement that s. 15 of the Act of 1965 prohibits extradition in certain circumstances and goes on to state: - "The applicant is prejudiced by the reluctance of the servants or agents of the State to be helpful or proactive or to otherwise assist in the matter".

66. At para. 6 of the grounding statement, the following is pleaded: - "Fair procedures and the right to due process dictate that an Irish citizen applicant who is presumed to be innocent of an offence under Irish law, is entitled to have a fair and impartial consideration of his case by the DPP and *where appropriate to have his prosecution brought in the State.* The entitlement to openness and fairness is imperative where a citizen, such as the applicant herein, has already been extradited to this State from the requesting State" (emphasis added).

67. Para. 7 pleads: "The respondents have not given adequate reasons for the reluctance to assist or engage and such reasons as they have provided are insufficient to insulate them from judicial scrutiny and remedy." And finally, at para. 8 the applicant pleads: "The second and third respondents, their servants or agents have the capacity to ensure that the appropriate documentation is secured for consideration but have failed or refused or otherwise declined to do so."

At the hearing of the application for judicial review before this Court, on being pressed by the Court as to what the basic right he was seeking, counsel submitted that the right was one of fundamental fairness. Counsel submitted that the applicant had a fundamental right to be considered for prosecution. At no point during the course of the application before me did the applicant refer to any case law other than the *Marques* line of authority. He referred to that line of authority only insofar as he stated that it was not on point. Indeed, at one point he submitted that the case may well favour him because it did not refer to "consideration" by the DPP of a prosecution, it only referred to prosecution by the DPP.

68. As the quote set out above from the *Marques v The DPP* decision demonstrates, it is unimpeachable law that an individual has no right to be prosecuted. It is also demonstrably clear that there is no freestanding right to be given the reasons for the decision not to prosecute. The Court of Appeal decision was a clear authority concerning a decision not to prosecute where a person subject to a request from the US for prosecution for offences which were also prosecutable in Ireland to which he indicated a willingness to plead guilty in this jurisdiction and where issues of fundamental fairness and proportionality in the context of facing extradition had arisen. The case concerned challenged to the DPP in the context of the decision to prosecute. It dealt explicitly with whether a right to be prosecuted in this jurisdiction existed. It is *prima facie* inexplicable that experienced counsel instructed by an experienced solicitor did not see that the decision in *Marques* was highly relevant to the application for leave.

69. Even if counsel could have thought the decision was not relevant prior to going into court, it was clear that the learned judge hearing the application for leave was seeking information about the law relating to a requirement for the DPP to consider prosecution at the insistence of the applicant. Indeed, the learned trial judge was cut off while saying "it would be quite an unusual . . ." The context in which the application for leave unfolded therefore also demonstrated that this was highly relevant case-law.

70. Furthermore, in his letter to the DPP, in his grounding statement and indeed orally to the learned judge hearing the application for leave, reference was made to the applicant wanting to be prosecuted in this jurisdiction. In my view that also indicates that the applicant was asserting that to be considered for prosecution was clearly bound up with the desire to be prosecuted in this jurisdiction.

71. In his written submissions, the applicant puts forward his case under the heading "The applicant's case" as follows:

> "There are two inter-related issues in the case; is the Applicant entitled to have the question of his prosecution considered by the DPP? and, can the State be compelled to procure the necessary and available paperwork to facilitate that consideration?
>
> The Applicant is merely seeking to have the question of his prosecution considered. He appreciates that he cannot compel the D.P.P. to decide one way or the other. He has never sought to make such a case."

72. As stated above both counsel and solicitor have consistently made the point that *Marques* was not on point. In the course of arguing his case before this Court, it became apparent that counsel was asserting this from one particular perspective. It was his submission that because the *Marques* line of authority did not consider the precise point of whether the DPP was obliged to consider the applicant for prosecution, it was of no relevance. In his submission, despite the absence of any investigative file before the DPP or indeed the existence of an investigative file in this jurisdiction, this was a case that was entirely novel and not governed by any legal authority. In essence, counsel for the applicant is submitting that because it was not factually on "all fours" with the facts in *Marques*, that latter case was therefore not "on point".

73. In my view, the duty of *uberrima fides* i.e. the duty to tell the court of relevant authorities, is not to be interpreted in such a blinkered fashion. Such an approach would be entirely at odds with the concept of legal principle which is inherent in the understanding of, and development of, legal norms. That legal principle is to be found in decision of the courts is a particular feature of the common law. What is clear from the decision in *Dean v DPP* (and many other decisions) is that relevant authority be opened to the court.

74. Relevant legal authority is entirely self-explanatory. It will contain matters relevant to the issues at stake in the proceedings. A clear issue at stake in these proceedings is the extent to which a person is entitled to make requirements from the DPP as to their potential prosecution. Competing interests such as fundamental fairness in the context of facing an extradition for alleged offences that would also amount to offences in this jurisdiction were at issue in these proceedings.

75. For counsel and solicitor to approach this area as if it was entirely devoid of relevant legal authority is to say the least highly surprising. One would have understood if counsel had acknowledged at the leave application that the *Marques* line of authority existed, but made an attempt to distinguish it. That attempt might have been based upon the difference (if any) between a right to be considered for prosecution and a right to be prosecuted. That did not happen in this case and instead counsel and solicitor proceeded as if this matter was a blank slate upon which no court had ever made relevant pronouncements of legal principle. The judge at the leave stage could have decided if there was any distinction or if this was a matter covered by the *Marques* decision..

76. It is instructive to recall the manner in which the hearing of the application for judicial review was run before this Court. This Court was informed that there was really a net issue that the court had to decide and was one of whether the *Marques* case was on point or not. Counsel for the applicant made no submission as to how existing legal principle or other legal principle demonstrated that the DPP should or could have such a duty to consider the respondents case. Counsel did not address how or why the State respondents could be compelled to obtain an investigative file in the possession of a law enforcement agency in a foreign state. Counsel presented his case, without even opening any of the *Marques* decisions, as if the sole determining point was whether *Marques* covered the precise point that he made. No legal principles were put forward as to why the applicant is entitled to the reliefs sought. There was nothing other than mere assertion that he had such a fundamental right. In short, counsel opened no legal authority nor identified any other set of principles from which a such a right could be derived for the applicant. He did not address any of the many legal authorities referred to in *Marques* to either rely upon them or to seek to distinguish them.

77. In his written submissions, which dealt primarily with the procedural objections of the respondents, the applicant, took an approach that was primarily directed towards the Attorney General's duty in enforcement of public rights and as the guardian of the Constitution. The crux of his argument is contained in the following paragraph:

> "In this instance a *prima facie* case has been established that the Applicant has committed offences under Irish law. The only reason that the Director of Public Prosecutions has not considered his prosecution is because she does not have the file. The Attorney General's "many hats" include a responsibility to defend the Constitution and constitutional rights, to enforce statutes and to present extradition proceedings. Perhaps the duty he owes the Applicant and his role in the extradition proceedings are incompatible. However, he has the capacity to procure relevant paperwork for the DPP in a manner that is consistent with both responsibilities, but has declined to do so. The net result is that (unlike *Marques*) no consideration has yet been given by the DPP to the question of the Applicant's prosecution here and section 15 of the Extradition Act 1965 has effectively been disapplied. The Applicant submits it is fundamentally unfair to permit his case to fall between the cracks that lie between the two State agencies charged with responsibility in the area, in the circumstances that pertain."

78. Without dwelling on the fact that this precise argument was neither presented to Noonan J at the leave stage or to myself at the oral hearing, the written submissions do not clarify how it can be argued that the *Marques* line of authority has no relevance. The applicant relies upon an argument that constitutional rights are at stake in his entitlement to have his prosecution considered. Those are rights, he submits, which the Attorney General has a duty to vindicate by accessing the file; the right to fundamental fairness demands it. The central flaw in that argument is that it fails to take into account that there is no right to be prosecuted. As stated previously, the argument that there is a right to be considered for prosecution is merely asserted and never developed by the applicant in any submission to the Court, whether written or oral. Moreover, in merely distinguishing between his assertion of a right to be considered for prosecution and the lack of a right to be prosecuted, there is a failure to address the central issues; why are those rights to be distinguished and why does a failure to consider a person for prosecution violate fundamental fairness when there is no right to be prosecuted?

79. Any court that is required to rule on the issue of whether there is a right to be considered for prosecution and a consequential right to insist that the Attorney General provide all necessary assistance to vindicate that right, would be required to address the role of the DPP in prosecutions and the status of a putative accused. It is entirely obvious that the principles set out in the various *Marques* decisions (and indeed the decisions referred to in those judgments) were highly relevant to the issues at stake in the present proceedings. The relevance was self-evident. No court could adjudicate on whether there is a right to compel consideration by the DPP of a prosecution of oneself without a consideration of the case-law which culminated in the Court of Appeal decision in *Marques*. That decision confirmed the long established principle that there was no right in law to be prosecuted. That finding had implications for the right to be given reasons. That finding would therefore have to be the starting point for any exploration of whether there was or could be aa right to be considered for prosecution.

80. The case that is made by the applicant is that the DPP must consider him for prosecution in this jurisdiction. He makes that case where he said that it was a matter of fundamental fairness in the context of facing extradition. The fact that there was already strong case law which rejected claims of a right to be prosecuted when dealing with issues of fundamental rights in the context of extradition proceedings , is naturally relevant to that consideration. Indeed, the fact that a distinction was sought to be made being right to be prosecuted and right to be considered for prosecution, is of itself indicative of the relevance of those earlier findings.

81. In the circumstances, I have no hesitation in holding that there was non-disclosure of relevant legal authority to the court and I am refusing the reliefs sought on that basis. At this point I do not have to reach any conclusion as to whether that was a decision that was made by counsel and solicitor *mala fides* or simply by a lack of due care and attention in presenting the case to the learned trial judge hearing the application for judicial review. In neither situation is it acceptable that relevant material is not placed before a judge. It is particularly unacceptable that, as appears to be the case here, counsel, despite invitation by the trial judge to clarify matters, spoke in generalities instead of opening relevant material.

82. It is possible that counsel became focused on the concept of the low bar that he had to meet at the leave stage which was that of arguable case. I refer to that part of the transcript where counsel submitted that it was at the very least arguable that the DPP should consider the question of his prosecution. Counsel went on to state that it was all he had to say at that juncture but "it may be more profound than that". There is difficulty in understanding the motivation of counsel in making that submission. It cannot be justified on the basis that it was an indication to the judge that he might have difficulties at a later stage in proving his case. If that was truly counsel's intention, it copper fastens the view that it was imperative that he open the *Marques* line of authority to the court. It is not for counsel to withhold information that is relevant because counsel believes that his case is "at the very least arguable" without making it clear to a judge hearing an *ex parte* the precise reason why doubt would hang over the strength of the case. In other words, the decision as to whether a case is arguable is one that the judge must make.

83. Where there is any doubt as to whether a case is ultimately "winnable" because of the state of the law, it is imperative that this law (including case law) be brought to the attention of the judge at the *ex parte* stage. This is because it is only then that the judge can decide if the case has actually reached the arguability threshold. If counsel is making an *ex parte* application where they fear that there are profound legal issues which affect the likelihood of success, then it is a fundamental duty of counsel to make that clear to the court by referring to relevant authorities and opening them to the court where necessary.

84. In stating that fundamental duty, it must be understood that this does not affect the arguability threshold for leave to apply for judicial review. That statement of counsel's fundamental duty at an *ex parte* application simply records that there is a particular duty to point to relevant case-law that appears contrary to the proposition of law that is being advanced or that will have to be distinguished if the law is to be held to be that advanced by counsel. An applicant is of course entitled to point out that the authority can be distinguished if that be the case or that the authority was wrongly decided or has been overtaken by subsequent legal authority. Counsel only has to reach an arguability threshold on those issues at the leave stage. The important thing is that the case-law be opened to the judge who can then decide whether such an argument is sustainable.

85. In this case, where a trial judge had expressed a desire for information in an area in which he was not a specialist, counsel's duty should have been even more obvious. This was a particularly inexplicable failing on the part of experienced counsel in the area.

86. In all the circumstances, where the *Marques* case was highly relevant but was not open at the leave stage, there was a breach of duty of candour. The applicant has requested in his written submissions, that the arguments about lack of candour be rejected because of the failures or errors on the part of the Attorney General in his submissions to the Court. In my view those errors, such as reliance on the Damache authority in its letter or the questioning of why the *ex parte* application was moved before Noonan J, are not such as to disentitle the State respondents to the relief claimed. They were either not made before the court or are inconsequential in the nature of the overall facts of the case. In any event those arguments do not extend in their entirety to the case presented by the DPP. Judicial review is therefore refused on the basis of lack of candour at the *ex parte* stage.

***Substance of the judicial* review**

87. In light of the above, it is perhaps not necessary to deal with the substance of these proceedings. The Court observes however that the applicant has never addressed, in any real or meaningful fashion, how his case could succeed despite the clear statement of principle by the Court of Appeal in *Marques*. The applicant has never addressed any law that would demonstrate that it was the role of the DPP to obtain investigative files for the purpose of considering prosecutions. His focus on the role of the Attorney General as the protector of constitutional rights and guardian of the Constitution was only solidified in his belated written submissions.

88. Counsel for the applicant submitted that the Attorney General had a duty to ensure that such files be obtained and sent to the DPP for her consideration. No law was opened to address how or on what basis the High Court could order Ireland and the Attorney General to procure from the law enforcement agency of a foreign state. More fundamentally, the applicant made no attempt to analyse the law as to extent or limitations on the role of the Attorney General as guardian of the Constitution in the specific context of prosecution and the right to be prosecuted. The clear and authoritative principles set out in the Court of Appeal decision in *Marques*, which relied upon the distinct line of authority which covered the central issue as to the right to be prosecuted in this jurisdiction, are directly on point in relation to rights concerning prosecution. The lack of a right to be prosecuted has a direct impact on whether there is a right to be considered for prosecution. Furthermore, insofar as the applicant relies upon his particular circumstances, i.e. a man awaiting extradition for charges which could be prosecuted here, similar type arguments of fairness were rejected in *Marques* based upon the lack of a right to be prosecuted.

89. This Court is therefore satisfied that even on the substantive point in the proceedings, namely the assertion of a right to be considered for prosecution, the applicant has not discharged the burden of proving that such a right exists and has been violated in this case.

Conclusion
90. In all the circumstances and for the reasons set out above I am refusing the reliefs sought.

91. As an addendum to the above, I note that on Friday 19th October, 2018, supplemental submissions of the second and third named respondents were filed with the Registrar. The above decision was written and ready for delivery prior to receipt of those submissions.