COURT OF APPEAL
CIVIL

Court of Appeal Record No.: 2015/642

IN THE MATTER OF THE EXTRADITION ACT 1965, AS AMENDED

Between/

THE ATTORNEY GENERAL
Applicant/Respondent

and

ERIC EOIN MARQUES
Respondent/Appellant

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION
Amicus Curiae

Court of Appeal Record No.: 2016/19

JUDICIAL REVIEW

Between/

ERIC EOIN MARQUES
Applicant/Appellant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL
Respondents

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION
Amicus Curiae

OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

INTRODUCTION

1. The *amicus curiae*, hereafter "the Commission", has been granted leave to intervene in each of the above-entitled proceedings, hereafter "the extradition proceedings" and "the judicial review proceedings" respectively. The Appellant in both the extradition and judicial review proceedings is referred to throughout as "the Appellant" and the relevant Respondents in each of the proceedings are referred to by their own titles of the Attorney General and the Director of Public Prosecutions ("the DPP"), respectively. In making these submissions in respect of both sets of proceedings, the Commission has endeavoured to limit them to the human rights issues within its remit, and does not seek to entrench on matters of factual dispute.

2. The Commission addresses two issues:

    (a) the practice in the United States of America ("U.S.A") of taking into account, when sentencing, matters other than those of which a person is convicted;
    (b) whether the DPP was obliged to provide reasons for her decision not to prosecute the Appellant.

THE EXTRADITION PROCEEDINGS

The status of the Constitution as regards an anticipated breach of rights abroad

3. At section 6.4 of her judgment in the ***Attorney General v. Damache***[1], Donnelly J. identified two legal tests which may arise in extradition cases: (i) where a claim is made that extradition may lead to torture, inhuman or degrading treatment or punishment; and (ii) where a claim is made that other fundamental rights, including fair trial rights, will be violated. Where a claim is made under (i), the requested person must establish substantial grounds for believing that there is a real risk of being subjected to such prohibited treatment. Where a claim is made under (ii) in respect of fair trial rights, a person must show there are substantial grounds for believing that he or she is at a real risk of being subjected to a *"flagrant denial"* of justice if extradited. In respect of the latter, Donnelly J. viewed the rights and obligations arising from the Constitution as the same as those under the European Convention on Human Rights ('the ECHR'), the "flagrant denial" test mirroring the

[1][2015] IEHC 339.

"egregious circumstances" recognised under the Constitution.

4. In the herein case, as noted by Donnelly J. in her judgment, in order to prevent his extradition, the Appellant would need to satisfy the Court not only that there were substantial grounds for believing that there was a real risk of his fair trial rights being breached, he would also have to show that the expected breach would amount to an *"egregious"* breach of rights or a *"flagrant"* denial of justice. Donnelly J. referred to the decision of the Supreme Court in ***MJE v. Buckley***[2], in which MacMenamin J. stated as follows:

   "Both Brennan and Nottinghamshire County Council are authority, therefore, for the proposition that, absent some matter which is fundamental to the scheme and order of rights ordained by the Constitution, or egregious circumstances, such as a clearly established and fundamental defect, or defects, in the justice system of a requesting state, the range and focus of Article 38 must be within the State and not outside it."

5. The question of the reach of constitutional rights arose again more recently in the Supreme Court in another European Arrest Warrant case, ***MJE v. Balmer***[3]. In his judgment, O'Donnell J. revisited the case law in the area and described in detail the various conceptual approaches that could be taken.

6. O'Donnell J. specifically referred to the judgment of Edwards J. in ***MJE v. Nolan***[4] and cast doubt on the usefulness of the concept of universality when considering the circumstances in which the Constitution will prohibit surrender[5] on account of an anticipated breach in the requesting state of an Irish constitutional principle:

   "37. I have, if anything, greater difficulty in accepting the argument that preventive detention infringes a fundamental right of universal application, and that accordingly, any such detention, wherever it may occur, is a breach of the Irish Constitution, limited only by considerations of the practicability of vindicating the rights involved. In my view, there is nothing in the Constitution to justify the distinction

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[2][2015] IESC 87.
[3][2016] IESC 25.
[4][2012] IEHC 249 – the judgment of Edwards J. was upheld on appeal by the Supreme Court, which did not make any finding on the constitutional issue – see [2013] IESC 54.
[5]Although ***Balmer*** was a European Arrest Warrant case, it is submitted that the same principles apply to extradition under the *Extradition Act 1965*.

between "mere" procedural rights and "higher rights of universal application". Nothing in the Constitution suggests an entitlement to disregard one right and enforce the other. The obligation on a court is to defend and vindicate all the rights of the citizen. Indeed, until now I would have regarded the Article 38 right of trial by jury as one of the basic rights guaranteed by the Constitution. It is, after all, derived from the right of trial in due course of law which can be traced to Magna Carta. The specific right of trial by jury was celebrated by Lord Devlin as "more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives": P Devlin, Trial by Jury, (London, 1956) at p.164. I would find it hard to conceive of a value system that ranked this right as decisively inferior to other rights, and I do not know where in the Constitution such a table of values is to be found. It is also strange if an unenumerated personal right under Article 40.3 may be weighed as more valuable than a right specifically enumerated in the Constitution. The superficial distinction between rights guaranteed under Article 38 (and limited to the territory of the State) and rights guaranteed as personal rights (which are not) is, in any event, too porous to be a serviceable concept. It is always possible, as the example of the presumption of innocence shows, to characterise a right in slightly different terms, as a personal right guaranteed by Article 40.3 to fair procedures, or a fair trial right under Article 38, or a component of the administration of justice under Article 34. The particular distinction asserted between procedural rights applicable at the trial (and prima facie unenforceable abroad) and rights in respect of detention (and prima facie enforceable) would also have the consequence that the Constitution did not control any part the trial of an individual abroad, but did purport to control his or her sentence.

38. The concept that there are rights of universal application having an international application poses more difficulties. While there might be broad agreement between civilised countries on headline principles (and this is itself a large assumption), there are, at a practical level, significant divergences between states on what those principles require. If, by way of example, the inclusion in a sentence for a crime of any element of detention for the protection of the public is a violation of a principle of universal application, it would be surprising if it was then adopted in countries like the United Kingdom and Germany and was found to be compatible with the European Convention on Human Rights. If it is a right of universal application, then one would expect to see it

universally applied. It is no answer to this problem to say that the Irish antipathy to preventive detention in this case is derived from a widely accepted principle: the presumption of innocence. By the same token, it is possible to say that the right to trial by jury for non-minor offences is derived from a principle of due process which is itself of universal application. The issue in every case is what those general principles require in specific circumstances, which is something upon which countries can and do differ. It is not possible to justify the imposition of our choices in this regard on others, or to condemn their choices, simply on the basis that we all adhere to some general principles which are not in dispute. This is particularly so in the case of a right expressed or developed in a singular way in the constitutional jurisprudence of one country. By definition, the right is not universally recognised. Universal applicability cannot be the basis for its application to other countries."

7. Although his judgment challenges the distinction which had been made in previous case law between Article 38.1 fair trial rights and *"higher rights of universal application"*, O'Donnell J. ultimately concluded that the *"egregious circumstances"* test from ***MJELR v. Brennan***[6] was correct, in view of the fact that Irish law in this context was *"observing"* the actions of a foreign sovereign state rather than *"controlling"* them[7]. O'Donnell J. did emphasise that a deep engagement with the facts in each case will be necessary:

"45 This suggests that this area cannot be subject to absolute bright line rules, and further, that progress should be careful and incremental, and in contested cases, should involve close consideration of the relevant facts. It is necessary, therefore, in my view, to look much more closely at the sentencing regime in the United Kingdom and to consider equally carefully the constitutional law on preventive detention in this jurisdiction than the argument on either side would permit before coming to a conclusion as to whether or not Mr. Balmer's surrender is prohibited under the Constitution, and therefore under s.37 of the EAW Act."

8. The Commission is mindful of the fact that both the Appellant and the Attorney General are likely to make extensive submissions on the facts of the present case and this is not an area on which it would be appropriate for the

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[6][2007] 3 IR 732.

[7]At paragraphs 43 and 44 of the judgment of O'Donnell J. in ***MJE v. Balmer*** [2016] IESC 25.

Commission to engage in any great detail. The Commission does note the approach of O'Donnell J., however, and a close examination of the particular situation which would face the Appellant if extradited is obviously desirable. Having said that, in the Commission's view, this approach does not prevent the Court from making more general findings in relation to the U.S. federal sentencing regime under examination.

Anticipated breach of Article 6 ECHR rights following extradition

9. As stated above, in respect of Article 6 of the ECHR, extradition is prohibited where there are substantial grounds for believing that, if removed, the person would be exposed to a real risk of being subjected to a flagrant denial of justice. In ***Othman (Abu Qatada) v. United Kingdom***[8], the ECtHR stated that:

    (a) an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country: para. 258;
    (b) the term "*flagrant denial of justice*" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein, and is "*a stringent test of unfairness*" which requires a breach of the Article 6 fair trial guarantees which is "*so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article*": paras. 259 and 260;
    (c) in assessing whether this test has been met, the same standard and burden of proof should apply as in Article 3 expulsion cases, i.e. it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed, he would be exposed to a real risk of being subjected to a flagrant denial of justice, and where such evidence is adduced, it is for the Government to dispel any doubts about it: para. 261.

10. These principles were applied by Edwards J., and surrender on a European Arrest Warrant refused, on the basis of Article 6 of the ECHR in ***MJELR v. Rostas***[9].

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[8] Application No. 8139/09, 17th January, 2012.
[9] [2014] EHC 391.

Proof of "Guilt" at Sentencing Stage

11. The central issue raised in the Appellant's Notice of Appeal in the extradition proceedings concerns the fact that, in the U.S. federal criminal justice system, what is referred to as *"relevant conduct"* and *"uncharged conduct"*[10] may be taken into consideration by a judge at sentencing stage, where such conduct is proved on the preponderance of the evidence. This standard of proof is seemingly equivalent to the balance of probabilities.

12. A conceptual difficulty when dealing with this issue is the extent to which the presumption of innocence is relevant at sentencing stage, that is, after the person has been convicted of the offence or offences in respect of which they are to be sentenced. One argument is that no issue of guilt or innocence is determined at sentencing stage and that there is therefore no basis for invoking the presumption of innocence. This view necessarily interprets *"guilty"* in the narrow sense of meaning guilty in respect of the charged offence or offences.

13. On the other hand, since the reasoning underpinning the presumption of innocence aims to prevent a person from being punished for conduct in respect of which they have not been convicted, then it can be argued that the principle can be justifiably invoked where there is to be a determination as to whether a person did or did not do a particular act, in circumstances where they will be punished if they are found to have done so. If it is accepted at sentencing stage that they did do an act which will result in a sanction, arguably they can be said to be *"guilty"* of it.

14. The above discussion is important in the present context because the presumption of innocence appears to be inextricably linked with the 'beyond reasonable doubt' standard of proof[11]. Thus, if one lowers the standard of

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[10]There appears to be a significant overlap between these categories and indeed *"uncharged conduct"* might arguably be seen as a subset of *"relevant conduct"*.

[11]Commenting on Article 14 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee, in its General Comment No. 13, states:

> *"7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of*

proof at sentencing stage in respect of conduct which results in (an increase in) punishment, this it is submitted interferes with the presumption of innocence.

15. It is further submitted that the lengthening of a sentence of imprisonment on the basis of certain conduct must be seen as a penal sanction for that conduct. It would appear to be a punishment which is not changed by the fact that it is *extra* punishment. At paragraph 5.41 of her judgment herein, Donnelly J. states:

> *"The sentencing court is not determining guilt or innocence on that other uncharged conduct; in a similar way, the court in this jurisdiction, in determining the surrounding circumstances which involve evidence of other offences, is not determining guilt or innocence in relation to those offences."*

16. Where guilt or innocence is interpreted in the narrow sense in relation to charged conduct, this statement is of course true[12]. However, it is submitted that it is likely to be little consolation to a convicted person to be assured that he or she is not being found *"guilty"* in respect of the conduct in question, in circumstances where he or she will nonetheless spend longer in prison as a result of the sentencing judge's view that such conduct *probably* took place.

The Irish Position

17. Although of some vintage, the 1993 Law Reform Commission *Consultation Paper on Sentencing*[13] provides some helpful and succinct guidance on the issue of factual determination at sentencing stage:

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proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial." (Emphasis added)

Article 14(2) of the ICCPR is in almost identical terms to Article 6(2) of the ECHR. The latter provides:

> *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."*

[12]It should be noted that the wording of Article 6 ECHR does seem to support the narrower interpretation of "guilty": *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"* (emphasis added).

[13]LRC CP6-1993 – March 1993.

"(I) Determining the Factual Basis
1.41 The first task of the sentencing judge is to determine the factual basis of the offence upon which to assess the appropriate sentence. A principle of fundamental importance in determining the factual basis upon which to assess the appropriate sentence is expressed in the ancient maxim nulla poena sine lege, i.e. no one is to be punished on a charge for which they have not been tried and found guilty. In The People (Attorney General) v O'Callaghan, *Walsh J gave this the weight of a constitutional prescript:*
"In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted."
1.42 Thus, the sentencing judge must sentence only on the facts supporting the offence in hand, and must ignore any other evidence which would tend to support the commission of other or more severe offences."

18. Part of this passage was quoted more recently by the Court of Criminal Appeal in ***DPP v. McDonnell***[14], a case which concerned the provision of hearsay evidence in relation to prior conduct of the convicted person by a Garda witness at sentencing. It appears that the position is that evidence of the commission of other offences for which the convicted person was never charged will be impermissible, but that is not to say that background evidence which might result in an increased sentence cannot be given. Where the person being sentenced disputes such evidence, *"strict proof"* will be required, and it appears to be taken for granted that this means proof 'beyond reasonable doubt'. Kearns P., giving judgment for the Court in ***McDonnell***, set out the following general principles:

*"[48] Summarising, it seems quite clear to this court that the admission at a sentencing hearing of hearsay evidence to suggest the commission of prior criminal offences on the part of a convicted person for which he has not been tried and found guilty or even if charged, he does not require to be taken into account, would infringe Article 38 and Article 40.4.1. of the Constitution which former article provides for a trial in due course of law for any such alleged offence and, which latter article provides that no citizen should be punished on any matter on which he has not been convicted (*The People (Attorney General) v. O'Callaghan *[1966] I.R. 501).*
[49] Hearsay evidence of character, antecedents, and as to the background to the particular offence being dealt

[14][2009] 4 IR 105.

with, including the extent of the role played therein by an accused may, at the discretion of the sentencing judge, be received, subject to the requirement that if a particular fact assumes specific significance or is disputed the court's findings should require strict proof. It is a matter for the sentencing judge to decide what weight should be attached to such hearsay evidence as is received, noting any objection taken thereto and any arguments or evidence offered in rebuttal."

The Strasbourg Position

19. The language of Article 6(2) of the ECHR (*"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"*) puts a focus on the concept of "charge" rather than punishment. As interpreted by the Strasbourg court in ***Geerings v. the Netherlands***[15], the presumption of innocence principle in Article 6(2) in most cases will not apply at sentencing stage:

    "43. However, whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge, the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence "charged". Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning referred to in paragraph 32 above (Phillips v. the United Kingdom, no. 41087/98, § 35, ECHR 2001 VII)."

20. It appears from the Strasbourg jurisprudence that Article 6(1) of the ECHR will apply throughout criminal proceedings, including during sentencing[16], but that Article 6(2) will only have any effect at sentencing in two instances. Firstly, where the accusations made at sentencing in relation to other relevant/uncharged conduct in effect amount to the bringing of a "new charge", the presumption of innocence will apply in respect of those accusations.[17]

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[15]Application no. 30810/03 - 1st of March 2007.

[16]See for instance ***Grayson & Barnham v. UK*** (Applications nos. 19955/05 and 15085/06 - 23rd September 2008), at paragraph 37.

[17]The Court commented in ***Geerings*** at paragraph 43 that *"whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge, the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular*

Secondly, where there are charges in respect of which there has been an acquittal, the presumption of innocence will remain active at sentencing stage to ensure there is no punishment in respect of such charges, as explained by the Grand Chamber in ***Allen v. UK***[18], a case involving a claim for compensation following the quashing of a conviction on appeal:

"103. The present case concerns the application of the presumption of innocence in judicial proceedings following the quashing by the CACD of the applicant's conviction, giving rise to an acquittal. Having regard to the aims of Article 6 § 2 discussed above (see paragraphs 92-94) and the approach which emerges from its case-law review, the Court would formulate the principle of the presumption of innocence in this context as follows: the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases."

The Presumption of Innocence – Protection against Unjust Punishment

21. The Strasbourg approach appears to focus on whether the evidence of relevant/uncharged conduct produced at sentencing in effect amounts to a new charge, affording protection by way of the presumption of innocence where it does. The Irish approach requires proof beyond reasonable doubt on any disputed fact adverse to the person being sentenced in so much as it comes within the nexus of the convicted conduct, although it is unclear whether the basis for this is the presumption of innocence. The Strasbourg position appears stricter in requiring that the evidence effectively amounts to a new charge before the presumption of innocence contained in Article 6(2) of the ECHR will apply.

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offence 'charged'". Although Article 6(2) therefore in theory applies at sentencing stage in every case, it seem that it cannot have any practical effect unless there is something akin to a "new charge".

[18]Application no. 25424/09 - 12th of July 2013.

22. When examining whether and when the presumption of innocence (and the accompanying 'beyond reasonable doubt' standard of proof) should apply at sentencing stage, it is the respectful view of the Commission that it is simpler, and more realistic, to focus on the issue of *punishment* rather than charge. As noted above, the presumption of innocence principle seeks to prevent punishment where guilt is not proven, as does the maxim *nulla poena sine lege*. It therefore seems fundamentally inconsistent and unjust to require proof beyond reasonable doubt in respect of *"charged"* conduct for which the person will be punished, but proof only on the balance of probabilities in respect of other *"relevant"* conduct for which the person will receive extra punishment.

23. It does not appear to be in dispute on the facts before the Court in the present case that 'the balance of probabilities' is the standard of proof applied at sentencing under U.S. federal criminal law, even where evidence adverse to the person being sentenced is being adduced. At paragraph 27 of the Affidavit of Keith A. Becker of 29th April 2015, filed on behalf of the Attorney General, Mr. Becker confirms that, under US federal sentencing law, *"conduct other than the offense conduct for which the defendant was convicted"* may be taken into account by the sentencing judge, and that the standard of proof in respect of such conduct is *"a preponderance of the evidence"*, which was noted by Donnelly J. in the High Court to be equivalent to a standard of proof on the balance of probabilities. Furthermore, it does not appear to be in dispute that proof of such conduct will be weighed in the balance and may lead to a longer sentence of imprisonment than the convicted person would otherwise have received (while remaining subject to the maximum sentence allowable in respect of the charge or charges upon which there was a conviction).

24. At paragraph 5.33 of her judgment herein, the learned High Court judge accepts that there is a real risk of relevant conduct in the form of evidence of financial gain causing an enhancement of any sentence the Appellant might receive in the United States. At paragraph 5.42 of her judgment, it seems to be implicitly accepted that there is a real risk of uncharged conduct being taken into account at sentencing although Donnelly J. does not accept that this would amount to sentencing for other offences. Of further note, at paragraph 5.37 the learned High Court judge finds that in this jurisdiction, *"it is highly likely that the court would approach contested matters of relevant fact, particularly where a finding will amount to an aggravating factor for the purpose of sentencing, on the basis of a beyond*

reasonable doubt burden of proof. Indeed, our constitutional requirements of fair procedures under Article 40 and the due process rights under Article 38.1 may mandate such an approach."

25. In such circumstances, it appears that there are substantial grounds for believing that there is a real risk of the Appellant receiving punishment for conduct that is proved only on the balance of probabilities. In the Commission's view, this would amount to a grave interference with the presumption of innocence. Regardless of whether the evidence of relevant/uncharged conduct can or should be described as amounting to a new charge, the fact remains that the Appellant is seemingly at risk of spending additional time in prison on account of conduct which may not be proved beyond reasonable doubt. It could be that the increase in the sentence would be small in the context of the sentence as a whole – even if it was, this would not resolve the fundamental breach of the principle of the presumption of innocence.

26. ***MJE v. Nolan***[19] was a European Arrest Warrant case involving apparent preventative detention under the IPP (*"Indeterminate sentence for Public Protection"*) sentencing regime in the United Kingdom. In refusing to surrender the requested person in that case, Edwards J. emphasised the fundamental and universal nature of the principle of the presumption of innocence:

"125. This Court is satisfied that one of those fundamental norms is the presumption of innocence. It is much more than a mere procedural trial right. It is recognised in the vast majority of the world's legal systems as being a fundamental principle of the justice to which every person is entitled as an aspect of their humanity. It is as old as the hills."

International Consensus on the Standard of Proof for Relevant/Uncharged Conduct

27. Although, as noted above, O'Donnell J. in ***Balmer*** commented that universal applicability is not the test for whether an Irish constitutional principle should be seen as prohibiting surrender, the Commission is of the view that the question of whether a criminal law principle is to be found in a broad range of countries remains strongly

[19][2012] IEHC 249 – the judgment of Edwards J. was upheld on appeal by the Supreme Court, which did not make any finding on the constitutional issue – see [2013] IESC 54.

relevant when considering whether breach of same should be seen as flagrant or egregious.

28. For instance, it is particularly noteworthy that a Council of Europe Recommendation entitled *Recommendation No. R (92) 17 of the Committee of Minister to Member States Concerning Consistency in Sentencing*[20] contains the following guidance at paragraph C(3), under the heading *"aggravating and mitigating factors"*:

> *"The factual basis for sentencing should always be properly proved. Where a court wishes to take account, as an aggravating factor, of some matter not forming part of the definition of the offence, it should be satisfied that the aggravating factor is proved beyond reasonable doubt and before a court declines to take account of a factor advanced in mitigation, it should be satisfied that the relevant factor does not exist."* (Emphasis added)

29. The Explanatory Memorandum to the said Recommendation states:

> *"Although it is widely accepted that aggravating and mitigating factors ought to have a considerable influence on the sentence, these factors are often not specified as part of the definition of the offence, and therefore may not have been proved by the same standard as the elements in the offence. This might occur when the defendant pleads guilty to the offence charged, but argues that the facts are more favourable to him or her than is alleged. Fairness demands that factors which have a substantial effect on the sentence should be proved, if the defendant disputes them, to the same standard as the elements of the offence itself. There is a clear analogy with Article 6 paragraph 2, of the European Convention on Human Rights. In some member states special procedures have developed to resolve issues of this kind: in England, for example, the judge must hold a pre-sentence hearing. Germany has a similar procedure, and France has an equate rapide. But, irrespective of the procedural approach, it is essential that factors that go against the defendant and which are disputed should be proved to the proper standard."*[21]

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[20]Adopted by the Committee of Ministers on the 19th October 1992.

[21]Explanatory Memorandum to Recommendation No. R (92) 17 of the Committee of Ministers to Member States – "Consistency in Sentencing" (adopted by the Committee of Ministers on 19 October 1992 at 482nd meeting of the Ministers' Deputies).

30. This is a Council of Europe recommendation and so, it is submitted, is likely to be given substantial weight by the European Court of Human Rights ('the ECtHR').

31. Indeed, more generally, the ECtHR relies on other international legal instruments and recommendations for guidance when establishing whether an international consensus has emerged. In ***Demir and Baykara v. Turkey***,[22] the Grand Chamber referred to the importance of international and European instruments in interpreting and applying the ECHR, concluding as follows:

> *85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.*
> *86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, mutatis mutandis,* Marckx, *cited above, § 41).*

32. In addition to the aforesaid Council of Europe Recommendation, it appears that the law of Canada, Australia, New Zealand, the United Kingdom and Ireland all provide for a 'beyond reasonable doubt' standard in this context. Article 724(3) of the Canadian Criminal Code provides as follows:

> *"Disputed facts*
> *(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,*
> *(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;*

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[22] App. No. 34503/97, 12th November 2008.

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
(c) either party may cross-examine any witness called by the other party;
(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender."
(Emphasis added)

33. Similarly, s.24 of the New Zealand Sentencing Act 2002 provides:

"24 Proof of facts
(1) In determining a sentence or other disposition of the case, a court—
(a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
(b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
(2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:
(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:
(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:
(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.
(3) For the purposes of this section,—

aggravating fact means any fact that—

(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and
(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case

mitigating fact means any fact that—

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and
(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case." (Emphasis added)

34. Prior to the enactment of the said 2002 Act, the New Zealand Law Commission had produced a report entitled *Proof of Disputed Facts on Sentence*[23] which found it a common principle throughout all of the jurisdictions studied (Australia, Canada, England and Wales, and New Zealand) that proof be beyond reasonable doubt in respect of aggravating factors at sentencing stage. The Judicial Commission of New South Wales has produced a *Sentencing Bench Book*[24], last updated in December 2015, which sets out the Australian position as follows at paragraph [1-410]:

"[1-410] Standard of proof

A court may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt: The Queen v Olbrich (1999) 199 CLR 270 at [27]–[28]; Leach v The Queen (2007) 230 CLR 1 at [41]; Filippou v The Queen (2015) 89 ALJR 776; [2015] HCA 29 at [64], [66]. The offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour: Filippou v The Queen at [64], [66]; The Queen v Olbrich at [27]–[28]." (Emphasis added)

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[23] New Zealand Law Commission Report No. 76, accessible at http://www.lawcom.govt.nz/our-projects/factual-basis-sentencing

[24] Accessible at: http://www.judcom.nsw.gov.au/publications/benchbks/sentencing

35. Paragraph [31-12] of O'Malley, *Sentencing Law and Practice*,[25] appears to show varying approaches to the burden and standard of proof applied at sentence hearings in Australia, Canada and the UK, but it is noteworthy that in none of the cases or approaches mentioned is there any acceptance of anything other than a beyond reasonable doubt standard where matters adverse to the accused or likely to aggravate the sentence are concerned.

36. Donnelly J., at paragraph 5.36 of her judgment herein, stated that *"[n]one of the cases demonstrate a universal requirement that all matters at sentencing be determined on the basis of a beyond reasonable doubt standard"*. However, whilst there may not be any clear judicial pronouncement that it is a fundamental universal norm that aggravating factors at sentencing which may result in an increase in sentence must be proved beyond reasonable doubt, in the Commission's respectful view, an international consensus has emerged, and the United States finds itself outside of this.

Conclusion on Extradition Proceedings

37. It is submitted that, when applying the relevant legal test to the facts of this case, if this Honourable Court were to find, as the learned High Court judge herein appears to have found[26], that there are substantial grounds for believing that there is a real risk of relevant and uncharged conduct, proved only on the balance of probabilities, causing a lengthening of any sentence which the Appellant might receive, it is the Commission's view, that this amounts to *"egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting state"*[27] and to a *"flagrant denial of justice"* amounting to

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[25] 2nd Ed., Dublin, 2006.

[26] See paragraphs 5.33 and 5.42 of the judgment of Donnelly J. herein – the learned High Court judge explicitly accepts at paragraph 5.33 that there is a real risk of relevant conduct in the form of evidence of financial gain causing an enhancement of any sentence the Appellant might receive. At paragraph 5.42, it seems to be implicitly accepted that there is a real risk of uncharged conduct being taken into account at sentencing although Donnelly J. does not accept that this would amount to sentencing for other offences.

[27] As per Murray CJ. in ***MJELR v. Brennan*** [2007] 3 IR 732.

"a nullification, or destruction of the very essence,"[28] of fair trial rights.[29]

THE JUDICIAL REVIEW PROCEEDINGS

Introduction

38. The Appellant contends that he is prosecutable in Ireland in respect of the conduct giving rise to the extradition request. His solicitors wrote to the DPP on 8th November 2013, stating that he would plead guilty if the DPP prosecuted him in respect of this conduct in Ireland. It was contended that it would be unjust and disproportionate to extradite him to the U.S.A., given his personal and family ties to this jurisdiction, the disparity in penalties for the conduct in question as between the U.S.A. and this jurisdiction, and certain fundamental rights concerns. The DPP replied by letter dated 16th December 2013, stating that, following a consideration of the matters contained in the said letter from the Appellant's solicitor, a decision had been taken not to prosecute the Appellant. Reference was made to the *Director's Guidelines for Prosecutors* and it was further stated: *"It is not the practice of the Director to give reasons for a decision not to prosecute"*.

39. The DPP's letter does not expressly state that consideration was carried out as to whether Ireland was the appropriate forum for prosecution, nor does it state that the Appellant's personal circumstances were seen as a factor to be taken into account. Although it is stated that the DPP considered the matters set out in the Appellant's solicitor's letter, no reasons were given as to why the primary submission that the Appellant should be prosecuted in Ireland had been rejected.

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[28]See for example the judgment of the Grand Chamber of the European Court of Justice in ***Mamatkulov v. Turkey*** (Applications nos. 46827/99 and 46951/99 - 4th February 2005), at paragraph 14 and of the Fourth Section of that court in ***Othman (Abu Qatada) v. United Kingdom*** (Application no. 8139/09, 17th January 2012) at paragraph 260.

[29]In relation to acquitted conduct, the learned High Court judge found at paragraph 5.50 of her judgment herein that it was not necessary for her to decide whether the taking into account of such conduct at sentencing, if proved on the balance of probabilities, would amount to a flagrant denial of justice. The Commission notes that this finding is not specifically challenged in the Appellant's Notice of Appeal, and accordingly it is not proposed to address the issue of acquitted conduct directly here other than to say that the Commission's view that increasing a sentence on the basis of relevant/uncharged conduct proved only on the balance of probabilities amounts to egregious circumstances and a flagrant denial of justice applies *a fortiori* in respect of acquitted conduct.

The Duty to Give Reasons

40. In ***Oates v. District Judge Browne***[30] Hardiman J. examined the development of jurisprudence on when a decision-maker will be seen as having a duty to give reasons for a decision affecting the individual. At paragraphs 47-48, he commented as follows:

"47. In O'Donoghue v. An Bord Pleanála *[1991] ILRM 750 the Court addressed the question of a duty to give reasons as follows (per Murphy J. at p. 757):*

'It is clear that the reason furnished by the Board (or any other tribunal) must be sufficient, first to enable the Courts to review it and secondly to satisfy the persons having recourse to the Tribunal that it has directed its mind adequately to the issue before it'.(Emphasis added)

I wish to say, though it is surely unnecessary to do so at this stage of the evolution of the jurisprudence, that I agree with that formulation of why, in point of law, it is necessary for a deciding body to give reasons. It is a practical necessity that reasons be stated with sufficient clarity that if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must 'satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it'.

48. This line of authority has been greatly expanded in recent times. Specifically in relation to the first of the principles enunciated by Murphy J. in the case just cited, in Mallak v. Minister for Justice [2012] 3 IR 297, Fennelly J. stated at p.322, para. 68 – 69:

'In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by an administrative decision have a right to know the reasons on

[30][2016] IESC 7.

which they are based, in short to understand them'. (Emphasis added)

I would respectfully consider that the formulation that affected persons "have a right... in short to understand them", them being the reasons for the decision, is an apt contemporary epitomisation of the second principle enunciated by Murphy J. in O'Mahony v. Ballagh."

41. The decision before the Supreme Court in ***Oates*** was a decision of the District Court, which was susceptible to judicial review. At paragraph 51 of his judgment, Hardiman J. found that the authorities established that *"the existence either of a right to appeal or of a right to seek judicial review triggers a right to a statement of reasons"*. The right to seek judicial review of a decision of the District Court is well-established and is relatively broad. The scope for judicial review of a decision of the DPP on whether to prosecute is more limited. However, decisions of the DPP on whether to prosecute are undoubtedly reviewable in certain circumstances, as was recognised in ***Eviston v. DPP***[31] and ***Carlin v. DPP***[32]. This was noted by Donnelly J. at paragraph 11.50 of her decision in the present case:

"11.50 It must be acknowledged that a decision of the DPP is reviewable. That has been confirmed time and again by the Superior Courts; however, due to the special position of the DPP, the nature of that review is limited. As set out at para. [11.16] above, O'Donnell J. held that a decision of the DPP is reviewable "if it can be demonstrated that it was reached mala fides or influenced by improper motive or improper policy, or other exceptional circumstances." O'Donnell J. acknowledged that, as so qualified. The State (McCormack) has remained the law."

The Appellant contends that there are *"exceptional circumstances"* rendering the DPP's decision reviewable in his case. On the basis that this Honourable Court finds that the decision of the DPP to be reviewable in the present case, it would accordingly seem to follow that the Appellant is entitled to the DPP's reasons.

42. In addition to examining the Irish case-law, Hardiman J. in ***Oates*** also made reference to the development of the relevant principles in the UK and in the Court of Justice of the European Union:

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[31] *Eviston –v- DPP* [2002] 3 IR 260.
[32] *Carlin –v- DPP* [2010] 3 IR 547.

"52. Although the above authorities are, in my view, dispositive of the present case, it would risk incompleteness not to have regard to the lively jurisprudence in this area which has been developed in the Courts of the United Kingdom and in the European Courts. In R. (Wheeler) v. Assistant Commissioner of the Metropolitan Police [2008] EWHC 439 (Admin) it was held that a decision maker must address the substantive points made on behalf of the person seeking review. At para. 17 the learned judge continued as follows:

'His reasons need not be elaborate or long and certainly should not be analysed as if there were a judgment of a judge of the Administrative Court, but it should appear from them that he was conscious of the substantial issues raised by the disciplined person, and explain why or on what basis he has concluded that the review should uphold the decision of the panel'. (Emphasis added)

53. In November, 2012, the Court of Justice of the European Union (CJEU) delivered a judgment in European Union v. Bamba (Case C – 417/11).At para. 49 the Court held:

'[T]he purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, secondly, to enable that judicature to review the legality of the act'.

54. The duty to give reasons, in its present form, is largely a development of the decades since the 1980s. It was, however, well established by the time of the hearing of this case in the District Court. It represents a major change (in my view for the better) in legal sensibilities and in the legal obligations of decision makers who derive their power from the Constitution or the Law."

The Position under the European Convention on Human Rights

43. In ***Jordan v. UK***[33] and also in ***Finucane v. UK***[34], the ECtHR found that in certain circumstances there was an obligation on the DPP in Northern Ireland to provide

[33](2003) 37 EHRR 2.
[34]App. No. 29178/95, 1st July 2003

reasons for a decision not to prosecute. In ***Jordan,*** Pearse Jordan was shot by security forces in Northern Ireland and the DPP decided not to prosecute the police officers involved. The ECtHR held that the refusal to disclose the reasons for this decision would "*not be conducive to public confidence*" and "*denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.*"[35] It should be noted that an important factor in that case, which is to be distinguished from the present case, was the possibility of a perception of bias, given that it was the actions of police officers which were under scrutiny. In such circumstances, the Court found that public confidence in the DPP's office would be likely to be undermined by the lack of reasons.

44. Similarly, in ***Finucane***, the ECTHR found a violation of Article 2 ECHR on the ground that various authorities had failed to carry out a prompt and effective investigation into the allegations of collusion by security personnel in the killing of the applicant's husband, Patrick Finucane: see paras. 82-3.

45. The Commission acknowledges that the facts in ***Jordan*** and ***Finucane*** were different to those in the present case. As in ***Jordan***, the risk of a public perception of bias undoubtedly played a large part in the decision in ***Finucane***. However, the Commission submits that the decisions remain relevant to the present case insofar as the ECtHR has recognised the importance of the Office of the Director of Public Prosecutions providing reasons in certain circumstance in order to maintain public confidence in that Office.

46. In this jurisdiction, the DPP, as an "organ of the State" is required by section 3 of the ECHR Act 2003 to act in a manner that is compatible with the ECHR.

The Position in England and Wales

47. In a judicial review challenge to a decision not to prosecute made by the Crown Prosecution Service of England and Wales the Lord Chief Justice Bingham, handing down judgment for a Divisional Court of the English High Court, stated, in ***R. v. Director of Public Prosecutions, ex parte Manning***[36]:

> *23. Authority makes clear that a decision by the*

[35] At paragraph 123.
[36] [2001] QB 330.

Director not to prosecute is susceptible to judicial review: see, for example, R. v. Director of Public Prosecutions, ex parte C *[1995] 1 Cr. App. R. 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."*

48. As the Crown Prosecution Service states on its website[37], its decisions have been challenged successfully on judicial

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[37] Accessible at : http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/

review on a number of different grounds, and *reasons* for a decision by the Service to prosecute, or not to prosecute, should be carefully recorded. It states:

> *"A decision by the Crown Prosecution Service to prosecute or not to prosecute may be judicially reviewed. If an application for judicial review is successful, the court will direct the CPS to reconsider its position. The final decision is, however, for the CPS. It is clear from the case law below that the courts are likely to order the CPS to review its prosecutorial decisions where:*
>
> *Law*
> *It is apparent that the law has not been properly understood and applied (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858).*
>
> *Evidence*
> *It can be demonstrated on an objective appraisal of the case that some serious evidence supporting a prosecution has not been carefully considered (**R (on the application of Joseph) v DPP** [2001] Crim LR 489; **R (on the application of Peter Dennis) v DPP** [2006] EWHC 3211);*
> *It can be demonstrated that in a significant area a conclusion as to what the evidence is to support a prosecution is irrational (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858; or*
> *The decision is perverse, that is, one at which no reasonable prosecutor could have arrived (**R v DPP, ex p. C** [1995] 1 Cr App R 136).*
>
> *Policy*
> *CPS policy, such as that set out in the* Code for Crown Prosecutors, *has not been properly applied and/or complied with (**R v DPP, ex p. C** [1995] 1 Cr App R 136; **R v DPP, ex p. Manning** [2001] QB 330; **R v Chief Constable of Kent, ex p. L; R v DPP, ex p. B** (1991) 93 Cr App R 416). This includes situations where irrelevant considerations have been taken into account (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858);*
> *The decision has been arrived at because of an unlawful policy (**R v DPP, ex p. C** [1995] 1 Cr App R 136); or*
> *It can be demonstrated that the decision was arrived at as a result of fraud, corruption or bad faith (**R v DPP, ex p. Kebilene** [2000] 2 AC 326; **R v Panel on Takeovers and Mergers, ex p. Fayed** [1992] BCC 524).*
>
> *Previous Judicial Decisions*

*Where an inquest jury has returned a verdict of unlawful killing, the reasons why a prosecution should not follow are not legally and evidentially robust, and have not been clearly explained (**R v DPP, ex p. Manning** [2001] QB 330; **R (on the application of Peter Dennis) v DPP** [2006] EWHC 3211); or*
*Where there have been proceedings in the civil court, the civil courts decision has not been carefully considered (**R v DPP, ex p. Treadaway, The Times**, October 31 1997).*

It is essential to ensure that the reasons for decisions, and in particular public interest considerations giving rise to decisions, are documented. This record can be used, if necessary, to demonstrate that the decision to prosecute was taken only after a full and proper review of the case. Interested parties should also be informed of the reasons for decisions.
Where a decision is challenged, and is likely to be the subject of a judicial review, the decision should be re-reviewed. Where, on a re-review, it is decided that the original decision was wrong, immediate action should be taken (if possible) to rectify the decision. This will result in quicker resolution of the issue for all parties and may avoid the need for judicial review proceedings to be brought."

Consideration of Personal Circumstances and Forum

49. The Appellant, an Irish citizen, raised concerns on a *prima facie* level that his fundamental rights would be breached if he were extradited to the U.S.A., and further he submitted that the DPP could prevent this by prosecuting him in Ireland. Specifically, it is noted that the Appellant put the DPP on notice *prima facie* of fundamental differences in relation to sentencing between the US federal criminal system and that of this jurisdiction and, in this respect, he argued that he would be at risk of being adversely affected if a decision not to prosecute him was taken by the DPP.

50. The Commission does not submit that the DPP was obliged to decide in favour of prosecution in these circumstances. It is, however, submitted that the Appellant's solicitor's letter of the 8th November 2013 appears to be sufficient to place an obligation on the DPP to at least *consider* whether it would be appropriate to prosecute the Appellant in Ireland, in light of the submissions made. In this regard, the Commission notes, without prejudice to the submissions made above in relation to the extradition proceedings, that even if it were to be determined that the relevant or

uncharged conduct proved only on the balance of probabilities at sentencing stage did not amount to egregious circumstances or a flagrant denial of justice, the fact that it is in breach of Irish constitutional due process rights should in itself be a factor which the DPP should weigh in the balance.

51. The DPP's letter of 16th December 2013 is not clear as to whether the potential for breach of the Appellant's fundamental rights in the U.S.A. was a consideration when deciding not to prosecute him. In her letter of the 16th December 2013, the Director expressly states that the *Director's Guidelines for Prosecutors* were taken into account when reaching the decision not to prosecute. Paragraph 4.4 of the *Guidelines* indicates that the public interest is a consideration when the DPP is deciding whether to prosecute, and paragraph 4.20 of the *Guidelines* indicates that a factor *"which may arise when considering whether the public interest requires a prosecution may include the following...(d) whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender"*.

52. At paragraphs 11.77 to 11.79 of her judgment herein, the learned High Court Judge infers, from a combination of the DPP's statement that she took the *Guidelines* into account and the apparent acknowledgment in her submissions that consideration of the public interest includes *"the individual and peculiar circumstances of an offender"*, that the DPP took the Appellant's personal circumstances into account when deciding not to prosecute him.

53. The provision of reasons would easily clarify the position. In this respect, it is the Commission's view that there is an onus on the DPP, specifically in light of this present case, to have expressly stated that the Appellant's personal circumstances (including the potential effect of the extradition on him) were a consideration, and further what weight was given to them.

54. On the matter of forum, considerable emphasis was placed by Donnelly J. in ***AG v. Damache***[38] on s.6(9) of the *Criminal Justice (Terrorism Offences) Act 2005* and Article 9 of Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA) which, when read together, place a legal obligation on the DPP to consider matters of forum in relation to terrorism offences which

[38][2015] IEHC 339.

might be prosecutable in more than one Member State (see paragraphs 12.7.36 to 12.8.10 of the said judgment). As noted by Donnelly J. at paragraph 11.9 of her judgment in the present case, there does not appear to be a similar specific domestic legislative provision in relation to the type of offences alleged against the Appellant.

55. However, it is the respectful view of the Commission that this does not mean that forum is not a necessary consideration for the DPP in circumstances where a citizen might be prosecuted for the same conduct in another jurisdiction as well as in the State. In *State (McCormack) v Curran*[39] Walsh J. stated:

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

56. The weight to be given to considerations of forum and the personal circumstances of the Appellant (there appears to be considerable overlap between these issues) are a matter for the DPP. However, in order to maintain public confidence in the DPP's office through transparency, the Commission submits that there should be a clear indication as to how the Appellant's personal circumstances and the issue of forum were weighed in the balance.

57. In ***BH (AP) v. Lord Advocate***[40], the UK Supreme Court found that, although the fact that a proposed extraditee might be prosecuted domestically would not usually be a factor which would prevent extradition, it might, albeit only very exceptionally, be relevant:

> *"64. In Norris v Government of the United States of America (No 2) [2010] 2 AC 487, para 67, having noted in para 66 that there had recently been a string of cases in which the extraditee had argued that he ought to be prosecuted in this jurisdiction of which Bermingham was one, Lord Phillips said:*
>
> *'Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of*

[39] *State (McCormack) v Curran* (1987) ILRM 225.
[40] [2012] UKSC 24.

proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an inquiry as to the possibility of prosecution in this country.'

In a postscript to his judgment which he wrote in the light of the admissibility decision in King he said that he remained of the view that rarely, if ever, was the possibility of prosecution as an alternative to extradition likely in practice to tilt the scales against extradition: para 86. These remarks had the unanimous support of all the other members of the court.

65. On the other hand cases where both parents of young children are at risk of being extradited may be regarded as being of an exceptional character, so as to raise the need to consider the possibility of a prosecution in this country a bit higher than the bar which the observations in Norris have set for it. The issue remains one of proportionality. The more compelling the interests of the children the more important it will be for the alternatives to extradition, if there are any, to be carefully examined and brought into the balance to see if they carry any weight. This is not to diminish the importance to be given to this country's treaty obligations. Rather it is to recognise that in cases involving the separation of parents from young children there is another powerful factor which is likely to make the scales more finely balanced than they would be if the children were not there."

58. The ***BH (AP)*** decision is discussed in the UK House of Lords Select Committee on Extradition Report of the 25th February 2015, entitled *Extradition: UK law and practice*. The said report contains an interesting discussion on the extradition of a country's own nationals, which is relevant in the present case, where the Appellant is an Irish citizen (while also having citizenship of the U.S.A.):

"EXTRADITION OF OWN NATIONALS
162. One witness referred to a "sense that if you are a British national or resident and it is possible for you to be prosecuted in the United Kingdom, you should be prosecuted here".[184] There are some countries which do not extradite their own nationals but this has not been the case in UK law for over a century.[185]
163. However, a number of witnesses said that there should

be a presumption that if a British national could be tried in the UK, he or she ought to be tried here. For example, David Bermingham said:

"If a case could be heard here, we ought to think very carefully about the fact that, as a first priority, it ought to be ... it should be incumbent upon a requesting state to make the case as to why putting someone on a plane in chains to the far side of the world to be locked up in prison is better than the case being dealt with in the UK."[186]

164. Similarly, Liberty proposed a forum bar based on "a presumption—capable of rebuttal by a Requesting State—that an extradition will not proceed if the alleged activity for which extradition is sought took place in part in the UK."[187]

165. These variations on the forum bar are proposed to deal with the concerns that "Once extradited, a requested person is separated from friends, family and their emotional support network".[188] For some they were necessary because they viewed it as inappropriate for extradition to be used in cases where the Requested Person has not "even set foot"[189] in the Issuing State.

166. Arguably, the impact of extradition on a person resident in the UK is more properly addressed by consideration of Article 8 of the ECHR as this can already take into account all aspects of his or her life and relationships in the UK (see Chapter 2).

167. ***The forum bar is still a new element to extradition law. It is too soon to come to a view on its effectiveness.*** *In the light of this conclusion, it is not yet clear whether a Requested Person in Scotland is less protected from extradition than a person elsewhere in the UK. However, it is certainly clear that in Scotland a Requested Person has fewer opportunities to present forum arguments.*

168. ***It may be that a wider 'interests of justice' test ought to be allowed in the forum bar but, on the basis of the evidence we have heard, that is far from certain. With only a small number of cases having gone to appeal, it is too soon to conclude that the bar is too restrictive.***

169. Unless case law demonstrates that the forum bar slows down extradition proceedings excessively, ***we conclude that having a process whereby prosecutors' decisions can be directly scrutinised in open court is a valuable addition to the 2003 Act and has potential to make this part of the process more transparent. This may be a useful addition to the law given our conclusions in paragraphs 138 and 139.***

170. ***We are content that the provisions concerning the prosecutors' certificate do not undermine the bar. The forum bar should not prevent extradition where a prosecution in the UK would not be possible. The CPS's***

approach to the certificate appears to us to be a proportionate use of the power to ensure that this does not happen. *We also note that the other bars to extradition are unaffected and would remain available to the Requested Person where forum arguments have not been successful.*

171. ***We do not consider that there should be (nor under the EAW scheme could there be) an absolute bar to extradition merely because it is sought in respect of a UK national whose criminal activity was performed entirely in this country.***

172. However, we note that there are cases where a person is a fugitive from a country in which he or she has physically committed a crime and cases where a person has not left the UK but has been engaged in, for example, cyber-crime or international fraud. In both instances the offences may be serious but the sense in which the Requested Person is a fugitive is different. In the latter cases, the UK is the Requested Person's home (with all the connections and ties which that implies) and, as such, they are different from those cases where a person's presence in the UK is a means to escape justice and seek a safe haven. In our view, questions of forum alone do not adequately address these differences.

173. ***We recommend, therefore, that where a person is normally resident in the UK the courts should be particularly astute to ensure that:***

(a) no other less draconian measures are available to progress the case to a just outcome;

(b) the forum bar has been fully explored in court;

(c) all relevant Article 8 arguments have been fully evaluated to ensure extradition is not disproportionate; and

(d) due consideration has been given to the possibility of obtaining assurances as to:

(i) the prospects of pre-trial bail; and

(ii) the transfer back to the UK of at least part of any eventual sentences. (Recommendation 6)" (Emphasis in original)

59. A legislative *"forum bar"* exists in England, Wales and Northern Ireland since the enactment of the UK Crime and Courts Act 2013. This is described at paragraph 144 of the aforementioned Select Committee report:

"144. Despite this recommendation, a forum bar was introduced into the 2003 Act by the Crime and Courts Act 2013. It was brought into force in England, Wales and Northern Ireland (but not Scotland) in October 2013. This forum bar is worded quite differently to the 2006 version. It provides that extradition may be barred on grounds of

forum if a substantial measure of the criminal activity took place in the UK and the judge decides, "having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place."[162] The provisions go on to spell out the "specified matters", namely:

(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;

(b) the interests of any victims of the extradition offence;

(c) any belief of a prosecutor that the UK is not the most appropriate jurisdiction in which to pursue the prosecution;

(d) whether the evidence necessary to prove the offence is or could be made available in the UK, were the prosecution to take place here;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard to:

(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such persons being given in the UK or in jurisdictions outside the UK; and

(g) the Requested Person's connections with the United Kingdom."

60. Notwithstanding the absence of equivalent legislative provisions in this jurisdiction which might govern the Appellant's case, it is submitted that the above discussion on the UK perspective is relevant to the present case as it shows the type of considerations which the DPP might or might not have considered when deciding not to prosecute the Appellant. Unfortunately, the DPP's letter of 16th December 2013, does not allow either the Appellant or the Court to establish whether the DPP took into account such considerations, and if so whether her conclusions on the issue were reasonable.

The Relevance of *Mallak* and *Murphy*

61. At paragraph 11.90 of her judgment herein, the learned High Court Judge found not only that the DPP is not under an obligation to give reasons for a decision not to prosecute, but also that she is not under an obligation to justify not giving reasons in any particular case:

"11.90 I have considered whether the reference by O'Donnell J in Murphy to para. [77] of Mallak is in fact an extension of the principle of giving reasons i.e. that there must at least be a statement as to why no reasons are being given. I do not believe that the Supreme Court meant that to apply individually in every case where the DPP takes a stance. In Mallak the court was engaged with the particular approach of the Minister, which apparently contrasted with the approach in other cases. In general the DPP does not give reasons for prosecutorial decisions. The legal basis for that approach has been approved and outlined in many of the decisions referred to above. In my view, it is acceptable for the DPP to rely in general on those reasons and she is not required to give a specific answer in each case as to why she is not giving reasons."

62. This approach appears to mean that ***Mallak*** and ***Murphy*** left the common law position in relation to the DPP's immunity from giving reasons untouched. The Commission respectfully disagrees.[41] Not only were the principles set out by Fennelly J. in ***Mallak*** clearly intended to apply in circumstances beyond the individual facts of that case, the decision in ***Murphy*** must be read as applying the ***Mallak*** principles to a decision of the DPP, albeit not the same type of decision which is before the Court in the present case. The Commission recognises that there may well be good reasons justifying a refusal of the DPP to give reasons in particular cases. However, the Commission considers that there does not appear to be a basis for finding that the proposition from paragraph 74 of ***Mallak*** that *"At the very least, the decision maker must be able to justify the refusal"* should not apply to decisions of the DPP on whether to prosecute.

63. As must be acknowledged from a reading of the careful judgment of Donnelly J. herein, it is possible to argue that, as ***Mallak*** and ***Murphy*** do not specifically address the position of the DPP when deciding on whether to prosecute, the earlier position as set out in cases such as ***Carlin*** and ***Eviston*** has not been displaced. However, the Commission is of the respectful view that this argument fails to recognise the breadth of application of ***Mallak***. As noted by Hardiman J. in ***Oates***, quoted above, the line of authority dealing with the duty to give reasons *"has been greatly expanded in recent times"*. It is the Commission's position

[41]The Commission previously made submissions in relation to the applicability of *Mallak v. the Minister for Justice, Equality and Law Reform* [2012] 3 IR 297 to the DPP in *Ali Charaf Damache v. the Director of Public Prosecutions Ireland and the Attorney General*, at paras 3 – 5 of the Commission's submissions.

that this expansion intends to cover the DPP's decision on whether to prosecute.

64. Leaving aside the duty to give reasons for a moment, it is difficult to find a basis for finding that the DPP should not have to at least justify a refusal to give reasons. The DPP's independence would not appear to be at risk merely because she was required to justify a refusal to give reasons. The affected person would in such a case at least be in a position to consider whether to challenge the said refusal to give reasons by way of judicial review, as he or she would have the reasons for it. Even if this Court were to find the decisions in ***Mallak*** and ***Murphy*** did not in themselves change the position of the DPP when deciding whether to prosecute, it is of course open to this Court to find that the traditional position has evolved such that the DPP in deciding to prosecute or not to prosecute is under an obligation either to give reasons or to justify a refusal to give reasons. However, the Commission's view is that this would be consistent with the decisions in ***Mallak*** and ***Murphy.***

Limited Reviewability v. Limited Intervention

65. Given the particular expertise of the DPP in relation to prosecutorial decisions, a large amount of curial deference is of course appropriate, and the instances where the Court will interfere with such a decision will necessarily be limited. However, it is the Commission's opinion that to impose a test framed in terms of exceptional circumstances is to give the impression of a quasi-immunity from review or special status for the DPP in the administrative order of the State. In the Commission's view, where a decision on whether to prosecute is made, reasons should be provided to an affected party in every case upon request, or alternatively a justification for refusing to give reasons should be provided. The decision will thus be capable of being reviewed. Whether an affected party will succeed in successfully challenging the decision by way of judicial review is another matter. Transparency and the rule of law do not require that the Court be quick to interfere with the DPP's expert decision-making. They do, it is submitted, require that the Court be in a position to examine same.

66. The Commission notes the potential limiting effect of the finding of Donnelly J. that the facts of this particular case do not amount to *"exceptional circumstances"* such as to make the decision of the DPP reviewable. The learned High Court judge reasoned as follows:

"11.98 By and large the circumstances facing Mr. Marques are common to a large number of requested persons who face extradition or surrender for offences either committed in this territory or which are offences over which Ireland exercises extra-territorial jurisdiction. There is nothing in the developing case law, including the decision in Murphy, which indicates that the decision not to prosecute in this jurisdiction or to give reasons in these types of cases amounts to an exceptional circumstance.

11.99 The fact that the Guidelines do not expressly cater for this situation does not translate this into an exceptional circumstance. The DPP is required to follow the law and prosecute in this jurisdiction where there is prima facie evidence and where it is in the public interest to so prosecute. The Guidelines have no statutory basis and are of general nature to assist prosecutors so that a fair, reasoned and consistent policy underlies the prosecution process. Not every eventuality can be covered in the Guidelines. In the final event, each case must be individually assessed. The Guidelines record that the personal circumstances of a suspect are considered under the heading of public interest. That was the real concern of Mr. Marques in this case; that his personal circumstances were not considered. On the basis of the facts and circumstances of this specific case, it is abundantly clear that they were considered by the DPP.

11.100 With regard to the particular circumstances of Mr. Marques' case, he submitted that, over and above the usual situation, he has offered to plead guilty. That, he submitted, was exceptional. It is an unusual factor but in the view of the court it does not amount, either on its own or in combination with all the other factors, to an exceptional circumstance. In Eviston, the constitutional right to fairness was, on the particular facts of that case, violated. In Murphy, the constitutional right to trial by jury was at stake. No constitutional or Convention right is at issue here. The offer of the plea of guilty is, but one of a number of factual considerations, that the DPP must consider in reaching her decision to prosecute or not to prosecute. It is a factual matter going towards the strength of the evidence. In general, a strength of the evidence factor is unlikely to amount to an exceptional circumstance for reviewing the DPP's decision or requiring reasons. This is because of the test set out in State (McCormack) that provided the facts do not exclude the reasonable

possibility of a proper and valid decision not to prosecute; the decision is not reviewable. To hold otherwise would be to trample upon the carefully demarcated limits set to the reviewability of the DPP's decision.

11.101 Moreover, even if there had been a full confession the consideration of the public interest where the DPP is best placed to decide on same, would still operate as a significant factor reducing the exceptionality of this circumstance. In other words, there will always be cases where it may appear from the outside that strong evidence exists for a prosecution but where no such prosecution is directed. The restrictions on the reviewability of the DPP protect her from routine review in such circumstances."

67. It is the Commission's very respectful view that this analysis is overly restrictive as regards the DPP's duty to give reasons. Although it is accepted that the Appellant does not have a right to be prosecuted in Ireland, it would be unrealistic to take the view that the decision has no effect on the Appellant's rights, particularly in circumstances where the learned High Court judge accepted that the United States federal sentencing regime feared by the Appellant, if imposed in this jurisdiction, might amount to a breach of constitutional fair trial rights.[42] Thus, although indirect, the decision not to prosecute does have a potential effect on the Appellant's constitutional and ECHR rights and it is the view of the Commission that it is sufficiently proximate to require reasons on the particular facts of the Appellant's case. Although, as discussed above, the Commission does not feel that *"exceptional circumstances"* should be required before a decision of the DPP on whether to prosecute becomes reviewable, it is submitted that exceptional circumstances do appear to arise on the facts of this case.

The Victim's Directive

68. Articles 6(1)(a) and 6(3) of Directive 2012/29/EU (the "Victim's Directive"), which have been directly effective since 16th November 2015, together provide that victims of crime have a right to be provided with reasons for a decision not to prosecute. Furthermore, Article 11(1) of the Directive specifically provides for a victim's right of review of a decision not to prosecute. As pointed out by Donnelly J. at paragraph 11.91 of her judgment in the High Court

[42] At para 5.37.

herein, this legislative action changed the position of the DPP in relation to victims only.

69. However, in the view of the Commission, the fact that the DPP must now give reasons to victims upon request in all cases where a decision not to prosecute is made, would appear to undermine any argument that it would have a serious effect on the independence of the DPP if there was a corresponding duty to give reasons to persons other than victims where a decision not to prosecute has been taken. In that sense, the Victim's Directive is of relevance. Furthermore, in relation to decisions not to prosecute, it appears that requests for reasons from victims are likely to greatly outnumber requests for reasons from those who would have been prosecuted, such that no resource argument would seem reasonable.

Conclusion on Judicial Review Proceedings

70. For the reasons given above, the Commission is of the respectful view that the DPP should have given reasons for its decision not to prosecute in this case, or at a minimum should have explained on what basis it seeks to withhold those reasons.

71. It is the Commission's view that the DPP should be subject to judicial review in the same manner as any other administrative body, and that the requirement to show *mala fides*, improper motive or, exceptional circumstances before a decision of the DPP even becomes *reviewable* is unhelpful. In the Commission's view, a better approach is that all decisions of the DPP on whether to prosecute are capable of being reviewed, but that the instances where such review will result in the Court interfering with the decision are likely to be rare. In order for decisions of the DPP to be capable of review, it is necessary for reasons to be given, or a justification to be provided for not giving reasons.

Michael Lynn S.C.
Anthony Hanrahan B.L.

15th June 2016

On behalf of the Irish Human Rights and Equality Commission, acting as Amicus Curiae