THE HIGH COURT

Record No. 2009/194 EXT

IN THE MATTER OF THE EXTRADITION ACTS 1965 to 2001

BETWEEN

THE ATTORNEY GENERAL

APPLICANT

-AND-

JAMES O'GARA

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 1st day of May, 2012.

1. Introduction

1.1 In these proceedings the United States of America (hereinafter the United States of America or the United States or the U.S.A. or the U.S.) seeks the extradition of the respondent with a view to placing him on trial for the offence of bank robbery in violation of Title 18, United States Code 2113 (a) (hereinafter 18 U.S.C. 2113(a)).

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

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

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

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

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

2.4 The Government by means of the Extradition Act, 1965 (Application of Part II) Order, 2000 (S.I. No. 474 of 2000) made an order pursuant to s.8(1) of the Act of 1965 applying Part II of that Act to the United States of America. Notice of the making of the said order was published in *An Iris Oifigiuil* on the 6th of February, 2001 at p.245. Part 9 of S.I. No. 474 of 2000 was subsequently amended, in order to give effect to provisions of the E.U.- U.S. Treaty, by the Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (S.I. No. 45 of 2010). Notice of the making of this said order was published in *An Iris Oifigiuil* on the 19th February, 2010.

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

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

2.6 S. 10 of the Act of 1965, as amended, deals with extraditable offences and in that regard sets out the requirements that must be met as to correspondence and minimum gravity. In so far as it is relevant to the present case the Court is mainly concerned with subs (1) and (3) which provide:

> "10.-(1) Subject to subsection (2), extradition shall be granted only in respect of an offence which is punishable under the laws of the requesting country and of the State by imprisonment for a maximum period of at least one year or by a more severe penalty and for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of at least four months or a more severe penalty has been imposed''
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> "(3) In this section 'an offence punishable under the laws of the State' means-
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> (a) an act that, if committed in the State on the day on which the request for extradition is made, would constitute an offence, or
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> (b) in the case of an offence under the law of a requesting country consisting of the commission of one or more acts including any act committed in the State (in this paragraph referred to as 'the act concerned'), such one or more acts, being acts that, if committed in the State on the day on which the act concerned was committed or alleged to have been committed would constitute an offence,

and cognate words shall be construed accordingly."

Subs. (2) is not relevant to the present case.

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

2.8 S.23 of the Act of 1965 provides;

> "23.-A request for the extradition of any person shall be made in writing and shall be communicated by-
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> (a) a diplomatic agent of the requesting country, accredited to the State, or
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> (b) any other means provided in the relevant extradition provisions...

2.9 S.25 of the Act of 1965 provides;

> "25.- A request for extradition shall be supported by the following documents-
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> (a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or. as the case may be. of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting country;
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> (b) a statement of each offence for which extradition is requested specifying. as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law of the requesting country;
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> (c) a copy of the relevant enactments of the requesting country or, where this is not possible, a statement of the relevant law;
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> (d) as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality, and
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> (e) any other document required under the relevant extradition provisions."

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

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

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

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

> "29-(1) Where a person is before the High Court under section 26 .... and the Court is satisfied that-
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> (a) the extradition of that person has been duly requested, and
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> (b) this Part applies in relation to the requesting country, and
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> (c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions, and
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> (d) the documents required to support a request for extradition under section 25 have been produced,

the Court shall make an order committing that person to a prison (or, if he is not more than twenty-one years of age, to a remand institution) there to await the order of the Minister for his extradition."

3. The Request for Extradition in this Case

3.1 The evidence before the Court establishes that on the 24th June, 2009, a request in writing was made by the United States of America for the extradition of the respondent for the purpose of having him stand trial in the U.S.A for the offence of bank robbery in violation of 18 U.S.C. 2113 (a). The request was communicated to the Minister by the Embassy of the United States of America in Dublin. The Court is satisfied in the circumstances that it was duly communicated by a diplomatic agent of the requesting country, accredited to the State.

3.2 The Court has had produced to it a certificate of the Minister (for Justice, Equality and Law Reform- as he was then entitled), dated the 15th July, 2009, in which he certifies that a request has been duly made by and on behalf of the United States of America, and received by him, for the extradition of the respondent. The Court is satisfied that the said certificate was made under, and is sufficient for the purposes of s. 26(1)(a) of the Act of 1965.

3.3 The evidence before the Court further establishes that the applicant then applied to the High Court pursuant to s.26(1)(b) of the Act of 1965, as amended, seeking a warrant for the arrest of the respondent; that the said application was successful and that such a warrant was issued by Mr. Justice Peart on the 22nd July, 2009.

3.4 The evidence further establishes that in execution of that warrant the respondent was subsequently arrested by Sergeant Sean Fallon, a member of An Garda Siochana. at Roscommon Garda Station, Roscommon town, in the county of Roscommon on the 17th November. 2009. He was then brought before the High Court and was duly remanded from time to time, initially in custody, and later on bail. pending a s.29 hearing in these proceedings, and he has duly appeared before the High Court and has answered his bail on all occasions on which he was required to do so.

3.5 Counsel for the respondent has informed the Court that no issue is taken as to the identity of the respondent.

3.6 The matter was before the Court for the purposes of a s.29 hearing on the 31st May, 2011, the 4th October, 2011, and the 24th October, 2011, following which the Court reserved its judgment, which it now delivers.

4. Broad Outline of the Case against the Respondent
4.1 A précis of the case against the respondent is set out in an affidavit sworn in support of the request for extradition with which the Court is presently concerned by Randall W. Jackson, Assistant United States Attorney for the Southern District of New York on the 4th June. 2009. The said affidavit and its accompanying exhibits are receivable in evidence without further proof pursuant to s.37(1) of the Act of 1965. the Court being satisfied that they have been signed by an officer of the requesting country and are certified by being sealed with the Seal of the Department of Justice of the United States of America on the authority of Hillary Rodham Clinton, Secretary of State. There are other affidavits and exhibits of the said Randall W. Jackson, and also of a David Caskey, to which reference will be made as required later in this judgment, and these are authenticated, certified and sealed in a similar fashion.

4.2 Mr. Jackson states the following at paragraphs 4 to 7 inclusive of his affidavit of the 4th June, 2009:

"SUMMARY OF THE FACTS OF THE CASE

> 4. At approximately 2:30p.m., on April 2, 2007, an individual believed to be O'Gara ("the suspect"), entered Country Bank, located at 4349 Katonah Ave., Bronx, NY. According to a bank teller, the suspect was a white male, wearing a blue and white jacket, a dark coloured hat and a nylon mesh mask. The suspect displayed a black handgun to the teller and demanded that she give him the money under her control. The teller case at approximately $12,260 into a bag and handed it to the suspect who then exited the bank.
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> 5. Outside of the bank, a bystander (Witness 1) observed the suspect exiting the bank wearing a blue and white jacket, a dark coloured hat and a nylon mesh mask. Witness 1 called 911 and reported that she had seen the suspect exit the bank and run between two houses on the block adjacent to the block where the bank was situated. Witness 1 indicated to Federal Bureau of Investigation (FBI) agents that she saw the suspect to run to the area of 238th Street and Martha Ave, Bronx, NY. FBI agents spoke to an individual (Witness 2) who lives in the area of 238th and Martha Ave. Witness 2 reported that around 2:30 P.M. on the day of the robbery, she observed her neighbour. O'Gara, run in between two houses and then run into his house at 320 E. 237th St., Bronx, NY. Upon investigation of the area where O'Gara was observed running, FBI agents recovered clothing matching the description of that worn by the suspect, a dark coloured handgun, and a bag containing the $12,260 that was taken from the Katonah Ave. Country Bank branch. FBI agents spoke with two other individuals (Witness 3 and Witness 4), who live nearby O'GARA's home and are personally familiar with O'Gara. Witnesses 3 and 4 both reported that they know O'Gara owns a dark coloured handgun.
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> 6. In April 2007, based on the facts as stated above, the FBI sought and obtained. a search warrant to obtain a Deoxyribonucleic acid (DNA) sample from O'Gara. Pursuant to the Search warrant authorization, investigating agents rubbed the insides of O'Gara's cheeks with a cotton swab, thereby obtaining O'Gara's saliva and tissue. The FBI then submitted to the cotton swap to a laboratory which is equipped to perform DNA analysis. The FBI also submitted certain items of the bank robbers clothing that was obtained from the crime scene.
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> 7. In February 2008, the FBI obtained a report from the laboratory which stated the results of the lab's DNA analysis. The report indicated that the DNA change from O'Gara matched DNA obtained from articles of the bank robber's clothing."

4.3 On the 2nd April. 2008. a grand jury sitting in the Southern District of New York returned an indictment charging O'Gara with a criminal offence against the laws of the United States and filed this indictment in the United States District Court for the Southern District of New York. A copy of this indictment is exhibited marked "A" in the affidavit of Randall W. Jackson sworn on the 4th June, 2009, and it is in the following terms:

> "The Grand Jury charges:
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> On or about April 2, 2007, in the Southern District of New York, JAMES O'GARA, the defendant, unlawfully, wilfully, and knowingly, by force and violence, and by intimidation, did take and attempt to take, from the person and presence of another, property and money and other things of value belonging to and in the care, custody, control, management and possession of a bank, that deposits of which were then insured by the Federal Deposit Insurance Corporation, to wit, O'GARA displayed a gun to an employee of the Country Bank located at 4349 Katonah Avenue in the Bronx, New York, and robbed the bank of approximately $12,260.
>
> (Title 18, United States Code, section 2113 (a).)"

4.4 The said affidavit of Randall W. Jackson sworn on the 4th June, 2009, also exhibits an authenticated copy of the domestic U.S. arrest warrant, marked "B"; a copy of the relevant provisions of the United States Code, marked "C" and "D" respectively; and provides a detailed description of the requested person accompanied by a photograph of that person, marked "E".

4.5 The Court is satisfied from a perusal of all of this material that the requirements of s.25(1) of the Act of 1965 have been met in terms of the provision of specified documents in support of the request for extradition in this case.

5. Uncontroversial matters- correspondence and minimum gravity
5.1 In so far as correspondence is concerned the Court has been invited to find correspondence with the offence of robbery, contrary to s.14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The Court has considered all of the information supplied in support of the request for extradition in this case, and having approached the matter in the manner indicated as appropriate by the Supreme Court in *Attorney General v. Dyer* [2004] 1 I.R. 40, is satisfied to do so.

5.2 In so far as minimum gravity is concerned, the offence of bank robbery, in violation of 18 U.S.C. 2113(a) is punishable by an offence of up to twenty years imprisonment in the U.S.A. Moreover, the corresponding offence in Irish law carries up to 14 years imprisonment. The Court is satisfied in the circumstances that the requirements of s.10(1) of the Act of 1965, and of Article II (1) of the Washington Treaty (which, though nothing turns on it in the circumstances of this case, is worded slightly differently from the relevant section of the Act) with respect to minimum gravity are met.

6. The Points of Objection
6.1 A Notice of Objection to the proposed extradition filed on behalf of the respondent contains some 5 points of objection. The Court was informed on the first day of the hearing that only point 4 was being proceeded with. Point 4, which comprises a number of sub-points, is pleaded in the following terms:

"4. The extradition of the respondent would amount to a breach of his constitutional rights and/or his rights under the European Convention on Human Rights in that:

a the requesting state does not observe the same norms as the State in relation to the treatment of prisoners. As such the respondent ought not to be surrendered in circumstances where his treatment as a prisoner will fall below the standards which would be considered acceptable and appropriate in a civilised state.

b. The conditions of imprisonment in the requesting state include the systematic use of prison rape, ... by other prisoners ..... If extradited the respondent will be exposed to an unacceptable risk of being raped whilst in custody. Notwithstanding the entry into force of the Prison Rape Elimination Act of 2003 the authorities in the requesting state have done little or nothing to reduce the incidence of such rape. Prison rape is at present at such an endemic level within the requesting state that it falls well short of the standard expected in a civilised state in terms of prison conditions.

c. The conditions of imprisonment in the requesting state include an unacceptable exposure to violence and death within the prison system largely by virtue of ..... the existence of prison gangs within the prison system of the requesting state. If extradited the respondent would be exposed to a wholly unacceptable risk of serious injury or death due to the existence of such gangs which are tolerated by the authorities in the US prison system largely for the purpose of control of the prison population."

6.2 In response to a request from the Court to counsel for the respondent that he should specifically identify both the constitutional rights and the rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) on which his client relies, the Court was informed that the respondent relies upon his constitutional rights to bodily integrity and to be treated with human dignity. and his rights under Article 3 of the Convention not to be subjected to torture or to inhuman and degrading treatment.

7. The evidence on behalf of the respondent.
7.1 The first affidavit upon which the respondent relies is an affidavit of his solicitor, Catherine Almond. of Garrett Sheehan & Partners, sworn on the 3rd June, 2010. Ms. Almond has also sworn a second affidavit in these proceedings on the 24th May, 2011. Counsel for the applicant, while agreeing that Ms. Almond's affidavits might be received by the Court *de bene esse*, indicated that he was objecting to aspects of Ms. Almond's evidence in as much as (a) although she is not an expert of American law or government policy, or on the prison system in the U.S.A.. she nonetheless purports to give evidence concerning American law and government policy, and to express opinions on aspects of the prison system in the U.S.A.; and (b) much of what she refers to is hearsay. In response counsel for the respondent sought to suggest that Ms. Almond does not put herself forward as an expert, and that she merely exhibits, and deals with the provenance of, material relied upon by the respondent's other deponent, Dr. Jeffrey Ross, who is relied upon as an expert. The Court has considered Ms. Almond's affidavits. While she does exhibit, and deal with the *provenance* of, material relied upon by Dr. Ross, it is also true to say that she goes further and does comment upon, and does offer opinions concerning, American law and government policy, as well as the prison system in that country.

7.2 In so far as the objection based upon lack of expertise is concerned the Court will uphold it, and will disregard those portions of Ms. Almond's affidavits that purport to comment upon, or other opinions concerning, either American law and government policy, or the prison system in the U.S.A.

7.3 In so far as the objection based upon hearsay is concerned. the Court takes the view, which it has expressed in other cases, that *in sui generis* proceedings, such as these are, hearsay evidence in the nature of documents from ostensibly reliable sources concerning facts about the requesting country, and its laws and policies, (what would be described in the immigration or asylum law context as "country of origin information") is admissible and may be relied upon by the Court, subject to issues as to the weight that may be attached to it.

7.4 The rule against hearsay is a rule of evidence primarily concerned with ensuring fairness in an adversarial contest where one side bears a burden of proof and where the other side is entitled to succeed if that burden of proof is not discharged. In contrast, the present proceedings are *sui generis*. They are more in the nature of inquisitorial proceedings than adversarial proceedings, but they are in truth neither one nor the other. What can be said is that neither side bears a burden of proof as such. They are here to assist the Court of course, but at the end of the day it is for the Court to be satisfied as to whether or not the requirements of the Act of 1965, and of the Washington Treaty, are met so as to allow it to extradite the respondent. - see the judgment of Murray C.J. in *Attorney General v. Parke* [2004] I.E.S.C 100.

7.5 With regard to the present issue concerning whether or not there is a real risk that the respondent's constitutional rights to bodily integrity and to be treated with human dignity, and his rights under Article 3 of the Convention not to be subjected to torture or to inhuman and degrading treatment, would be breached, the respondent bears only an evidential burden of pulling forward cogent evidence tending to suggest that such a risk exists. He is not required to prove it beyond reasonable doubt or even on the balance of probabilities, and so bears no burden of proof as such.

7.6 In such circumstances, the Court considers that for the purpose of assisting it in its enquiry it is entitled to receive, and to have regard to, documentary material in the nature of country of origin type information notwithstanding that it is strictly speaking hearsay, that the author(s) is/are not present to be cross-examined, and that the Court may not have formal proof of due execution and content. This would appear to have been the approach of the Supreme Court in the, admittedly somewhat different, European arrest warrant context. In particular, in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] 3 I.R. 783, Denham J., as she then was, stated at p.8O1:

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

However, the Court will only attach such weight to material of this sort as seems to it to be appropriate, and the Court will take into account any submissions received from an interested party or parties concerning the weight to be attached to any particular piece of such evidence.

7.7 In the circumstances the Court has received, and has had regard to, the following documents exhibited by Ms. Almond in her

affidavit sworn on the 3rd June, 2010:

Exhibit "A"- National Prison Rape Elimination Commission Report (June, 2009) -Executive Summary pp.l-24;

Exhibit "B" - Human Rights Watch Report "No Equal Justice: The Prison Litigation Reform Act in the United States" (hereinafter referred to as Human Rights Report, 2009)

7.8 The remit of National Prison Rape Elimination Commission, and the background to its 2009 report is, I believe, succinctly summarized in the following extracts from the executive summary to that document, which states at pp.1-3:

"Rape is violent, destructive, and a crime-- no less so when the victim is incarcerated."

"Even as courts and human rights standards increasingly confirmed that prisoners have the same fundamental rights to safety, dignity, and justice as individuals living at liberty in the community, vulnerable men, women and children continued to be sexually victimised by other prisoners and corrections staff. Tolerance of sexual abuse of prisoners in the government's custody is totally incompatible with American values.

Congress affirmed the duty to protect incarcerated individuals from sexual abuse by unanimously enacting the Prison Rape Elimination Act of 2003. The Act called for the creation of a national Commission to study the causes and consequences of sexual abuse in confinement and to develop standards for correctional facilities nationwide that would set in motion a process once considered impossible: the elimination of prison rape."

"[The Commission's report contains] nine findings on the problems of sexual abuse in confinement and select policies and practices that must be mandatory everywhere to remedy these problems."

"In the years leading up to the passage of PREA and since then, corrections leaders and their staff have developed and implemented policies and practices to begin to prevent sexual abuse and also to better respond to victims and hold perpetrators accountable when prevention fails. They have been aided by a range of robust Federal initiatives, support from professional corrections associations, and advocates who have vocally condemned sexual abuse in confinement. The landscape is changing. Training curricula for correctional staff across the country now include information about sexual abuse in confinement and how to prevent it. Some agencies and facilities have formed sexual assault response teams to revolutionize their responses to sexual abuse. Despite these and other achievements, much remains to be done, especially in correctional environments in which efforts to address the problems of sexual abuse have been slow to start or have stalled. Protection from sexual abuse should not depend on where someone is incarcerated or supervised: it should be the baseline everywhere."

"Since forming, the Commission has convened public hearings and expert committees, conducted a needs assessment that involved site visits to 11 diverse correctional facilities, and thoroughly reviewed the relevant literature. Throughout the process, corrections leaders, survivors of sexual abuse, healthcare providers, researchers, legal experts, advocates and academics shared their knowledge, experiences and insights about why sexual abuse occurs, under what circumstances, and how to protect people.

The Commission used what it learned about the nature and causes of sexual abuse in correctional settings and its impact to develop mandatory standards to prevent, detect and punish sexual abuse. Two 60 day periods of public comment were critical junctures in the creation of the standards. The Commission tailored the standards to ret1ect the full range of correctional environments across the country: adult prisons and jails: lock-ups and other short-term holding centres: facilities for juveniles; immigration detention sites; and probation, parole and other forms of community corrections. Many standards reflect what corrections professionals recognize as good practices -- and are already operational in some places -- or are requirements under existing laws. If for correctional agencies incur new costs to comply with the Commission standards, those costs are not substantial compared to what these agencies currently spend and are necessary to fulfil the requirements of PREA.

The Eighth Amendment of the US Constitution forbids cruel and unusual punishment-- a ban that requires correctional staff to take reasonable steps to protect individuals in their custody from sexual abuse whenever the threat is known or should have been apparent. In *Farmer v Brennan* [501 U.S. 825 (1994)] the Supreme Court ruled unanimously that deliberate indifference to the substantial risk of sexual abuse violates an incarcerated individuals rights under the Eighth Amendment. As the court so aptly stated, sexual abuse is ` not part of the penalty for their criminal offenders pay for their offences against society'."

7.9 It is not necessary for the purposes of this judgment to review all of the Commissions nine findings. Some of them relate to particular aspects of the general problem that are not relevant to any potential incarceration of the respondent in a US prison in the event of his extradition. e.g. sexual abuse of children in custody, sexual abuse of women in custody and sexual abuse of immigrants in custody. However, the following findings are potentially relevant:

"FINDING 1 (at p.3)

Protecting prisoners from sexual abuse remains a challenge in correctional facilities across the country. Too often, in what should be secure environments, men .... are raped or abused by other incarcerated individuals and corrections staff."
(In support of this finding. the Commission's report states (*inter alia*):

"Although the sexual abuse of prisoners is as old as prisons themselves, efforts to understand the scale and scope of the problem are relatively new. The first study specifically of prevalence --examining abuse in the Philadelphia jail system -- was published in 1968. The most rigorous research produced since then -- mainly of sexual abuse among incarcerated men-- has yielded prevalence rates in the mid-to- high teens, but none of these are national studies.

With an explicit mandate from Congress under PREA, the Bureau of Justice Statistics (BJS) launched a ground breaking effort to produce national incidence rates of sexual abuse by directly surveying prisoners."

" BJS conducted the first wave of surveys in 2007 in a random sample of 146 State and Federal prisons and 282

local jails. A total of 63,817 incarcerated individuals completed surveys, providing the most comprehensive snapshot of sexual abuse in prisons and jails to date. Four and a half percent of prisoners surveyed reported experiencing sexual abuse in one or more times during the 12 months preceding the survey or over their term of incarceration if they had been confined in that facility for less than 12 months. Extrapolated to the national prison population, an estimated 60,500 State and Federal prisoners or sexually abused during that 12 month period.

Although sexual abuse of prisoners is widespread, rates vary across facilities. For example, 10 facilities had comparatively high rates, Between 9.3 and 15.7 percent whereas in six of the facilities no one reported abuse during that time period. More prisoners reported abuse by staff and abused by other prisoners: 2.9 percent of respondents compared with about 2 percent. (Some prisoners reported abuse by other inmates and staff.)"

"FINDING 2 (at p.5)

Sexual abuse is not an inevitable feature of incarceration. Leadership matters because corrections administrators can create a culture within facilities that promotes safety instead of one that tolerates abuse."
"FINDING 3 (at p.7)

Certain individuals are more at risk of sexual abuse than others. Corrections administrators must routinely do more to identify those who are vulnerable and protect them in ways that do not leave them isolated and without access to rehabilitative programming."
(In support of this finding. the Commission's report states (*inter alia*):

"The Commission is concerned that correctional facilities may rely on protective custody and other forms of segregation (isolation or solitary confinement) as the default form of protection. And the Commission learned that desperate prisoners sometimes seek out segregation to escape attackers. Serving time under these conditions is exceptionally difficult and takes a toll on mental health, particularly if the victim has a prior history of mental illness. Segregation must be a last resort and interim measure only. The Commission also discourages the creation specialised units for vulnerable groups and specifically prohibits housing prisoners based solely on their sexual orientation or gender identity because it can lead to demoralising and dangerous labelling.

The Commission is also concerned about the effect of crowding on efforts to protect vulnerable prisoners from sexual abuse. Crowded facilities are harder to supervise, and crowding systemwide makes it difficult to carve out safe spaces for vulnerable prisoners that are less restrictive than segregation.")

"FINDING 4 (at. p.9)

Few correctional facilities are subject to the kind of rigorous internal monitoring and external oversight that would reveal why abuse occurs and how to prevent it. Dramatic reductions in sexual abuse depend on both.''
"FINDING 5 (at p.11)

Many victims cannot safely and easily report sexual abuse, and those who speak out often do so to no avail. Reporting procedures must be improved to instil confidence and protect individuals from retaliation without relying on isolation. Investigations must be so and competent. Perpetrators must be held accountable through administrative sanctions and criminal prosecution.''
"FINDING 6 (at p.14)

Victims are unlikely to receive the treatment and support known to minimise the trauma of abuse. Correctional facilities need to ensure immediate and ongoing access to medical and mental health care and supportive services."

7.10 The Court has also considered in detail the Human Rights Watch Report "No Equal Justice: The Prison Litigation Reform Act in the United States." The gravamen of this lengthy report is, I believe, fairly summarised in the following extracts from the summary contained in Chapter l. and the conclusions set forth in Chapter XL of that document at p.1 :

"I- Summary"

"The Prison Litigation Reform Act (PLRA), passed by Congress in 1996, denies equal access to the courts to the more than 2.3 million incarcerated persons in the United States.

The PLRA subjects lawsuits brought by prisoners in the federal courts to a host of burdens and restrictions that apply to no other persons. As a result of these restrictions, prisoners seeking the protection of the courts against unhealthy or dangerous conditions of confinement, or those seeking a remedy for injuries inflicted by prison staff and others, have had their cases thrown out of court. These restrictions apply not only to persons who have been convicted of crime, but also to pre-trial detainees who have not yet been tried and are presumed innocent."

The PLRA's restrictions include:

The exhaustion of remedies requirement. Before a prisoner may tile a lawsuit in court, he must first take his complaints through all levels of the prison's jail's grievance system, complying with all the deadlines and other procedural rules of that system. If the prisoner fails to comply with all technical requirements, or misses a tiling deadline that may be as short as a few days, his right to sue may be lost forever.

The physical injury requirement. A prisoner may not recover compensation for "mental or emotional injury" unless she makes a "prior shelving of physical injury". Under this provision, prisoners who have been subjected to sexual assault and other intentional abuse by prison staff had been denied a remedy.

Application to children. (not applicable)

Restrictions on court oversight of prison conditions. The PLRA restricts the power of federal courts to make and enforce orders limiting overcrowding or otherwise remedying unlawful conditions in prisons and jails.

Limitations on attorney fees. If a prisoner files a lawsuit and wins, establishing that her rights have been violated, the PLRA limits the amount her attorneys can be paid.

The PLRA's sponsors argued that the law is necessary to deal with 'frivolous' lawsuits brought by prisoners. Some prisoners, like some non-prisoners, do file frivolous suits, and the PLRA includes the reasonable requirements that prisoner cases be subject to a preliminary screening process and be immediately dismissed if they are frivolous or malicious, or if they fail to state a claim on which relief can be granted. But the cases described in this report shows that other provisions of the PLRA have resulted in dismissal of claims involving serious physical injury, sexual assault and intentional abuse by prison staff -- claims that no reasonable person would characterize as frivolous.

Unlike many other democracies, the United States has no independent national agency that monitors conditions in prisons, jails and juvenile facilities and enforces minimal standards of health, safety, and humane treatment. Perhaps for this reason, oversight and reform of conditions in these institutions has fallen primarily to the federal courts. Beginning in the 1970s, lawsuits brought by prisoners led to improved medical care, sanitation and protection from assault. While significant problems remained, by the time the PLRA was passed in 1996, US prison conditions had been transformed in just a few short decades.

The effect of the PLRA on prisoners' access to the courts was swift. Between 1995 and 1997, federal civil rights filings by prisoners fell 33 percent despite the fact that the number of incarcerated persons had grown by 10 percent in the same period. By 2001 prisoner filings were down 43 percent from their 1995 level, despite at 23 percent increase in the incarcerated population. By 2006 the number of prisoner lawsuits per thousand prisoners had fallen 60 percent since 1995.

If the effect of the PLRA were to selectively discourage the filing of frivolous or meritless lawsuits, as its sponsors predicted, then we would expect to find prisoners winning a larger percentage of their lawsuits after the law's enactment than they did before. But the most comprehensive study to date shows just the opposite: since the passage of the PLRA, prisoners not only are filing fewer lawsuits but also are succeeding in a smaller proportion of the cases they do file. This strongly suggests that rather than filtering out meritless lawsuits, the PLRA has simply tilted the playing field against prisoners across the board. The author of a comprehensive study on the impact of the act concludes that 'the PLRA's new decision standards have imposed new and very high hurdles so that even constitutionally meritorious cases are often thrown out of court'"

"XI Conclusion (at p.44-45)

The PLRA has had a devastating effect on the ability of incarcerated persons to protect their health and safety and vindicate other fundamental rights. While justified by the PLRA's sponsors as necessary to prevent frivolous lawsuits, the requirement that prisoners first take their complaints through the facility's grievance system, no matter how complicated or multilayered process or how short the deadlines, has barred relief for prisoner claims regardless of their merit. The provision prohibiting compensation for 'mental or emotional injury' unless accompanied by physical injury has placed an entire category of improper and even abusive staff behaviour beyond the reach of the law."

"Prisons, jails and juvenile detention facilities are unique environments. On the one hand, they are places where liberty is severely restricted-- where men, women, and children live, often for years or decades at a time, under the constant surveillance and near absolute power of custodial staff. Even their ability to communicate with the outside world is restricted, with letters and telephone calls subject to monitoring and censorship.

At the same time these facilities are, of necessity, closed institutions to which outside access is limited. Most prisons severely restrict access by the news media and many flatly prohibit media interviews with prisoners, practices that have been upheld by the US Supreme Court. Therefore, the kind of public and media scrutiny that helps prevent abuses of power in other government institutions simply does not operate in cases of incarceration.

This combination of virtually unlimited power and lack of transparency creates a potential for abuse-- a potential that, as this report makes clear, is realized all too frequently in prisons, jails, and juvenile detention facilities. If abuse is to be prevented, and remedied when it does occur, there must be an outside agency with the power to compel access to information and order a remedy in appropriate cases.

In the United States this role has historically been carried out by the federal courts. But the PLRA, by erecting barriers to court access that apply only to incarcerated persons, has severely limited the ability of the courts to perform this function. Reasonable amendments to the PLRA would remove these barriers while leaving intact the law's central feature: the preliminary screening of prisoner cases and early dismissal if they are plainly without merit. Congress should enact these amendments without delay to restore the rule of law to prisons, jails and juvenile detention facilities in the United States."

7.11 The Respondent relies principally upon an affidavit of Dr. Jeffrey Ian Ross sworn on the 11th January, 2011, to which there are extensive exhibits all of which have been carefully considered by this Court. Dr. Ross is Associate Professor in the School of Criminal Justice, College of Public Affairs, and Research Fellow of the Center for International and Comparative Law at the University of Baltimore. Maryland. He has extensive qualifications and experience in criminology and penology and is an expert on, and has written extensively about, the U.S. criminal justice and correctional system.

7.12 At paragraph 5 of his affidavit Dr. Ross makes the point that the respondent is charged with a federal crime. Accordingly, Mr. O'Gara, if convicted and sentenced to prison, will be incarcerated at a federal correctional facility run by the Federal Bureau of Prisons (F.B.O.P. or B.O.P. for short) and not a state facility. Due to the nature of his crime the death penalty will not be an issue, however, because the crime was committed with a handgun the prospective sentence is rather lengthy (typically 7 to 12 years). The federal sentence guidelines require all inmates to serve 85 % of their sentences and they are subject to mandatory minimum sentences. Since bank robbery is a crime of violence those sentenced are usually sent to correctional facilities that are of higher security.

7.13 Dr. Ross identifies three areas of concern about American prisons from peer reviewed scholarly literature/ scientific research and he focuses on these. These are levels of prison violence (especially proclivity to rape), poor medical care, and the rights of prisoners which arc significantly curtailed because of the *Prison Litigation Reform Act* 1995 (passed by Congress in 1996). It is necessary to

consider his evidence, particularly with regard to the first and third of these areas of concern, in some detail. However, while his affidavit contains a most extensive literature review and all of his sources are appropriately referenced the Court does not, in general, proposed to identify or to summarize his source material within this judgment. It will only do so if it is considered necessary in the light of some specific controversy.

7.14 Dr. Ross commences with a review of scholarly literature which documents the level of violence in U.S. prisons and correctional facilities. He states that although copious anecdotal research exists about the level of violence (i.e., inmates versus inmate, inmate versus correctional staff, correctional staff versus inmates, and self inflicted violence) at American correctional facilities, no scholarship has been conducted which specifically tests the level of violence at different federal correctional facilities. Such research as has been conducted over the past sixteen years research has been conducted on general level factors, and the relationship between individual level factors such as: age, education level, ethnicity, gender, mental health status, type of crime the individual was convicted of, race, etc.; facility-related variables such as crowding, levels of misconduct in a correctional facility, inmate capacity, design capacity, and other selected components of correctional facilities; and with/without violence. Most research, regardless of the facility, indicates that violence is endemic to American correctional facilities. Unfortunately, the majority of scholarly research with respect to levels of violence and health care concerns reflects the state of affairs in local (i.e., jails) and state correctional facilities and almost completely ignores the federal system. Anecdotal evidence suggests the reason for this state of affairs is that it is much more difficult for researchers to gain access to the federal system. One particular academic commentator has suggested that the social organization of prisons (i.e., differences among staff and inmates, degree of crowding, etc.) has an effect on violence behind bars. It was not, however, suggested that the security level or type of facility had an effect on violence.

7.15 Dr. Ross then reviewed scholarly literature dealing with the role of gangs in the fomentation of violence in F.B.O.P. prisons. This reveals that some jails, prisons, and other correctional facilities are literally run by gangs. Even if convicts want to "do their own time'" and be left alone, there are strong pressures to join a gang for self and mutual protection. In situations like these, unaffiliated individuals are subject to routine victimization and they may not be able to defend themselves. Gang members may coerce, extort, or steal material possessions or services from convicts. Sometimes this is done when inmates conduct a cell invasion, by running *en mass* into the victims' cell and grabbing anything of value. According to one commentator, 'The guards can be of little help in protecting him, since in many institutions administrators tend to 'look the other way' as rival gangs tend to maintain a certain level of social control and order". It is generally understood that because of competition over space, drug markets, and rivalries on the streets, gangs are responsible for the lion's share of violence in prisons. One research study from 1985, though dated, indicates that gangs make up only about 3% of the inmate population but are responsible for 50% of the violence.

7.16 Dr. Ross then reviewed the scholarly literature dealing with the role of rape as a method of violence and subjugation in the F.B.O.P. This indicates that that most people who are sent to prison tear being raped. Undoubtedly, there is both consensual and coerced sex in prison. These practices are also complicated by male prostitution. However, sexual assault is rarely about physical attraction or gratification; it is about violence, politics, power, and business. Some convicts routinely and habitually exploit others sexually. When in prison, some convicts or groups of convicts try to coerce fish (the new arrivals), using fear and/or violence to force them into sexual submission. To surrender will put a fish at the mercy of the violent thugs. If new convicts resist, this stance may become a source of challenge for rapists, while victims may risk serious injury (and they might be raped regardless) or even be killed. In some correctional facilities both correctional officers and administrators have been known to ignore inmates complains about rape.

7.17 Dr. Ross points out at paragraph 14 of his affidavit that in one recent study, 46% of correctional officers in a Texas prison suggested that the prisoners were culpable for their rapes. In another study it was remarked that "In some extreme cases, rape can become a 'management tool' to punish prisoners who step out of line, break a potentially strong inmate leader, coerce prisoners or crime suspects, create snitches, silence dissidents, and divide inmates".

7.18 The literature further indicates that statistics on male sexual assault in American prisons are difficult to obtain, and for good reason. Most victims never report being raped because of fear of retribution and/or embarrassment that they let themselves fall prey to this kind of victimization. Nevertheless, since the passage of the *Prison Rape Elimination Act* of 2003 the federal government has started to collect data on the frequency and type of sexual violence behind bars. In the most recent victimization survey (the second of its kind) conducted by the Bureau of Justice Statistics (B.J.S.) (part of the U.S. Department of Justice) between the 1st January, 2007, and the 30th June, 2007, the report indicated that in 2006 there were 242 allegations of sexual violence with a rate of 1.5 per 1,000 inmates in federal correctional facilities (p.3). The report, however, does not break out the number of males versus females that were sexually assaulted in federal facilities. Moreover, the writers cautioned readers of the report that the 2006 survey results should not be used to rank systems or facilities. Given the absence of uniform reporting, caution is necessary for accurate interpretation of the survey results. Higher or lower counts among facilities may reflect variations in definitions, reporting capabilities, and procedures for recording allegations as opposed to differences in the underlying incidence of sexual violence.

Since the B.J.S. data should be interpreted with caution, and as simply the tip of the iceberg, other published research estimates on the frequency of male rape include approximately 196.000 men raped in prisons each year. Dr. Ross cites Leighton, P.& Roy J. (2005). Rape, in M. Bosworth (ed.) *Encyclopedia of Prisons & Correctional Facilities*, Vol. 2 (pp.819-822). Thousand Oaks. C.A.: Sage Publications, in which the authors, Leighton and Roy, having reviewed the available research, summarised the position by remarking at p.819: "Other research concludes the number of men raped behind bars is 20% to 30%, with a high number of repeat victimizations (at the extreme involving 50-100 incidents per victim) and a significant number (up to 80 %) of incidents involving multiple perpetrators".

7.19 Dr. Ross has also reviewed the scholarly literature on the quality of medical care in U.S. prison and correctional institutions, which he characterises as being substandard in general. He asserts at paragraph 17 of his affidavit that "[t]he scholarly evidence clearly and systematically points to the widely acknowledged perception that the FBOP and Federal Medical Centers (FMCs), where chronically sick or infirm prisoners are housed, engage in symbolic health care." Although his literature review on this aspect of the matter is extensive and wide ranging, and due note of it has been taken by this Court, it is not necessary to rehearse the detail of it for the purposes of this judgment.

7.20 Finally Dr. Ross examines and comments upon the issue of curtailment of prisoners access to the courts. He notes that between the early 1960's until the mid 1990's, there was an increase in lawsuits brought forth by/against correctional facilities and prison systems. Relying on different amendments to the U.S. Constitution (i.e., First, Fourth, Fifth, Sixth. Eighth, and Fourteenth), prisoners, jail house lawyers, and prison reform organizations have taught for, and judges have passed (*sic*) numerous important legal reforms concerning prison conditions and practices.

7.21 Dr. Ross contends that it is widely understood that in the United States most prison reforms have been accomplished through prisoner litigation. According to the United States Supreme Court Case of :*McCarthy v. Madigan*, 503 U.S. 140, 153, (1992), "'Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining

most fundamental political right." In 1996, *the Prison Litigation Reform Act* (P.L.R.A.) was passed. Advocates of this legislation believed that inmate litigation was out of control, primarily connected to "frivolous" matters, "thus impairing the quality of justice enjoyed by law-abiding persons" (per Human Rights Watch Report, 2009 at p.9). Unfortunately, the P.L.R.A. has had a severe dampening effect on the number and type of inmate litigation permissible in federal courts. Bartollas, C. 2002. *Invitation to Corrections*. Boston: Allyn & Bacon remarks at p.220 that it "places limitations on population caps and limits the time periods of injunctions and consent decrees placed on institutions, forces solvent inmates to pay part of the filing fee, and requires judges to screen prison claims to eliminate frivolous law suits". The legislation made it almost impossible for the courts to initiate any actions against correctional facilities that were perceived to be overly broad. It is conceivable that the number and kinds of suits against the F.B.O.P. would be even higher over the past 14 years had the P.L.R.A. not been in force.

7.22 Dr. Ross states that the P.L.R.A. has been criticized by numerous prison activists, correctional workers, prison administrators, civil/human rights organizations, and is considered draconian in many quarters. Opponents point out that the act mitigates inmates' due process protections and equal protection under the law. According to the Human Rights Watch Report, 2009 at p.1, "The PLRA subjects lawsuits brought by prisoners in the federal courts to a host of burdens and restrictions that apply to no other persons. As a result of these restrictions, prisoners seeking the protection of the courts against unhealthy or dangerous conditions of confinement or those seeking a remedy for injuries inflicted by prison staff and others have had their cases thrown out of court". Dr. Ross contends that the passage of the *Prison Litigation Reform Act* violates Article 13 of the Convention, and thus signatories to this document are well within their rights to block extradition to the United States. The P.L.R.A. also violates Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) in his view.

7.23 Dr. Ross's conclusions are stated at paragraph 28 of his affidavit wherein he states:

> "Given the social scientific literature reviewed, those sentenced to the FBOP, regardless of the security level, will not escape violence, including sexual assault, poor medical conditions, and their ability to fight their conditions using the courts are seriously curtailed. In particular, high levels of prison violence and poor medical care, violates Article 3 of the European Convention on Human Rights, and Article 4 of the Charter of Fundamental Rights of the European Union. Additionally the passage of the *Prison Litigation Reform Act* violates Article 13 of the European Convention and Article 47 of the FREU, and thus signatories to this document are well within their rights to block extradition to the United States."

7.24 There is then a second affidavit of Dr. Ross in these proceedings sworn by him on the 3rd October, 2011, for the purpose of addressing certain criticism of matters asserted by him in his first affidavit, which criticisms are contained in an affidavit of Randall W. Jackson sworn on the 26th May, 2011 (and reviewed below from 8.2 to 8.11 inclusive). He characterises Mr Jackson's arguments and evidence as being largely irrelevant tangential. and inappropriate to the points of objection. and/or as being unconvincing.

7.25 At paragraphs 4 to 7 inclusive Dr. Ross focuses on a challenge by Mr. Jackson to his assertion that Mr. O'Gara faces a potential sentence of between 7- 12 years. He states that "This is both a red herring and a straw dog argument The [reference to] length of sentence was made in passing in my affidavit My affidavit focuses on the prison conditions in the United States violating internationally accepted standards, in particular those in the European Union. Mr. Jackson, however, spends at least half of his second affidavit on sentence length. Because the length of sentence is not the major contention, there was no need for elaboration." Dr. Ross goes on to characterise a lengthy discussion in Mr. Jackson's affidavit concerning pre-sentence investigation as being "irrelevant to the major basis of the appeal", and that concerning Mr. O'Gara's potential eligibility for a three point reduction in offence level if he pleads guilty, and his potential eligibility for good time credit if he behaves himself in prison, as being "tangential to the content of my affidavit of January 11, 2011 ".

7.26 Then Dr. Ross states the following at paragraphs 8 to 10 inclusive of his second affidavit:

> "8. With regards to the likelihood of sexual assault, Mr. Jackson claims that I 'glossed over a point.' I assume that he must be referring to the statistic of 2.91 per 1000 inmates reporting sexual violence. Mr. Jackson fails to mention that most victims of sexual assault regardless of where this occurs are extremely reluctant to report that they have been victims of sexual victimisation. Failure to report is even higher in correctional facilities where victims fear additional retribution from their attackers and correctional officers and administration. Thus actual incidence is widely acknowledged to be higher than reported incidence.
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> 9. Mr. Jackson claims that the anecdotal information from state prisons is irrelevant. ....This is false as both the state and federal correctional institutions share more similarities than differences. For example, the American Correctional Association (i.e., the major professional association and accreditation organisation in the United States) requires both federal and state agencies to abide by the same kinds of standards. Although state prisons are not the same as federal correctional facilities, suggesting that anecdotal or any other kind of information between the federal and state levels is irrelevant would be akin to suggesting that English spoken in Ireland is irrelevant to English spoken in the United States.
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> 10. Mr. Jackson states that the 'incidence of rape may be even lower now than it was the time of the last survey' because of reforms in the Prison Rape Elimination Act. Without the existence of an outcomes evaluation of this Act (which has not been conducted), these kinds of statements are meaningless. Again bringing up the decrease in violent crime in the United States as 'other research' that Leighton and Roy mention ....is a red herring or inconsequential that bears no connection with the points of my original affidavit."

8. The evidence on behalf of the applicant.

8.1 In a first supplemental affidavit sworn on the 6th December, 2010, Mr. Randall W. Jackson, who is Assistant United States Attorney of the Southern District of New York, and the lead prosecutor in the case against the respondent, deposes to the following matters at paragraphs 6 to 12 thereof:

> "6. The Respondent is charged with one count of bank robbery in violation of Title 18, United States Code, Section 2113(a). The maximum penalty for this offence is twenty years imprisonment. Hence, there is no possibility that the Respondent will face execution, if convicted of the crime that is the basis of the indictment against him.
>
> 7. Further, the United States Criminal Code does not authorize federal judges to impose physical or corporal punishment as a sentence, or a part thereof. The federal judge who will impose sentence on the Respondent, if he is convicted, will be required to calculate a sentencing range under the United States Sentencing Guidelines, and then impose a sentence

on the basis of various factors enumerated in Title 18, United States Code, Section 3553(a), which include the history and characteristics of the defendant, the nature of the crimes, as well as the need for deterrence and adequate punishment.

8. Based upon my expertise, my familiarity with the prosecution of the Respondent. and my consultations described above, I can represent that the Respondent, (1) if ordered detained pending trial by a United States Magistrate Judge or United States District Judge, would be held at the Metropolitan Correctional Center ("MCC") in New York. New York, or at the Metropolitan Detention Center ("MDC") in Brooklyn, New York, which are both federal jails administered by the BOP; and (2) if convicted and ordered to serve a period of incarceration by a United States District Judge, would be held at a United States Federal Correctional institution, the identity and location of which would be determined by the BOP, pursuant to detailed and formally promulgated policies and procedures regarding inmate designations. and only following a post-sentence review of a detailed report prepared by the United States Probation Office regarding the background, history, characteristics of the Respondent, and the nature of the offence for which he stands convicted.

9. While there is the potential for sexual assaults to occur at most prisons, a number of steps have been taken by the United States Government and the BOP to reduce the incidence of sexual violence against prisoners committed by other prisoners. Under these procedures, the BOP employs a "zero tolerance" policy with regard to inmate sexual assaults. Inmates with a history of any sexual predation are identified by the BOP, provided an opportunity for psychological treatment, and appropriately segregated from other inmates.

10. Further, in 2003, the United States Congress passed the Prison Rape Elimination Act of 2003 ("PREA"). The statute provided for a Commission to study this issue, and a report was issued in June 2009. The BOP and the Department of Justice are currently examining ways of improving policies and procedures as a result of the findings and recommendations of the PREA Commission.

11. More generally, the BOP employs a number of "separation" policies designed to prevent inmates who pose any risk of violence from having access to other inmates to whom these inmates are determined to pose a threat. Under these policies, an inmate may identify to BOP staff any other inmate who may pose a risk to the inmate and the BOP will appropriately separate these individuals from contact with one another.

12. As stated above, the Respondent is charged with bank robbery. He is not a known member of any gang or other criminal organization, nor has he been charged with any capital crime, or is a suspect for any capital crime. Based on these facts, and the Respondent's personal characteristics, with which I am familiar, Mr. Hyle of the BOP has represented that the Respondent would not be particularly susceptible to threats of violence from other prisoners while incarcerated in the United States."

8.2 In a further (and second supplemental) affidavit sworn by him on the 26th May, 2011, Randall W. Jackson seeks (*inter alia*) to respond to Dr. Ross's affidavit of the 11th January. 2011. In this affidavit Mr. Jackson takes issue with some of Dr. Ross's conclusions and elaborates on certain of the reasons for his belief that Mr. O'Gara is unlikely to be subjected to any harms warranting the denial of his extradition to the United States.

8.3 Mr. Jackson challenges Dr. Ross's suggestion that the likely penalty for Mr. O'Gara's bank robbery crime will be 7 to 12 years imprisonment. He opines that this conclusion is incorrect, and is based on an oversimplification of the sentencing process that will be used to determine Mr. O'Gara's sentence. He contends that the federal judge who will impose sentence on Mr. O'Gara, if he is convicted, will calculate a sentencing range utilizing the advisory United States Sentencing Guidelines ('"U.S.S.G." or "Sentencing Guidelines"), and then impose a reasonable sentence on the basis of the Sentencing Guidelines range and various factors enumerated in Title 18, United States Code, Section 3553(a), which include the nature and circumstances of the offence and history and characteristics of the defendant; the need for the sentence to serve various goals of the criminal justice system, including (a) to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment, (b) to accomplish specific and general deterrence. (c) to protect the public from the defendant, and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner: the kinds of sentences available; the sentencing range set forth in the guidelines; policy statements issued by the Sentencing Commission; the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. A copy of 18 U.S.C. § 3553(a) is exhibited with this affidavit.

8.4 Mr. Jackson points out that, in general, a probation officer normally conducts a pre-sentence investigation, which may include an interview with the defendant, and submits a report to the sentencing court before it imposes sentence. The defendant, his counsel, and the government normally have an opportunity to review and object to the pre-sentence report, including any proposed sentencing range recommendations, before it is submitted to the court. At least seven days before sentencing, the probation officer must submit to the court and the parties the final pre-sentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officers comments on them.

8.5 Mr. Jackson says that in this case the Sentencing Guidelines range will he determined by U.S.S.G. §2B3.1, which prescribes a sliding scale for bank robberies based on the amounts stolen. Based on the crime Mr. O'Gara is alleged to have committed (and, again, assuming his conviction after trial), his offence level under Section 2B3.I of the Sentencing Guidelines would likely be Level 26. This includes a three-point enhancement for the brandishing of a dangerous weapon. He suggests that at offence level 26, the advisory Sentencing Guidelines would recommend that a federal judge impose after trial no more than a 70-87 month sentence, approximately five to seven years' imprisonment, for a defendant with Mr. O'Gara's criminal history.

8.6 Mr. Jackson further states that if Mr. O'Gara elects to enter a guilty plea, he would be eligible for a three point reduction in his offence level for acceptance of responsibility, resulting in an offence level of 23. Such an offence level would correspond with a suggested 51-63 month sentencing range, making the bottom of his U.S.S.G. range just over four years' imprisonment.

8.7 Mr. Jackson makes the further point that all inmates in the federal prison system are. Moreover, eligible for "good time credit," which effectively lowers an inmate's sentence by approximately 15% if he exhibits normal good behaviour while detained. Thus, Mr. Jackson opines that if Mr. O'Gara is extradited and convicted after a guilty plea, he is very likely to face a sentence as short as approximately 3.5 years. Accordingly, while many other factors will play into Mr. O'Gara's eventual sentence, it is Mr. Jackson's belief that Dr. Ross has overstated the likely penalty that Mr. O'Gara will face upon extradition if he is convicted.

8.8 Mr. Jackson expresses the further view that Dr. Ross has also overstated the likelihood that Mr. O'Gara will become a victim of sexual assault in a U.S. federal prison. Dr. Ross has conceded that the "most recent victimization survey (the second of its kind)

conducted by the Bureau of Justice Statistics ... indicated that in 2006 there were 242 allegations of sexual violence with a rate of 2.91 per 1000 inmates in federal correction facilities." [The Court would remark, however. that although it is stated to be such in his affidavit the raw data in the report in fact states that the figure is 1.5 in federal facilities and 2.91 overall.] Mr. Jackson believes that Dr. Ross has attempted to gloss over this point, and Mr. Jackson seeks to emphasise that this statistic makes clear that less than one-half of one percent of all federal prisoners have been victims of sexual violence. That is. 99.5% of federal prisoners never become a victim of sexual violence, according to the survey.

8.9 In response to Dr. Ross's suggestion that the survey understates the rate of such incidents Mr. Jackson asserts that Dr. Ross has provided no support to explain why the survey's results should be disregarded. Instead, he says, Dr. Ross has identified various bits of anecdotal information related to state prison systems, such as a report on the attitudes of correction officers in a Texas state prison. Mr. Jackson opines that anecdotal information from state prison systems is irrelevant to this extradition request, because Mr. O'Gara would be housed in the federal system.

8.10 Mr. Jackson urges that the 2006 data from the Bureau of Justice Statistics is particularly telling here given that the important reforms of the Prison Rape Elimination Act. discussed in his earlier affidavit, were initiated beginning in June 2009. He suggests that it is reasonable to presume that the incidence of rape may be even lower now than it was at the time of the last survey. Such a decrease in the incidence of prison rape would correspond with the general trend of decreasing violent crime in the United States over the last ten years. Mr. Jackson exhibits with his affidavit the Federal Bureau of Investigation, Uniform Crime Statistics, which indicate, he suggests, that between 2000 and 2009 the incidence of violent crime in the United States generally dropped approximately seven percent. He adds that, importantly, Dr. Ross has cited no research supporting his argument that the Bureau of Justice Statistics understates the incidence of sexual assault in federal prison. Dr. Ross has cited only Leighton and Roy's *nebulous* (Mr. Jackson's characterisation) statement that "other research" concludes that the incidence is higher. He complains that Dr. Ross has failed to identify what "other research" Leighton and Roy are alluding to, and he has not indicated that either Leighton and Roy or his own research supports such conclusions. Moreover, these estimates relate to the total incidence of sexual misconduct in prisons in the United States, and not specifically federal prisons. The Bureau of Justice Statistics survey, which indicates that 99.5% of federal prisoners are never victims of sexual violence, is focused on the prison system in which the Mr. O'Gara would be housed -the federal B.O.P. system.

8.11 Mr. Jackson also takes issue with certain of Dr. Ross's assertions concerning the quality of medical care in U.S. prisons and correctional facilities. However, as the respondent is not pressing the issue of medical care, and as the Court has not considered it necessary for the purposes of this judgment to rehearse the specifics of Dr. Ross's evidence on medical care, it is also not necessary to set out Mr. Jackson's evidence on medical care and it is sufficient to state that the Court has considered the evidence of both and taken due note of matters that are disputed.

8.12 In yet another (third supplemental) affidavit of Randall W. Jackson, sworn on the 13th October, 2011. Mr. Jackson responds to the second affidavit of Dr. Ross by briefly elaborating on certain provisions of the Prison Litigation Reform Act; and seeking to clarify the record as to which of the materials referenced in Dr. Ross's affidavits he was able to access.

8.13 Mr. Jackson states in his third supplemental affidavit that the Prison Litigation Reform Act ("P.L.R.A.") was enacted in 1996. primarily as a response to an increasing deluge of frivolous civil law suits filed by U.S. prisoners. (Pub. L. No. 104-134, 110 Stat. 1321 (1996)(codified as amended at 11 U.S.C. §523(a)and 18U.S.C. §§3624(b). 3626)). He contends that no aspect of P.LR.A. deprives prisoners with legitimate grievances of a remedy. Rather, the P.L.R.A. has made the courts more capable of devoting resources to legitimate prisoner suits through several provisions designed to limit the impact of frivolous claims on the dockets of the federal court. Several of those provisions are as follows:

> "a. The PLRA features a requirement that prisoners exhaust their administrative remedies prior to filing a federal law suit. (42 U.S.C. § 1997e (a)). In its most basic manifestation, this aspect of the PLRA merely requires prisoners to write a letter to prison officials asking them to address whatever problem the prisoner has. Alternatively, a prisoner may be required to utilize the formal grievance system employed by a prison prior to filing a lawsuit. In the event that the prisoner is unable to obtain the requested relief through administrative means, he is then entitled to pursue his lawsuit.
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> b. The PRLA features a requirement that most prisoners contribute normal filing fees associated with litigation prior to filing a federal lawsuit. (28 U.S.C. § 1915) Under the Statute, a federal court is still entitled to allow an indigent prisoner to file suit in *forma pauperis,* meaning the court may permit a prisoner with a legitimate claim to file without paying any fee if he or she can demonstrate an inability to pay. If the prisoner has the ability to pay, the statute generally requires the prisoner to pay required filing fees in appropriate instalments. usually not exceeding twenty percent of an inmate's prison income.
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> c. Under the PLRA, if a prisoner has filed three successive lawsuits that a federal court determined to be frivolous or completely lacking in merit, that prisoner is precluded from filing any future lawsuits without first paying the entirety of the court's normal filing fees in advance. (28 U.S.C. § 1915(g)). Importantly, this provision of the PLRA does not apply if a prisoner indicates that he is in imminent danger of physical harm."
>
> d. Finally. the PLRA features a requirement that, in a suit to recover money damages for mental or emotional injury, a prisoner must show physical injury as well. (42 U.S.C. § 1997e (e)). That is a prisoner must simply demonstrate that his emotional injury was accompanied by a physical act that caused some sort of harm.

8.14 Mr. Jackson contends that the summary that he has presented makes it clear that the Act in no way precludes prisoners with legitimate grievances from seeking a judicial remedy. but rather institutes several sensible reforms designed to increase the focus on legitimate lawsuits.

8.15 Then at paragraph 7 of his third supplemental affidavit, Mr. Jackson seeks to address Dr Ross's criticism that he had failed to address the scholarly material on which Dr Ross had based his conclusions. Mr. Jackson states:

> "...this Affidavit is also submitted to clarify the record as to which materials referenced in Dr. Ross's Affidavits I was able to access_ In Dr. Ross's October 3.2011 Affidavit, he states that my prior response 'fails to address both the scholarly (peer reviewed) and government documentation which I marshalled in my affidavit of January 11, 2011". Dr. Ross, however, never attached many of the underlying materials that purportedly formulate the basis for some of his conclusions. As a result, I have never had access to these materials, and the flaws in his reasoning I identified were based on the conclusions described in his Affidavit and the quoted material cited in the Affidavit. My prior submissions have been based on the cited materials and interviews, as well as the broad body of material that I have reviewed over

the years in my capacity as a federal prosecutor"

9. Submissions

Submissions on behalf of the respondent

9.1 The respondent's case is essentially that there is very strong evidence that prison rape and sexual assault are endemic in U.S. prisons and correctional facilities and that he faces a real risk that he may be subjected to prison rape or sexual assault in the event that he is extradited. He contends that in circumstances where there is a real risk that his human and fundamental rights to bodily integrity and to be treated with human dignity may be breached this Court ought not to extradite him because to do so would be incompatible with this State's obligations to him both under our own Constitution and also under the Convention. particularly Article 3 of the Convention.

9.2 In response to a challenge from this Court, counsel for the respondent conceded that Whatever about the possible application of the Convention to any proposed extradition of the respondent from Ireland to the U.S.A, the Charter can have no application because it is not a situation where Ireland is implementing. or acting within the scope of E.U. law. In that regard Article 51 of the Charter expressly states (*inter alia*):

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member Stales only when they are implementing Union law."

9.3 A further aspect to the respondent's case that he contends represents both a stand alone reason not to extradite, and also something that feeds in to any other prison conditions argument is the significant restrictions on the possibility of litigating prison issues that are now in place post the enactment of the Prison Litigation Reform Act. The respondent contends that the restrictions now in place are so severe as to amount to an egregious circumstance of the type spoken of by the former Chief Justice in Minister for *Justice. Equality and Law Reform v. Brennan* [2007] 3 I.R. 732, i.e. one that represents a fundamental defect in the system of justice of the requesting state. Furthermore the respondent submits that it is one in respect of which there is no remedy. Moreover, unlike the situation that obtains in the European arrest warrant context (and Brennan was an E.A.W. case) there is no presumption that the requesting state will respect the respondent's fundamental rights in the event that he is extradited. The respondent bas referred the Court to the Supreme Court's decision in the case of *Ellis v. 0 'Dea* (No. 2) [1991]1 I.R. 251 in support of the last contention, and in particular to the following passage from the end of the judgment of McCarthy J. (at p. 262):

> "The making of the extradition arrangement presupposes that the Government and the Oireachtas are satisfied, amongst other things, that, an Irish citizen being extradited either to the United Kingdom. as in this instance, or to any other State with which Ireland has such an arrangement will not have his constitutional rights impaired. This does not however, relieve the High Court or, on appeal, this Court, from its duty to inquire into allegations that there is a risk as contended on this appeal."

9.4 It was conceded by Counsel for the respondent that there is no easy proof of the level of risk which a person in the position of the respondent faces, and it was for this reason that Counsel took the Court through the exhibits to Dr. Ross's affidavit in some detail. It was urged on the Court that the picture that emerges from all of that material is that the chance of being sexually assaulted is in the range between 2% and 5%, in a six month period, depending on what study is being looked at. Moreover, the statistics didn't really draw any great distinction between the federal system and the state system. Counsel submitted that any system wherein the chance of being subjected to sexual assault or rape is running at or about that level must be regarded as being seriously deficient and give cause for significant concern. Counsel characterised the chances of an individual prisoner being sexually assaulted, including being raped, as being "extraordinarily high" and as representing a real risk by any yardstick that the respondent's rights would be breached. Counsel was confronted by the Court with the proposition that there will always be some degree of violence, including sexual violence, in even the best run prison system and that it might, on one view of it, be regarded as hyperbole to characterise a low single figure percentage chance as being an extraordinarily high chance and as representing a real risk that the respondent's rights would be breached. In rejoinder, counsel posed a question rhetorically as to whether a parent would be prepared to send his/her child to a school knowing that the child would face a 2%-5% risk per six months of being sexually abused there. He submitted that any parent would regard a risk at that level as being both real and unacceptable.

9.5 It was further submitted that the duty on a prison authority to protect a prisoner against rape and sexual assault is much higher than the corresponding duty to protect him/her against mere physical and non -sexual assault because of the particularly serious violation of the right to bodily integrity and human dignity that sexual assault, and especially rape, entails. It was suggested that there is no acceptable level of rape within a prison system and that to set any level at all would be to normalise it in a repugnant way. It was submitted that the evidence before the Court shows that in the United States prison system rape and sexual assault are absolutely endemic. Counsel further urged that prison rape and sexual assault forms a problem not only in relation to the U.S. corrections system generally but also on account of the fact that the risk of being raped or sexually assaulted in prison is an accepted feature of prison life within the popular culture of the U.S.A.. Counsel suggested that it is widely known amongst the general population of the U.S.A. that it goes on, and yet there is seeming indifference to it. It would. counsel suggested. be dangerous for a court in the European Union, where we do not have this problem at remotely the same level as they do in the U.S.A., to look at the situation in the U.S.A. and attempt to normalise it in some way, lest to do so might be regarded as a further incidence of seeming indifferent.

9.6 Counsel for the respondent has further asserted that the United States of America is generally acknowledged to have a poor track record in terms of its willingness to defend and vindicate the fundamental rights of prisoners and it was submitted that the Court should take account of this alleged fact. In elaboration of this it was further suggested that many features of the U.S. prison and correctional system do not measure up to European standards in terms what is expected in that regard on this side of the Atlantic. By way of example counsel pointed to the fact that the U.S.A, although it is a signatory to the International Covenant on Civil and Political Rights, entered a reservation with respect to the execution of juveniles. It was submitted that the U.S.A.'s willingness to apply the death penalty to juveniles. or at least its desire to maintain the possibility of doing so. is indicative of its attitude. It was further urged that the Prison Litigation Refom1 Act is yet another example of the U.S.A.'s allegedly scant regard for the fundamental rights of prisoners.

9.7 The Court was also referred by the respondent to the case of *Attorney General v. Murphy* [2010]1 I.R. 445. This was also a case in which the respondent sought to resist his extradition to the U.S.A. on the grounds*, inter alia,* of poor health and also that the prison conditions that he would face if sentenced upon his return would breach his constitutional rights. Rejecting the respondent's objections on these grounds, Peart J. had stated at p.449:

> "'I am not satisfied that the respondent has discharged the very heavy onus which is upon him to demonstrate that, in his particular case, and not simply in some general sense, the prison conditions in which he is likely to be held after sentencing are not such as will adequately protect his right to bodily health and integrity."

Counsel for the respondent has cited this to make the point that the language used by Peart L and in particular his reference to the respondent bearing a heavy onus, does not accord with the approach recently adopted by the Supreme Court in the seminal European arrest warrant case of *Minister for Justice. Equality and Law Reform v. Rettinger* [2010]3 I.R. 783. Counsel has further relied on this Court's judgment in *Minister for Justice. Equality and Law Reform v Mazurek* (Unreported, High Court, Edwards J., 13th May, 2011) wherein I sought (at pages 20- 22) to distil core principles from the judgments in *Rettinger*, and some earlier authorities. In counsel for the respondent's submission at an absolute minimum the test articulated in *Rettinger* must apply in a case such as the present.

Submissions on behalf of the applicant.

9.8 The applicant has submitted that it is well established that where a person seeks to resist surrender to another State with whom Ireland has an extradition arrangement on the grounds that his rights under the Constitution or European Convention on Human Rights will be infringed, it is he who bears the onus of establishing that there is a real and substantial risk that his rights will be breached if returned to the requesting state.

9.9 It is urged that this principle is consistent with the recognition by the Courts in this jurisdiction that applications for extradition should be dealt with on the basis that requests for surrender are made on foot of treaties and arrangements entered into between Ireland and the requesting state which are presumed to have been made in good faith. The applicant says that the Supreme Court has indicated in a number of decisions dealing with requests under the Extradition Act 1965 that this is the appropriate way to approach extradition requests from other states. See for example *Shannon v. Ireland* [1984] I.R. 548. *Larkin v. 0'Dea* [1995] 2 I.R. 485 and *Ellis v. O'Dea* [1991] I.R. 251.

9.10 Moreover, in a more recent case of *Attorney General v. Skripakova* (Unreported, Supreme Court, 24th April, 2006) Murray C,J, stated the principle in the following terms at p.5:-

> "'The purpose of that Act [the Extradition Act. 1965] is to enable the State to fulfil its obligations under bilateral and multinational arrangements for the extradition of persons from this country to other countries where they may stand trial for criminal offences of a nature which correspond to matters which are criminal offices under our criminal law and there is no issue....about a corresponding offence. In my view the submission on behalf *of the* Applicant is correct. When the conditions required by the Act concerning a request for extradition and a warrant executed for that purpose have been fulfilled and the Respondent relies on an exception to the obligation on the State to extradite. the onus rests on that person to establish that there are substantial grounds to justify the Court refusing an Order for extradition in spite of the conditions in question being otherwise met."

9.11 The Court was also referred to *Minster for Justice. Equality and Law Reform v. Altaravicius* [2006] 3 I.R. 148 wherein Murray C.J. (with whose judgment Hardiman J. agreed and Denham J. concurred) stated at p.159-160:-

> "... it is undoubtedly the case that extradition arrangements. whatever their form, between this country and other States have been applied by the Courts on the presumption that those States have complied or will comply in good faith with their obligations under the relevant treaty or statutory provisions governing those arrangements. Generally speaking extradition arrangements and the like are based on recipricocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith. In *Ellis v. O'Dea* (No.2) [1991] I.R. 251 at p.262 McCarthy J. stated:- *"The making of the extradition arrangements presuppose that the Government and the Oireachtas are satisfied, amongst other things, that, an Irish citizen being extradited to the United Kingdom, as in this instance, or to any other State with which Ireland has such arrangements. will not have his constitutional rights impaired". In Wyatt v. McLoughlin* [1974] IR. 378 at p.390 Finlay J., stated: "... *I am satisfied that I am entitled to have regard to the fact that an Extradition Act is necessarily the consequence, ... of an agreement between two sovereign states reposing confidence in each other, and I should not in the first instance, suppose that the court and other authorities of the country by which extradition is sought are using deceit so as to secure the apprehension of the plaintiff"* . I take this as a correct statement of the law and is not affected by the decision of this Court in that case on appeal. In fact an example of that approach is to be found in the statement of Walsh J. (at p.395) in giving a majority judgment in the appeal in *Wyatt v. McLoughlin* when he stated:- *"Until there is some reason to believe to the contrary, it is to be assumed that a statement of facts such as the one appearing on the warrant executed in this case, or any warrant sent here for execution, is a truthful statement of the facts of the case in respect of which the arrest is sought".* That approach is again underscored by the principles and objects recited in the preamble to the framework decision when it refers to mutual recognition of judicial decisions, judicial cooperation and a high level of confidence between member states."

9.12 Thus, submits the applicant, where a breach of rights is alleged by way of opposition to an extradition application under the Act of 1965 the issue to be determined by the Court is whether there is evidence to displace the presumption that the requesting state will, in the course of dealing with the person whose surrender is sought, respect that person's fundamental rights.

9.13 The applicant submits that it is well recognised in our jurisprudence that the mechanism for protecting a respondent against unfair procedures or abuses will necessarily differ between the various states with whom Ireland bas extradition arrangements. The issue in an application for extradition such as this is whether cogent and reliable evidence has been put before the Court by the respondent, bearing in mind the onus at all times in this and other such cases rests upon him to demonstrate a real likelihood that a constitutional or convention right will be infringed if surrender takes place.

9.14 The Court was also referred to *Minister for Justice, Equality and Law Reform v. Stapleton* [2008]1 I.R. 669, a case which concerned a request for surrender under the European Arrest Warrant Act 2003, wherein Fennelly J. made the following observations at p.688-689:-

> "It is true that the principle of mutual trust and confidence must have been at the heart of former bilateral or multilateral extradition arrangements. Such arrangements were (and still are so far as extradition arrangements with states outside the European Union are concerned) an expression of the sovereign power of the respective states. They implied at least some level of mutual political trust and, at the judicial level. confidence in the legal systems of the co-operating states. McCarthy J.. in his concurring Judgment in *Ellis v. 0'Dea* (No. 2) [199I]I.R. 251 at 262 stated:-
>
> > 'The making of the extradition arrangement presupposes that the Government and the Oireachtas are satisfied,

among other things, that, an Irish citizen being extradited either to the United Kingdom, as in this instance. or to any other state with which Ireland has such an arrangement, will not have his constitutional rights impaired.'"

It was submitted that this passage sets out a clear exposition of the reasoning behind the approach which a court should adopt in a case such as the present one. It reiterates that the onus to establish such a likelihood at all times rests on the person making such a claim and. that by entering an extradition treaty, such as the one between Ireland and the U.S. there is an expression by this State of a level of confidence in the system of law and justice in the U.S.A. The making of an extradition treaty with a state, such as America, presupposes that the Government and Oireachtas are satisfied that a person being surrendered to that State will not have his or her constitutional rights or rights under the Convention impaired.

9.15 The applicant urges that this Court must consider the objections of this respondent to his extradition to the requesting State on the basis that the onus rests upon the respondent to show that there is a real risk that. despite such expression of confidence and trust by the State in the U.S.A., his rights under the Constitution and/or the Convention will be violated if surrendered to that State.

9.16 It has been drawn to the Court's attention by the applicant that prison conditions have been raised as an objection to extradition/surrender in a number of recent cases. The applicant has sought to highlight two cases as being of particular note. The first is *Attorney General v. Frederick David Russell* [2006]1.E.H.C. 164 (Unreported, High Court, Peart J., 23rd May, 2006), a Part II case, and *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783 a European arrest warrant case upon which. as has already been stated, the respondent also relies.

9.17 The Court has read and considered the *Russell* decision which appears to have been decided on its own particular facts, and it does not appear to advance matters greatly with respect to principle. In so far as *Rettinger* is concerned the Court is wholly familiar with the Supreme Court's judgments in that case, and as previously stated I have sought to apply its principles in a number of cases albeit all in the European arrest warrant context. As both the applicant and the respondent rely on *Rettinger* it appears to be common case *inter partes* that this Court should also adopt the *Rettinger* approach in this conventional extradition case.

9.18 In so far as the evidence in this case is concerned, the applicant contends that the respondent's complaints are of a general kind. They are largely, if not entirely, about prison conditions in general in the requesting state. The Court is asked to note that this is not a case where the "expert" evidence adduced by the respondent is based on the premise that he, by virtue of some characteristic unique to him or his case, e.g. his membership of a particular grouping, or his sexuality, is at risk of having his rights violated. It was submitted that the evidence put forward by the respondent amounts to little more than a very general critique of the American prison system. Apart from general criticism of the regime, it has been submitted that there is no concrete or specific evidence that there is a real risk that the respondent will be subjected to inhumane treatment. The applicant says the evidence is entirely lacking in specificity. As Denham J (as she then was) has stated in *Rettinger* the mere possibility of ill treatment does not establish the respondent's case.

9.19 It has been further submitted that the evidence adduced by the respondent in this case falls far short of the onus which rests on him to show to the necessary standard that there is a real risk of the human rights violations of which he complains. While the principal affidavit of Dr. Ross does not paint a flattering picture of the U.S. prison system, it is submitted that it does not demonstrate that there are, within the federal system, problems to such a degree or extent as to justify this Court in concluding that there is a real risk that this respondent will be subjected to inhuman or degrading treatment if extradited. It was submitted that the claims made arc unduly general and vague and that they are insufficiently specific to the facts of this case.

10. The Court's Decision

The Law

10.1 Somewhat unusually, the parties are not in complete agreement as to the law, and as it happens the Court does not completely agree with either party's submission as to what the applicable law is.

10.2 The Court does not agree with the respondent's contention that there is no presumption at all that the requesting state will respect the fundamental rights of the respondent. However, if the Court understands counsel for applicant's submission correctly, which places much reliance on the remarks of Murray C.J. (as he then was) in *Altravicius* quoted above, and the later further remarks of Fennelly J. in *Stapleton* also quoted above, the applicant is effectively contending that an identical presumption arises in extradition cases to that which arises in European arrest warrant cases. If that is the applicant's position then this Court does not agree with that either.

10.3 In the Court's view the true position with respect to a presumption lies in between the parties respective positions. The Court considers that a default presumption does arise in extradition cases that the other country will act in good faith and that it will respect a proposed extraditee's fundamental rights. As Fennelly J. has pointed out in *Stapleton* the making of bilateral extraction arrangements implies at least some level of mutual political trust and, at the judicial level, confidence in the legal systems of the co-operating states. However, in conventional extradition cases the presumption is much weaker and is much more easily rebutted than is the presumption that arises under the European arrest warrant system. This is because the whole European arrest warrant system is built and predicated upon the notions of mutual trust and confidence between member states, and mutual recognition of judicial decisions, and there is a continuing and ongoing commitment to abide by these principles as expressed in the recitals to the Framework Decision, including recital 12 thereto which expressly states that the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. Moreover, though it is by no means perfect, there is. by virtue of the fact that all member states operating the European arrest warrant system are signatories to the Convention, a greater common understanding between the States operating the European arrest warrant system of what constitutes an individual's fundamental rights, and what is required to be done to defend and vindicate those rights. Such is the level of mutual trust and confidence in other member states who are parties to the European arrest warrant system that the Oireachtas has given statutory effect to the presumption that arises -in s.4A of the European Arrest Warrant Act 2003 (as inserted by s.69 of the Criminal Justice (Terrorist Offences) Act 2005). S.4A provides that *"It shall he presumed that an issuing state will comply with the requirements of 'the Framework Decision, unless the contrary is shown"* Neither the Extradition Act 1965, nor the Washington Treaty. contains a comparable provision. That is not to say that no presumption at all arises, but as the Court has stated it is very much weaker and more easily rebutted than is the case under the European arrest warrant system. Furthermore, it needs to be emphasised that rebuttal of the presumption does not of itself establish the existence of a real risk. It merely means that the Court is put on enquiry as to whether there is a real risk.

10.4 For the avoidance of doubt the Court does agree with the parties that the *Rettinger* principles must otherwise apply in this case. As previously stated I have previously attempted in my judgment in Mazurek to distil the applicable principles from the various

judgments in *Rettinger*. It seems to me that, in so tar as they must apply to the present case, they can, with appropriate modifications, be expressed as follows:

> By virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms. which provides that *'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*. the objectives of the [Washington Treaty] cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3. (See analagous remarks of Fennelly J. at p.813 in *Rettinger* re the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant);
>
> The subject matter of the court's enquiry "is the level of danger to which the person is exposed." (per Fennelly J. at p.814 in Rettinger);
>
> "it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a *'real risk'* (per Fennelly J. at p.814 in *Rettinger*) "in a rigorous examination." (per Denham J. at p.801 in *Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (per Denham J. at p.801 in *Rettinger*);
>
> A court should consider all the material before it, and if necessary material obtained of its own motion. (per Denham J. at p.800 in *Rettinger*);
>
> Although a respondent bears no legal burden of proof as such, a respondent nonetheless bears an evidential burden of adducing cogent "evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention." (per Denham J. at p.800 in Rettinger);
>
> "It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the r questing State may present evidence which would, or would not, dispel the view of the court." (per Denham J. at p.801 in *Rettinger*);
>
> "The court should examine the foreseeable consequences of sending a person to the requesting State." (per Denham J. at p.801 in *Rettinger*). In other words the Court must be forward looking in its approach;
>
> "The court may attach importance to reports of independent international human rights organisations." (per Denham J. at p.801 in *Rettinger*)

The evidence

10.5 The first thing to be said is that the Court considers that sufficiently cogent evidence has been adduced by the respondent to displace any presumption that the requesting state will respect the respondent's fundamental rights, and to put the Court on its enquiry as to whether the respondent will. if extradited, be exposed to a real risk of breach of his right to bodily integrity and/or not to be subjected to inhuman and degrading treatment.

10.6 While it has been urged on the Court by counsel for the respondent that no level of risk is acceptable when one is speaking of something as serious as rape the Court does not regard this submission as being particularly helpful because it is simply impossible for any prison system to absolutely guarantee that such a thing may never happen, any more than it can guarantee that no prisoner may ever be murdered in prison, that no prisoner will ever commit suicide, that no prisoner will be ever be assaulted or that drugs will never be dealt or consumed in prison. Moreover, to acknowledge this is not to in any way to seek to normalise or condone the extra ordinary physical and mental violations that rape (and sexual assault) entails and the seriousness and reprehensible nature of those offences.

10.7 In fairness to counsel for the respondent, he did appear to accept that there has to be a line somewhere although he was unwilling to suggest as to where it should be drawn. Somewhat more helpfully he suggested that regardless of where the line may be drawn, in so far as the evidence adduced by the respondent tends to suggest that the incidence of rape and sexual assault in U.S. prisons, per six months, is in the range between 2% and 5% that that is much too high and represents a wholly unacceptable level of risk.

10.8 It is important to remark at this stage that although counsel for the respondent characterised as "overwhelming" the evidence from his side to the effect that in U.S. prisons between 2% and 5% of prisoners per six months are subjected to incidents of rape or serious sexual assault, those figures are not accepted by the applicant who contends that the incidence is lower, and significantly lower. It is therefore necessary for the Court to examine the evidence as to incidence in some detail.

10.9 The scholarly material listed by Dr. Ross in the Bibliography appended to his principal affidavit, the majority of which was reviewed and 54 of which were exhibited by Dr Ross, and forms the basis of his conclusions, extends to some 65 items consisting variously of peer reviewed academic papers published in academic journals; some non peer reviewed articles and commentary from other publications: some research papers, a number of reports from international bodies, and extracts from books and reference works. The Bibliography provided is annexed as Appendix 1 to this judgment. Those items specifically referred to in the affidavit (some 54 of the 65 items listed in the Bibliography) were impressively collated and presented to the Court in three lever arch files. In addition one loose individual article, though not formally exhibited, was handed in during the hearing. The Court has considered all of this material.

10.10 Although an extensive volume of material has been presented the amount of such material representing research into, and data concerning, the incidence of prison rape and sexual assault is actually fairly modest. This is apparent if one strips out from the list of 54 items the articles and papers concerned with law, those concerned with prisoner's health and prison medical facilities, those concerned with other issues such as the effects of long term imprisonment, overcrowding in prisons, suicide in prisons, the problem of gangs in prison, non-sexual violence and victimisation in prisons, influences on inmate violence levels, factors that predict risk, and nonscholarly articles/material or mere commentary.

10.11 Accordingly, the Court does not regard the following 49 publications as providing it with material assistance with respect to establishing the incidence of the problem of prison rape and sexual assault in U.S. prisons and correctional facilities (which is not to say that they are of no relevance to other aspects of the case hut they do not assist in establishing incidence):

"Bartollas, C. 2002. *Invitation to Corrections. Boston*: Allyn & Bacon.

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Basking D., Sommers, R. & Steadman, J.H. (1991). Assessing the impact of psychiatric impairment on prison violence, *Journal of Criminal Justice*, 19(3), 271-280.

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Butler. T. J. (1999. Commentary: The Prison Litigation Reform Act: A Separation of powers dilemma, *Alabama Law Review*, 50, 585-601.

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Delgado, M. & Humm-Delgado, D. (2008). *Health and Health Care in the Nation's Prisons: Issues. Challenges, and Policies*. Lanham, MD: Rowman & Littlefield Publishers, Inc.

Dugger. R. L. (1995). Life and Death in Prison, In J. T. Flanagan (Ed.) *Long-term imprisonment: Policy, science, and correctional practice* (pp. 171-173). Thousand Oaks. CA: Sage Publications.

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Gaul, G. M. (2005). Acreditors Blamed for Overlooking Problems Conflict of Interest Cited Between Health Facilities, Group That Assesses Conditions, *Washington Post*, July 25, 2005.

Hammel, L. (2009). Judge doubles time of requested sentence; Prisoner guilty of attack on another inmate, *Telegram & Gazelle*, December 26.

Hassine, V. (2004). *Life without Parole*. (3rd Ed.). Los Angeles: Roxbury

Heffernan, D. (1996). Comments, America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law. *Catholic University Law Review*, 45(2), 481-560.

Hobart, P. (1999). Comment: The Prison Litigation Reform Act: Striking the balance between law and order, *Villanova Law Review*. 44, 981-1014.

Human Rights Watch. (2009). No Equal Justice: *The Prison Litigation Reform Act in the United States*. New York: Human Rights Watch.

Ingraham, B. L. & Welford, C. (1987). The totality of conditions test in 8th Amendment Litigation, In S.D. Gottfredson & S. McConville (Eds.), *America's correctional crisis: Prison populations and public policy* (pp. 13- x). New York: Greenwood Press.

Killion Valdez, C. (2008). Group calls for investigation of suicide at Federal Medical Center, *Post-Bulletin*, February 16.

Lukens, J. T. (2006). Prison Litigation Reform Act: Three Strikes and You're out of Court- It May Be Effective, but is It Constitutional *Temple Law Review*, 70(2), 471-520.

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10.12 Of the 15 remaining items listed in the bibliography, 9 are not exhibited (nor even, as occurred in one case, were they just handed in) and accordingly the Court, not having been provided with an opportunity to consider them, cannot take them into account. The items in question are:

Camp, G.M., & Camp. C.G. (1985). *Prison gangs: Their extent, nature, and impact on prisons*. Washington. DC: U.S. Government Printing Office.

Donaldson, S. (1995). *Rape of incarcerated Americans: A Preliminary statistical look*. Retrieved from http://www.spr.org/docs/stats.html.

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Ross, J. I. (2008). *Special Problems in Corrections*, Upper Saddle, NJ: Prentice Hall.

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Stastny, C. & Tyrnauer, G. (1982). *Who Rules the Joint? The Changing Political Culture of' Maximum-Security Prisons in America*. Lexington. MA: Lexington Books.

10.13 For the most part the 9 items listed in the last paragraph would appear to come within the category of books written by commentators and as such probably do not contain original data (though the Court cannot be certain of this, not having had an opportunity to review them.) The exception would appear to be the publication by Donaldson. It would appear from the title that this contains original data analysis. It is, however, some 17 years old and therefore is probably of little value in terms of assessing the present incidence of the problem of rape and sexual assaults in U.S. prisons and correctional institutions. It is perhaps for this reason that it has not been exhibited (the Court notes that it is suggested to be accessible via an internet link provided in the bibliography, however the Court has been unable to successfully access it and believes the link provided may no longer be current), but it is some somewhat unfortunate that it was not exhibited given that it is referred to as justifying in part certain assertions in another publication that is the subject of some controversy, namely the chapter on Rape by Leighton. & Roy in M. Bosworth (ed.) *Encyclopedia of Prisons & Correctional Facilities*, (2005), Vol. 2 (pp. 819-822). Thousand Oaks, CA: Sage Publications.

10.14 The following 13 items remain as potentially being of assistance to the Court on the question of incidence, and they have all been exhibited (or in the case of the Bowker paper, simply handed in) and considered:

"Amnesty International. (1998). USA: *Rights For All*. (Chapter 4 "*Violations in Prisons and Jails: Needless Brutality*.")

Beck, A. J., Harrison, P.M. & Adams, D.B. (2007). Sexual Violence Reported by Correctional Authorities, 2006, Bureau of Justice Statistics, NCJ218914.

Bowker, L. (1986). The victimization of prisoners by staff members, inK.C. Haas & G. P. Alpert (eds.) *The Dilemmas of Punishment* (pp. 134-157). Prospect Heights, IL: Waveland.

Gibbons, J. J. & Katzenbach, N. (2006). *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*. Washington. DC: Commission on Safety and Abuse in America's Prisons.

Kerbs, J.J. & Jolley, M. M. (2007). Inmate-on-inmate victimization among older male prisoners. *Crime & Delinquency*, 53(2), 187-218.

Leighton. P. & Roy, .1. (2005). Rape. in M. Bosworth (ed) *Encyclopedia of Prisons & Correctional Facilities*, Vol. 2 (pp. 819-822). Thousand Oaks, CA: Sage Publications.

Lockwood, D. (1980).Reducing Prison Sexual Violence, in R. Johnson & H. Toch (eds.) *The Pains of Imprisonment* (pp. 257-265). Beverley Hills, CA: Sage Publications.

Rideau, W. (1992). The Sexual Jungle, in W. Rideau & R. Wikberg (Eds.) *Life Sentences: Rage and Survival behind Bars* (pp. 73-107). New York: Times Books.

Steiner, B. (2009). Assessing Static and Dynamic Influences on Inmate Violence Levels, *Crime & Delinquency*, 55(1), 134-161.

Wolff, N. & Shi, J. (2009). Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath, *Journal of Correctional Health Care*, 15(1), 58-82.

Wolff, N., Shi, J. Bachman, R. & Siegel, J. (2006). Sexual victimization inside prison: Rates of Victimization, *Journal of Urban Health*, 83. 835-848.

Wolf, N., Shi, J & Bachman, R. (2008). Measuring Victimization inside prison: Questioning the questions, *Journal of Interpersonal Violence*, 23, 1343-1362.

Wolf. N., Shi, J., Blitz, C. & Siegel. J. (2007). Understanding sexual victimization inside prisons: Factors that predict risk. *Criminology & Public Policy*, 6, 201-231.

10.15 Of those 13 items, all of which the Court has carefully reviewed, only 5 represent the presentation and analysis of original research concerning the incidence of rape and sexual violence across the U.S. prison and correctional system as opposed to commentary. These are:

Beck, A. J., Harrison, P.M. & Adams, D.B. (2007). Sexual Violence Reported by Correctional Authorities, 2006. Bureau of Justice Statistics, NCJ218914.

Wolff. N. & Shi, J. (2009). Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath, *Journal of Correctional Health Care*. 15(1). 58-82.

Wolff, N., Shi, J. Bachman, R. & Siegel, J. (2006). Sexual victimization inside prison: Rates of Victimization, *Journal of Urban Health*, 83. 835-848.

Wolf, N., Shi, J & Bachman, R. (2008). Measuring Victimization inside prison: Questioning the questions, *Journal of Interpersonal Violence*, 23, 1343-1362.

Wolf, N., Shi, J., Blitz, C. & Siegel, J. (2007). Understanding sexual victimization inside prisons: Factors that predict risk, *Criminology & Public Policy*, 6. 201-231.

10.16 Some of the remaining material represents importance evidence as to prevalence (i.e. how extensive or widespread is the problem perceived to be) as opposed to incidence (i.e. how frequently is it happening) and is helpful in that limited way, e.g., Gibbons, J. J. & Katzenbach, N. (2006). *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*. Washington. DC: Commission on Safety and Abuse in America's Prisons: also the Amnesty International Report of 1998 entitled US 4: *Rights For All*, (Chapter 4 "*Violations in Prisons and Jails: Needless Brutality*."); Bowker, L. (1986). The victimization of

prisoners by statTmembers. In K.C. Haas & G. P. Alpert (eds.) *The Dilemmas of Punishment* (pp. 134-157). Prospect Heights, IL: Waveland; and Steiner, B. (2009). Assessing Static and Dynamic Influences on Inmate Violence Levels, *Crime & Delinquency*, 55(1), 134-161.

10.17 The others items, while they might properly be described as academic commentaries based upon literature reviews, for the most part offer no new data. To the extent that any new data is provided they contain only anecdotal accounts of incidents of prison rape and sexual assault, alternatively the findings of small scale qualitative studies as opposed to large scale quantitative research. They do express concern at a perceived problem, but they do not quantity the extent of the problem across the U.S. prison and correctional system in anything approaching a scientific way. An example is provided by the following passage from Rideau. W. (1992). The Sexual Jungle, in W. Rideau & R. Wikberg (Eds.) *Life Sentences: Rage and Survival behind Bars* (pp. 73-107). New York: Times Books. The author states at p.75-76:

> "The pursuit of power via sexual violence and the enslavement of weaker prisoners is not peculiar to the Louisiana penal system. It is an integral feature of imprisonment throughout the United States, in both jails and prisons, and even in juvenile institutions- yes, children do it too. Dr Anthony M Scacco, Jr., a criminologist formerly with Connecticut's Department of Corrections, publishing the results of a study in his book *Rape in Prison*, reported that rape and other sexual violence were rampant in juvenile and young-adult institutions in Connecticut. Staff at Michigan's Wayne County Jail once candidly admitted that "guards are unable to prevent cases of robbery, assault and homosexual rape among inmates." An exhaustive 1968 study of the Philadelphia prison system by the police department and the district attorney's office concluded that sexual violence, in the word of Chief Assistant District Attorney Alan Davis, was "epidemic." In 1968, Illinois' Cooke County Jail officials reported mass rapes to be "routine occurances at Cook County Jail."

In the Court's view reliance on material such as this is rightly to be criticised because it is significantly anecdotal and such studies as are referred to are local in focus and are neither footnoted in the text nor otherwise referenced. Moreover, the studies that are referred to are very old and dated (more than 40 years old), and the book in which this chapter appears dates itself from 1992.

10.18 Specific similar criticisms have been levelled by the applicant in this case at Dr. Ross's citation of, and reliance upon, a certain passage from Leighton. P. & Roy, J. (2005). Rape, in M. Bosworth (ed.) *Encyclopedia of Prisons & Correctional Facilities*, Vol. 2 (pp. 819-822). Thousand Oaks, CA: Sage Publications. The passage in question states at p.819:

> "'Estimates based on a compilation of previously published surveys suggest some 80,000 unwanted sexual acts take place behind bars in the United States every day, with a total of 364.000 prisoners raped every year. This includes approximately 196,000 adult males raped in prisons. 123,000 adult males raped in jails, 40,000 boys raped in juvenile and adult facilities, and 5,000 women raped in prisons (Donaldson, 1995; Stop Prison Rape, 2001a). Other research concludes the number of men raped behind bars is 20% to 30% with a high number of repeat victimizations (at the extreme involving 50 - 100 incidents per victim) and a significant number (up to 80% of incidents involving multiple perpetrators or groups."

It seems to the Court that the applicant's criticisms are justified. The "previously published surveys" are nowhere identified. They may perhaps be referred to in the Donaldson, 1995 and/or the Stop Prison Rape, 2001a documents referenced in the text. Unfortunately, notwithstanding the reliance being placed on these surveys, neither the original surveys, nor the Donaldson/Stop Prison Rape documents, have been exhibited and the Court has been unable to consider them. Be that as it may, the principal complaint is that the 'other research" isn't even identified, not to mind referenced, and yet the assertion based upon it is being relied upon by the respondent in support of the contention that the incidence of prison rape and sexual assault across the U.S. prison and correctional system exists at such a level that it creates a real risk of breach of the respondents fundamental rights to bodily integrity and not to be subjected to inhuman and degrading treatment.

10.19 At best materials of this sort present limited and local quantitative data analysis, alternatively qualitative data analysis with all its inherent limitations, based on existing (and sometimes old, or very old) research carried out by persons other than the document's author; and at worst they present purely anecdotal evidence, alternatively unsupported assertion. While such materials may be characterised as scholarly writings (as Dr. Ross has characterised them) they do not represent scientific studies and they do not present solid new scientific or social scientific data, or the analysis of such data, concerning the incidence of rape and sexual violence across the U.S. prison and correctional system. That is not to criticise any of the commentators concerned. The Court recognises the very significant logistical difficulties that researchers face in carrying out meaningful quantitative research in this area. However, the Court can only act on evidence and evidence based expert commentary. Where expert commentary is offered, as it is here both directly from Dr. Ross himself and indirectly from the authors of many of the papers/documents that he has exhibited, the Court and any other interested party such as the applicant is entitled to say: "*show me the underlying evidence*."

10.20 In so far as the respondent puts forward a figure for the incidence of rape and sexual assault as being in 2% to 5% range on a six monthly basis, this seems to be based upon the research of Wolff, N. & Shi, J. (2009) as described in their paper entitled: Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath, *Journal of Correctional Health Care*, 15(1), 58-82. The first thing to be said is that this an impressive and serious piece of research that presents new data based upon quantitative data analysis of responses received to a questionnaire administered using an audio-computer administered survey instrument to a total of 6,964 men aged 18 years or over from male general prison populations in a single state correctional system in the northeastern U.S.A. The questionnaire related to their experiences, if any, of physical and sexual assault during a six month period in 2005.

10.21 This study like most good research fairly acknowledges its limitations, including the possibility of biases and the fact that it is not a national survey hut rather merely provides a basis for "point estimation." The authors claim that point estimates of sexual assault during a six month period in adult male prisons are converging around two per 100 inmates, with rates about 10 times greater for physical assault and that the results of their research is consistent with this. The specific data revealed by the research suggests that approximately of 21% of male inmates are physically assaulted during six month period, and sexual assault is estimated to be in the range between 2% and 5%.

10.22 1t should. however, be noted that neither the other point estimates referred to of two per 100 inmates (or 2%). nor the 2% to 5% estimates based upon the study's specific findings, are rape or any other form of sexual assault specific. but rather they embrace a wide range of sexual victimisation behaviours. However, table 3 annexed to the study breaks down the data and indicates that expressed as a percentage of those surveyed who acknowledged being sexually assaulted (i.e. the 2% to 5% overall figure), the incidence of forced sex, oral sex and anal sex respectively were measured at 7.6%, 8.5% and 14.2% respectively in the case of inmate on inmate sexual assault and at 8.7%, 10.1% and 8.0% respectively in the case of staff on inmate sexual assaults.

10.23 The 2006 paper by Wolff, J, N., Shi. J. Bachman, R. & Siegel, J. (2006) entitled: Sexual victimization inside prison: Rates of

Victimization, *Journal of Urban Health*. 83, 835-848 predates the paper just reviewed but is equally impressive. It again involves quantitative data analysis of responses received to a questionnaire administered using an audio-computer administered survey instrument to some 6.964 male respondents and 564 female respondents. Face to face interviews were conducted with 112 men and 18 women who were unable, for various reasons, to be interviewed using the computer equipment. The survey revealed *(inter alia)* that rates of sexual victimisation varied significantly by gender, age, perpetrator, question wording and facility. Rates of inmate-on inmate sexual victimisation in the previous six months were highest for female inmates (212 per 1,000), more than four times higher than male rates (43 per 1,000). As this Court is primarily interested in male rates involving rape or serious sexual assault (which broadly equates to the "non consensual sex acts" category of victimisation conduct used in the study) it is necessary to drill down into the data. Table 2 to the paper sets out the data in relation to the six month prevalence (the Court prefers the word incidence) of sexual victimisation in a statewide correctional system, by gender, in 2005. The figures in relation to inmate on inmate sexual victimization involving non-consensual sex acts per 1,000 male inmates were 15 (1.5%) or in the range 12-17 (1.2% - 1.7%) when a 95% confidence interval was applied. The figures in relation to staff on inmate sexual victimization involving non-consensual sex acts per 1000 male inmates were 19 (1.9%) or in the range 16 - 21 (1.6% - 2.1%) when a 95% confidence interval was applied.

10.24 In a discussion of their overall findings the authors stated at p.844:

> "overall rates of sexual victimization were found to vary significantly by gender, age, perpetrator (inmate or staff), question wording, and facility. These rates also varied if delimited to nonconsensual sexual acts or abusive sexual conduct. On average, rates of sexual victimization were lowest for males, inmate-on-inmate victimizations, and nonconsensual sexual acts. Thus, studies focusing solely on inmate-on-inmate non-consensual sexual acts (particularly, rape) in male prisons will provide very conservative estimates of sexual victimisation overall. In our study, the percentage of the male inmate population experiencing such incidents over a 6-month period was 1.5%, on average, and at any point since incarcerated, 1.6%. For male prisons, the highest rates of sexual victimization (76 per 1,000) is associated with staff perpetrators.
>
> These rates, based on averaging, mask considerable variation among prisons housing men. The literature clearly demonstrates that prison environments are heterogeneous. Our research is consistent with this literature. An individual's risk of sexual victimisation is not equivalent to across prisons even within a single prison system. Depending on facility, a male inmate might be housed in a prison where the risk of inmate-on-inmate sexual victimisation is as high as 6.4% or as low as 3.0%. Likewise, he might be in a facility where the risk of sexual victimisation by a staff person ranges from 3.7 to 11.8%. More research is needed to identify the factors that predict variation and risk across male facilities. The literature suggests that violence levels inside prisons are associated with overcrowding, management style, and availability of programming, but the definition of violence in prior research focused on physical violence, not sexual. This is an important area for future exploration."

10.25 The paper by Wolff N., Shi, J & Bachman, R (2008) entitled: Measuring Victimization Inside Prisons: Questioning the Questions. *Journal of Interpersonal Violence*, 23, 1343-1362 again concerned quantitative data analysis of responses received to a questionnaire administered using an audio-computer administered survey instrument to some 7,443 respondents (6,879 men and 564 women) drawn from 12 adult male facilities and one adult female facility. Table 1 to this paper sets out the six month prevalence rates (per 1,000) for victimisation by gender, type of perpetrator and phrasing of the survey question. Again, drilling down into the data reveals that the figures in relation to inmate on inmate sexual victimization involving non-consensual sex acts per 1,000 male inmates were 16 (1.6%) or in the range 13 - 19 (1.3% - 1.9%) when a 95% confidence interval was applied. The figures in relation to staff on inmate sexual victimization involving non-consensual sex acts per 1000 male inmates were 21 (2.1%) or in the range 18 - 25 (1.8%- 2.5%) when a 95% confidence interval was applied. One significant finding at p. 1354 in the research was that:

> "using questions that focus on inmate-on-inmate rape understates the rape experience of male (1.6% versus 3.0%) and female (3.7% versus 5.0%) inmates. Similarly, using questions phrased in terms of rape or sexual assault. as measured by nonconsensual sexual acts understates exposure to sexual victimisation within the prison setting (males: 3.0% versus 9.4%; females: 5.0% versus 25.0%).'"

10.26 The paper by Beck. A. J., Harrison, P.M. & Adams, D.B. (2007). Sexual Violence Reported by Correctional Authorities, 2006, Bureau of Justice Statistics. NCJ218914 is heavily relied upon by the applicant in this case. It represents the only national research study of the incidence and prevalence of sexual violence within U.S. prisons and correctional facilities. The background to it is that the Prison Rape Elimination Act of 2003 requires the Bureau of Justice Statistics (B.J.S.) to develop new national data collections on the incidence and prevalence of sexual violence within correctional facilities. This particular piece of research employs a research strategy called an administrative records survey. Between the 1st January and the 30th June, 2007, B.J.S. completed the third annual national survey of administrative records in adult correctional facilities, covering calendar year 2006. Although the results were limited to incidents reported to correctional officials, the survey is said to provide an understanding of what officials know, based on the number of reported allegations, and the outcomes of follow-up investigations. By comparing results of the 2006 survey with those from 2004 and 2005, B.J.S. was able to assess trends in sexual violence for the first time since the Prison Rape Elimination Act was passed.

10.27 The 2006 administrative records survey provides the basis for the annual statistical review required under the Act. The survey included all Federal and State prison systems and facilities operated by the U.S. military and Immigration and Customs Enforcement. The survey also included representative samples of jail jurisdictions, privately operated adult prisons and jails, and jails in Indian country. Altogether, the administrative survey included facilities housing more than 1.8 million inmates, or 81% of all inmates held in adult facilities in 2006.

10.28 The 2006 survey recorded 5,605 allegations of sexual violence. Taking into account weights for sampled facilities, the estimated total number of allegations for the Nation was 6.528. Since the Prison Rape Elimination Act was passed in 2003, the estimated number of allegations nationwide has risen by 21% (5,386 in 2004; 6,241 in 2005). Some of the increase may have resulted from adoption of B.J.S. definitions and improved reporting by correctional authorities. Expressed as rates, there were 2.91 allegations of sexual violence per 1,000 inmates held in prison, jail, and other adult correctional facilities in 2006, up from 2.46 per 1,000 inmates in 2004. Overall the rate in State prisons (3.75 per 1,000) was higher than the rate in local jails (2.05 per 1,000). About 36% of the reported allegations of sexual violence in 2006 involved stall' sexual misconduct; 34%, inmate-on-inmate nonconsensual sexual acts: 17%, staff sexual harassment; and 13%, inmate-on-inmate abusive sexual contacts. These percentages were nearly unchanged from those reported in 2005. Correctional authorities reported 3.489 allegations of staff sexual misconduct and harassment during 2006, compared to 3,470 during 2005. It is important to note that the most common outcome of investigations was a determination that the evidence was insufficient to show whether the alleged incident occurred. In 2006, more than half of all allegations (55%) were unsubstantiated; more than a quarter (29%) were unfounded (determined not to have occurred). About a sixth of all allegations (17%) were substantiated. Previous surveys recorded similar outcomes. Based on completed investigations, allegations of staff sexual

harassment and inmate-on-inmate nonconsensual sexual acts were less likely to have been substantiated than other types of allegations. During 2006, 7% of allegations of staff sexual harassment and 14% of inmate-on-inmate nonconsensual sexual acts were substantiated, compared to 19% of the allegations of inmate-on-inmate abusive sexual contacts and 25% of the allegations of staff sexual misconduct. Though not of direct concern to this Court in terms of the issue it has to decide, it should be noted in passing that the survey yielded a wealth of other data.

10.29 Again, the limitations of the research are properly acknowledged. It is suggested that given the absence of Uniform reporting, caution is necessary for accurate interpretation of the survey results. Higher or lower counts among facilities may reflect variations in definitions, reporting capacities, and procedures for recording allegations as opposed to differences in the underlying incidence of sexual violence.

10.30 Having weighed all of the evidence put before it, the Court is not satisfied that it is an accurate characterisation of it to say, as the respondent does, that it overwhelmingly supports his case. Concerns have certainly been raised in the literature about the level of sexual violence of all types, including rape and serious sexual assaults, in U.S. prisons. While the evidence does not support a basis for differentiating state prisons from federal prisons in that regard, the position may not however be entirely uniform when local or county jails are taken into the mix, or as between institutions in different parts of that country. The figures for sexual violence generally are seen to vary somewhat across different studies, and this is hardly surprising given the difficulties of conducting such research, differences in the methodology employed, differences in how questions are phrased, and the fact that prison environments are heterogeneous. The preponderance of evidence, however, suggests that the figures for non-consensual sexual acts, whether inmate on inmate or staff on inmate are in fact lower than suggested by the respondent. In particular the range spoken of and relied upon by the respondent, namely between 2% and 5% per six months, is not specific to non-consensual sexual acts but also embraces abusive sexual contacts, staff sexual misconduct and staff sexual harassment. The figures for non-consensual sexual acts appear to be significantly lower than the 2% to 5% overall figures yielded by the particular study in question, and in fact appear to be more in the region of0.291% as revealed in the B.J.S. study, a figure significantly lower than counsel for the respondent was prepared to concede. Nonetheless, the figures for non consensual sexual acts in the other three studies were expressly stated and required no calculation. These were for the most part in the range between 1% and 2.5% when a 95% confidence interval was applied.

10.31 While the preponderance of evidence suggests that prison conditions in the U.S.A may be harsh, and some prisoners may face abuses or violations of their fundamental rights, and that by virtue of the Prison Litigation Reform Act such prisoners may in some instances be cut off from certain avenues by means of which they could previously have sought legal redress, and all of that must of course be a cause for a degree of concern, the Court is not satisfied that such evidence as exists at present goes so far as to establish that this particular respondent will be exposed to a real risk that his fundamental rights to bodily integrity and/or to be treated with human dignity and not to be subjected to inhuman or degrading treatment will be breached.

10.32 As regards the extensive collection of material best characterised as reports or commentaries on the human rights record of the U.S.A., the Court would respectfully adopt and endorse as apposite the following remarks of Latham L.J. in a case from our neighbouring jurisdiction, viz *Miklas v. Deputy Prosecutor General of Lithuania* [2006]4 All E.R. 808 where he stated at p.813:

> "It is, however, important that reports which identify breaches of human rights. or other reprehensible activities on the part of governments or public authorities are kept in context. The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse."

11 Conclusion

11.1 In the Court's view the evidence in this case, while it was sufficient to put the Court upon its enquiry, falls short of demonstrating that the particular respondent in this case will, if extradited, be exposed to a real risk that his fundamental rights will be breached. As counsel for the applicant has correctly stated this is not a case where it is suggested that the respondent is at risk of having his rights violated by virtue of some characteristic unique to him or his case. e.g. his membership of a particular grouping, or his sexuality. His case is correctly characterised as being based upon general criticism of the American prison system and its human rights record with regard to the treatment of prisoners particularly as it is perceived in some quarters both in the U.S.A. and on this side of the Atlantic. That alone is not enough in this Court's view to justify it in regarding the respondent as being at real risk. The Court is disposed in all the circumstances to dismiss the objections to the respondent's extradition and will make an order pursuant to s. 29 (1) of the Act of 1965 as amended committing the respondent to a prison there to await the order of the Minister for his extradition.

APPENDIX 1

COMPLETE BIBLIOGRAPHY OF MATERIAL

REFERRED TO BY DR ROSS

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