THE HIGH COURT

Record No.: 2013/51 EXT

Between/

THE ATTORNEY GENERAL

Applicant

and

ALI CHARAF DAMACHE

Respondent

and

THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

Extradition and fundamental rights: the appropriate tests

1. In determining whether extradition should be refused on the ground of a prospective breach of the respondent's fundamental rights, the *amicus curiae* submits that the following tests apply.

The Constitution

2. Where a prospective breach of Constitutional rights is asserted, no rigid formula applies, although probability has been applied as a standard of proof: *Finucane v. McMahon*[1]*; Russell v. Fanning.*[2]

3. In *Finucane*, Finlay C.J. stated (at pp. 203-4):

> *"The duty of the Court 'as far as practicable to defend' the constitutional rights of the applicant may not necessarily be best served by any rigid formula of standard of proof. I am satisfied that what is necessary is to balance a number of factors, including the nature of the constitutional right involved; the consequence of an invasion of it; the capacity*

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1 [1990] 1 IR 165 (Finlay C.J. at 203-7).

2 [1988] I.R. 505, at 531.

of the Court to afford further protection of the right and the extent of the risk of invasion. Upon the balancing of these and other factors in each case, the Court must conclude whether its intervention to protect a constitutional right is required and, if so, in what form."

4. In a European Arrest Warrant case, *Minister for Justice and Equality v. Nolan*,[3] Edwards J. drew guidance from the Supreme Court's judgment in *Nottinghamshire County Council v. B*, [2011] IESC 48, in which the role of the Constitution, extra-territorially, was considered in a child abduction case under the Hague Convention. Edwards J. drew the following principles:

"*104. First, applying the reasoning in* Nottinghamshire County Council *to the extradition context, where it is suggested that the Court should not surrender a respondent on s. 37(1)(b) grounds, the focus of the Court's enquiry should be on the act of surrender itself. In this regard, it must be asked whether (to paraphrase O'Donnell J.) what is apprehended as being likely to happen in the issuing State is something which would depart so markedly from the essential scheme and order envisaged by the Constitution and be such a direct consequence of the Court's order that surrender is not permitted by the Constitution.*
105. Secondly, the constitutional rights at issue must be precisely identified.
106. Thirdly ... consideration must be given to the focus of application of the constitutional provision or provisions relied upon. Are they primarily intended to apply to the situation of persons who are within the jurisdiction of Ireland and its courts (i.e. to what occurs in Ireland) or are they truly fundamental in the sense of being regarded as of universal application?
...
111. Fourthly, although it has already been touched on in the context of the first principle enunciated above, it bears repetition that sufficient proximity requires to be demonstrated between the proposed surrender and the apprehended harm that will or may arise from the circumstance complained of as being egregious....
112. Fifthly, regard may be had to the nature and degree of the differences between the law of the requesting state and the law which it is asserted the Irish Constitution would permit or require in this jurisdiction, bearing in mind that it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland...

[3] High Court, 24th May 2012; [2012] IEHC 249.

113. Sixthly, the Court may also consider and have regard to whether what is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances."

The High Court judgment in *Nolan* was appealed to the Supreme Court. The appeal was dismissed without the Constitutional issue being dealt with.[4]

5. More specifically in respect of fair trial rights, the Supreme Court has stated that "*egregious circumstances*" may lead to a refusal to surrender in a European Arrest Warrant case: *Minister for Justice, Equality and Law Reform v. Brennan*.[5] Murray C.J. stated:

"Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.
"The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials

[4] See the judgment of Denham C.J., dated 10th December 2013; [2013] IESC 54.

[5] Supreme Court, 4th May 2007; [2007] IESC 21.

in this country.
"There may well be egregious circumstances such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting State according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

6. Previously, in *Ellis v. O'Dea*,[6] Walsh J. in the Supreme Court put the matter as follows:

"*All persons appearing before the courts of Ireland are entitled to protection against all unfair or unjust procedures or practices. It goes without saying therefore that no person within this jurisdiction may be removed by order of a court or otherwise out of this jurisdiction, where these rights must be protected, to another jurisdiction if to do so would be to expose him to practices or procedures which if exercised within this State would amount to infringements of his constitutional right to fair and just procedures. The obligation of the State to save its citizens from such procedures extends to all acts done within this jurisdiction and that includes proceedings taken under the Extradition Act, 1965"*

The European Convention on Human Rights ('the ECHR')

7. Article 3 of the ECHR requires that extradition is refused where there are substantial grounds for believing that the person concerned, if surrendered, faces a real risk of being subjected to torture, inhuman or degrading treatment or punishment in the requesting state: *Minister for Justice, Equality and Law Reform v. Rettinger*[7] (hereafter '*Rettinger*').

8. Where a person provides evidence of a prospective breach of Article 3, it is for the State "*to dispel any doubts*". Denham C.J., in *Rettinger* cited, at para. 16 of her judgment, the Grand Chamber judgment of the European

[6] [1989] 1 IR 530, at 537.

[7] [2010] 3 I.R. 783, at para. 28, p. 800.

Court of Human Rights ('the ECtHR') in *Saadi v. Italy*,[8] as follows:

"(iii) it is in principle for the respondent to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it."

9. However, this does not mean that the burden of proof has shifted to the Contracting State: *Rettinger*, para. 31, at p. 801 (cf. para. 80).

10. In the recent judgment of *Attorney General v. Piotrowski*,[9] Edwards J. refused an extradition to the Ukraine on the basis of prison conditions, stating that the *Rettinger* principles apply in an extradition as well as an EAW context: "*As regards the substantive issue, it is accepted by both sides that the law is as laid down by the Supreme Court in* Minister for Justice, Equality and Law Reform v. Rettinger *[2010] 3 IR 783, suitably adapted to the extradition context*".[10]

11. 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*,[11] 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*

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8 App. No. 37201/06, (2009) 49 E.H.R.R. 30.

9 High Court, 21st October 2014, [2014] IEHC 540.

10 At p. 55.

11 Application No. 8139/09, 17th January, 2012.

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.

12. These principles were applied, and surrender refused on the basis of Article 6 of the ECHR, in *Minister for Justice, Equality and Law Reform v. Rostas*, High Court, 1st July 2014, Edwards J.[12], a European Arrest Warrant case.

13. In respect of Article 9 of the ECHR, persuasive guidance is given by the very recent judgment of the Court of Appeal of England and Wales in *R.(B) v. Secretary of State for the Home Department*[13]:

"The courts have drawn a distinction between (i) alleged violations of articles 2 and 3 (which require a "real risk" of violation) and (ii) alleged violations of other Convention rights (which require a "flagrant" violation): see, for example, R (Ullah) v Special Adjudicator *[2004] UKHL,* [2004] 2 AC 323 *at para 24:*

> *"While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment:* Soering, *para 91;* Cruz Varas, *para 69;* Vilvarajah, *para 103. In* Dehwari, *para 61 (see para 15 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: Soering, para 113 (see para 10 above);* Drodz, *para 110;* Einhorn, *para 32;* Razaghi v Sweden*;* Tomic v United Kingdom.

[12] [2014] EHC 391.

[13] [2014] 1 W.L.R. 4188.

Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1*, para 111:*

> *"The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state."*

"'Flagrancy' has been defined by the ECtHR as 'a nullification or destruction of the very essence of the right guaranteed by [the relevant] article': Mamutkulov and Askarov v Turkey *(2005) 41 EHRR 494, para OIII-14. It seems that there never has been a successful article 9 challenge in a 'foreign case'. I use the phrase 'foreign cases' in the sense in which it was used by Lord Bingham in* Ullah *at para 9, viz to mean those where it is claimed that the conduct of the state removing a person from its territory to another territory will lead to a violation of that person's Convention rights in that other territory.*"

The Constitution – a stronger protection than the ECHR?

14. The ECHR is a regional set of minimum standards which States must comply with, allowing them some margin of appreciation, except in relation to certain standards that are unqualified such as Article 3. It is submitted that the Constitution may, in certain areas, provide stronger protections to the individual than the ECHR.

15. This was acknowledged by Hedigan J. in a case concerning prison conditions, *Dumbrell v. Governor of Castlerea Prison.*[14] The agreed note of his ex tempore judgment records the judge as stating:

    "*This is a very disturbing case. It is quite unacceptable that the prisoner has been detained in 23 hour lock up for that long. In my view, Irish law has set higher standards that those of the European Convention on Human Rights. It is fundamental to the Convention system that each country can take a much more rights as they choose but no less. In this case, Irish law provides stronger rights than those agreed by the 47 Convention signatories, some of whom from the former Soviet Union struggle with even those minimum rights. Ireland has higher standards.*"

16. The *amicus curiae* turns now to the issue of solitary confinement.

Prison conditions and solitary confinement

17. The practice of housing a prisoner alone, with little or no contact with other prisoners, is variously referred to as solitary confinement, isolation or segregation. There are a number of variables, including hours per day in the cell, level of interaction with other prisoners, entitlement to visits, degree of access to information and media, justification for the measure, and the prisoner's right of independent review. It is therefore difficult to make any general statement as to whether solitary confinement constitutes a breach of fundamental rights. It is clear however that restrictions on social interaction engage issues of fundamental rights.

18. In *Devoy v. Governor of Portlaoise Prison,*[15] Edwards J.

[14] High Court, 6th August 2010, ex tempore judgment of Hedigan J.

[15] [2009] IEHC 288.

commented as follows:

"Because man is a social animal the Court recognises that the humane treatment, and respect for the human dignity, of a prisoner requires that he or she should not be totally or substantially deprived of the society of fellow humans for anything other than relatively brief and clearly defined periods".

19. In *Connolly v. Governor of Wheatfield Prison*,[16] Hogan J. expressed concern over the 23 hour per day protective segregation of the applicant, then in place for more than 3 months, finding that it *"must be regarded as an exceptional measure"*, but did not find that the applicant's constitutional rights had reached the point of being breached.

20. In *Kinsella v. Governor of Mountjoy Prison*[17], the same judge found it *"impossible to avoid the conclusion that a situation where a prisoner has been detained continuously in a padded cell with merely a mattress and a cardboard box for eleven days compromises the essence and substance of this constitutional guarantee [of the protection of the person]"*.[18]

21. The domestic courts' approach appears to impose higher standards than that of the European Court of Human Rights. In *Ramirez Sanchez v. France*[19], the ECtHR found no violation of Article 3 where the applicant had been held in 22 hour per day isolation for more than 8 years, although it must be observed that there were very substantial security considerations in the case. The ECtHR made a similar finding in *Ocalan v. Turkey*[20], where the applicant had been the sole inmate on an island prison for more than 5 years.[21]

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16 [2013] IEHC 334.

17 [2012] 1 IR 467.

18 *Ibid*, at para. 10.

19 App. No. 59450/00, 4th July 2006 – Grand Chamber.

20 App. No. 46221/99, 12th May 2005 – Grand Chamber.

21 Although the same applicant in *Ocalan v. Turkey (No. 2)* has more recently succeeded in having a prior period of his detention declared in breach of Article 3 ECHR, App. nos. 24069/03, 197/04, 6201/06 and 10464/07, 18th March 2014 – judgment available only in French, press release accessible at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4703714-5709561

22. Although a maximum time limit for solitary confinement has thus not been judicially imposed, both the courts of this jurisdiction[22] and the ECtHR[23] emphasise that solitary confinement cannot be imposed for an indefinite period. Even in *Babar Ahmad v. United Kingdom,* the ECtHR stated (at para. 223): *"If an applicant were at real risk of being detained indefinitely at ADX, then it would be possible for conditions to reach the minimum level of severity required for a violation of Article 3. Indeed, this may well be the case for those inmates who have spent significant periods of time at ADX"* (emphasis added). Having said that, neither the Irish nor the Strasbourg courts appear to require that a prisoner be informed of a precise time period for which he or she will be subject to solitary confinement. Thus, although the period of such confinement may not be indefinite, it may be permissible that it is open-ended.

23. This contrasts with the view of the UN Special Rapporteur on Torture[24] who, in a 2011 report, proposed the following definition for solitary confinement: *"the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day"*.[25] The Special Rapporteur went on to recommend that *"prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition*".[26] The 15 day limit appears to have been chosen on the basis of reports examined by the Special Rapporteur which tended to show that *"at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible"*.[27]

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[22] See *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334, at para. 22.

[23] See *Babar Ahmad v. United Kingdom* (App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April 2012), at para. 223.

[24] The United Nations Commission on Human Rights, in resolution 1985/33, appointed an expert, a special rapporteur, to examine questions relevant to torture. The mandate was extended for 3 years by Human Rights Council resolution 25/13 in March 2014

[25] See para. 26 of the UN Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment of the 5th August 2011. The Istanbul statement on the use and effects of solitary confinement adopted at the International Psychological Trauma Symposium on 9th December 2007 also adopts the 22 hour definition.

[26] Ibid, at para. 88.

[27] Ibid, at para. 26.

24. Nonetheless, neither the Irish courts nor the ECtHR have adopted this 15 day limit, nor indeed have the courts imposed a strict limit on the duration of segregation.[28]

25. The UN Special Rapporteur on Torture identified five different justifications which are provided by State authorities for the use of solitary confinement, these being
"(a) To punish an individual (as part of the judicially imposed sentence or as disciplinary regime);
"(b) To protect vulnerable individuals;
"(c) To facilitate prison management of certain individuals;
"(d) To protect or promote national security;
"(e) To facilitate pre-charge or pretrial investigations".[29]

The Special Rapporteur has recommended the abolition of solitary confinement imposed as punishment.[30]

26. In its Observations on United States' compliance with the UN Convention Against Torture adopted on 20th November 2014, the UN Committee Against Torture stated that *"the full isolation for 22-23 hours a day in super-maximum security prisons is unacceptable"* under Article 16 of the said Convention, and called for such prison regimes to be banned.[31] The Committee also expressed its continuing regret that the United States had not withdrawn its interpretive understandings and reservations to the definition of torture, which in the view of the Committee undermined the application of the Convention[32]. Although there is no international, or perhaps even Europe-wide, consensus on the precise limits which should be put on the use of solitary confinement, the *amicus curiae* respectfully submits that it is appropriate that the Court should consider

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[28] See the comments of the Strasbourg Court at para. 210 of *Babar Ahmad v. United Kingdom* (App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April 2012) to the effect that the Court "*has never specified a period of time, beyond which solitary confinement will attain the minimum level of severity required for Article 3*"; and para. 23 of the judgment of Hogan J. in *Connolly v. Governor of Wheatfield Prison* [2013] IEHC 334: "*it would be generally inappropriate to lay down any* ex ante *rules regarding solitary confinement*".

[29] UN Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment of the 5th August 2011, at para. 40.

[30] Ibid, at para. 84.

[31] Concluding observations on the third to fifth periodic reports of United States of America, UN Committee Against Torture, 20th November 2014.

[32] Ibid, at para. 9.

the comments of the UN Committee Against Torture on this issue, as the UN body with responsibility for monitoring States' compliance with the Convention.

27. The Amicus makes the following respectful observations on the facts of the herein case, while also remaining mindful of its undertaking not to entrench upon matters of factual dispute[33] .On the issue of prison conditions, the following facts do not appear to be contentious:

(a) There is at least a possibility that the respondent would be imprisoned in ADX Florence were he to be convicted of the charges against him in the United States;[34]

(b) If imprisoned in ADX Florence and not subject to Special Administrative Measures ("SAMs"),[35] there is at least a possibility that the respondent could be accepted onto the "Step-Down Program" which could lead to a gradual relaxation of the conditions of imprisonment;

(c) If accepted onto the Step-Down Program in ADX Florence, the respondent would have to spend a minimum of 12 months under "General Population" conditions before progressing to the Intermediate Unit (i.e. Phase 2 of the programme), and a minimum of 6 months would then have to be spent in the Intermediate Unit before progressing to Phase 3 of the programme;[36]

(d) Both General Population and Intermediate Unit conditions in ADX Florence involve confinement alone in a cell for more than 22 hours per day;[37]

(e) There is at least a possibility that the respondent would be subject to SAMs for a period if imprisoned in the United States;

(f) If subject to SAMs in ADX Florence, the respondent would not be eligible for the Step-Down Programme, but could apply for the "Special Security Unit Program";[38]

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[33] See Affidavit of Emily Logan Chief Commissioner,, 6 October 2014, at para. 12.

[34] See para. 19 of the August 2014 Affidavit of Jennifer Arbittier Williams.

[35] Note that prisoners who are subject to SAMs are not eligible for the Step-Down Program in ADX Florence, but may be eligible for the "Special Security Unit Program" – see the Affidavit of Steven D. Julian at para. 3, fn. 1.

[36] See para. 23 of the November 2014 Affidavit of Laura L. Rovner and para. 29 of the Affidavit of Kenneth Fulton.

[37] See Affidavit of Kenneth Fulton at paras. 16a and 16b.

[38] Affidavit of Steven D. Julian at para. 3, fn. 1.

(g) If accepted onto the Special Security Unit Programme, the respondent would have to spend a minimum of 12 months in Phase 1 of the Programme, followed by a minimum of 12 months in Phase 2 of the Programme;[39]

(h) Prisoners on Phase 1 and Phase 2 of the Special Security Unit Programme are confined alone in their cell for more than 22 hours per day;[40]

(i) Solitary confinement can have adverse effects on a prisoner's health.[41]

28. Accordingly, it seems appropriate for the Court to examine the conditions in ADX Florence and the manner of imposition, administration and review of any SAMs which might be applied in the respondent's case. As to whether the evidence in fact satisfies the relevant Constitutional or ECHR standards of proof is of course a matter for the Court and the *amicus curiae* does not propose to put forward any recommended conclusion in that regard.

29. Paragraphs 41 and 42 of the Affidavit of Steven D. Julian, filed on behalf of the Attorney General, set out the criteria for referral to ADX Florence. Therefore, it is relevant to consider what justification might be advanced by the U.S. prison authorities for the imposition of solitary confinement on the respondent, and whether it would be proportionate. As set out in the Affidavit of Steven D Julien, most of the factors to be taken into account concern the likelihood of violence and the risk to institutional security and good order. However, also included as a factor is *"that the inmate was convicted of, charged with, associated with, or in any way linked to terrorist activities and, as a result, presents national security management concerns which cannot adequately be met in an open population institution"*. Although it is a matter which the Attorney General may wish to clarify, one possible interpretation of the words *"as a result"* is that this is effectively a blanket order permitting convicted terrorists to be referred to ADX Florence, regardless of any individualised security risks which they might personally pose. Paragraph 19 of the August 2014 Affidavit of Jennifer Arbittier Williams, filed on behalf of the Attorney General, refers to the possibility of the

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39 Affidavit of Steven D. Julian at para. 7.

40 Affidavit of Steven D. Julian at paras. 4 and 5.

41 See *inter alia*, the Affidavit of Ian O'Donnell. The evidence submitted on behalf of the Attorney General does not appear to dispute that solitary confinement can have a detrimental effect on health.

respondent being incarcerated at ADX Florence if *"as a result of his status, [he] is unable to be safely housed in the general population of another institution"* (emphasis added). Thus, it may be that respondent would be at risk of being subject to solitary confinement solely on the basis of the offence which he was convicted of, without an individualised assessment of the necessity for solitary confinement in his particular case.[42] That said, it is relevant to note that the European Court of Human Rights in *Babar Ahmad and others v. United Kingdom*[43] ('the *Babar Ahmad* judgment') was satisfied on the evidence before the Court in that case *"that the Federal Bureau of Prisons applies accessible and rational criteria when deciding whether to transfer an inmate to ADX"*.[44]

30. At paragraph 70 of his March 2014 Affidavit, filed on behalf of the respondent, Joshua L. Dratel asserts that a U.S. prosecutor's power over whether the respondent would be subject to solitary confinement could be used as a *"bargaining chip"* in the process of plea bargaining. This appears to be accepted at paragraph 10 of the August 2014 Affidavit of Jennifer Arbittier Williams, with the clarification that the final say as to the conditions of imprisonment rests with the Federal Bureau of Prisons. This would appear to indicate that, in practice, prolonged solitary confinement is (on occasion at least) used by the U.S. authorities for punitive purposes, rather than to ensure the safety of staff and prisoners or to protect national security.

31. Applying the principles from the case law in this jurisdiction, with the exception of solitary confinement *"for a period not exceeding 3 days"* which can be imposed for breaches of prison discipline,[45] the imposition of solitary confinement for punitive purposes seems likely to fail a proportionality test, due to a lack of necessity. In *Killeen v. Governor of Portlaoise Prison*,[46] Hedigan J. stated that

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42 Amnesty International expresses similar concerns at pages 3 and 24 of its 2014 report *Entombed – Isolation in the US Federal Prison System*.

43 Apps. No. 24027/07. 11949/08, 36742/08, 66911/09 and 67354/09, 10th April 2012.

44 At para. 220 of the judgment.

45 In *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288, Edwards J. commented that *"Although the disciplinary provisions of the [Prisons Act] allow (inter alia) for solitary confinement as a penalty for breach of discipline such a penalty can only be applied 'for a period not exceeding 3 days'"* - at page 84 of the judgment.

46 [2014] IEHC 77.

"[i]n the event of prolonged segregation there should be available judicial review of the necessity and proportionality of the measure". The obvious means of applying enhanced punishment for a crime would be to impose a longer sentence of imprisonment, and it seems arguable that the U.S. prosecutor's power to recommend solitary confinement, effectively as a sanction for not agreeing to a plea bargain, would appear to be unnecessary to achieve the aim of punishment. Where unusual prison conditions such as solitary confinement involve a significant infringement on the fundamental rights of a prisoner, then it seems difficult to justify the imposition of those conditions on a punitive basis.[47] In *Attorney General v. PO'C*,[48] O'Sullivan J. refused to order the extradition of the respondent to the United States *inter alia* on the basis that the Court would have no control over whether the respondent would be imprisoned under a regime of gratuitous and inhumane punishment in a particular prison in Arizona. As noted by Charleton J. in *Foy v. Governor of Cloverhill Prison*,[49] "*there is no entitlement to expose the health of a prisoner to risk unless there is a situation of compelling justification or necessity"*.

32. The European Court of Human Rights *AB v. Russia*[50] emphasised the need for objective justification for solitary confinement. The applicant in that case had spent more than three years on remand in solitary confinement. Of particular concern to the Court appeared to be the fact that the prison authorities had given no substantive justification for the isolation of the applicant, who was *"suspected of a non-violent economic crime and had no record of disorderly conduct while in the remand prison"*.[51]

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47 With the exception perhaps of very short-term solitary confinement for breaches of prison discipline, such as that permitted by s.13 of the Prisons Act 2007 for up to 3 days.

48 [2007] 2 IR 421.

49 [2012] 1 IR 37, at para. 18.

50 App. No. 1439/06, 14th October 2010 – at para. 102.

51 *Ibid*, at para. 105. Lack of justification for 23 hour per day solitary confinement was also of concern to the Court when finding a breach of Article 3 ECHR in *Iorgov v. Bulgaria* (App. No. 40653/98, 11th March 2004): *"it is significant that the Government have not invoked any particular security reasons requiring the applicant's isolation and have not mentioned why it was not possible to revise the regime of prisoners in the applicant's situation so as to provide them with adequate possibilities for human contact and sensible occupation".*

33. Even if the Court in the present case is satisfied that the possible imposition of solitary confinement on the respondent would be likely to be justified on the basis of security or good order, it is respectfully submitted that a proportionality test must still be applied. The *amicus curiae* notes that the conditions at ADX Florence, and in particular the fact that the applicant if referred there would have to spend a minimum of 18 months in 22 hour solitary confinement before being eligible for transfer to less restrictive conditions, may be disproportionate to the aim of protecting national security or the good order of the prison. There appears to be a lack of evidence to show that, for example, the respondent sharing a cell with another person, or having more than 2 hours per day out-of-cell recreation, would pose a threat to U.S. national security or the good order of the prison.

34. Whether solitary confinement on national security or good order grounds would be objectively justified in the respondent's case is far from clear. This question perhaps should be viewed in the context of the respondent's relatively lengthy prison history in this jurisdiction where, in the understanding of the *amicus curiae* , he has not been under high-security conditions or conditions of solitary confinement. This is to be contrasted with the applicants in the *Babar Ahmad* case, where the ECtHR, although noting that the applicants were not physically dangerous, appeared to lay emphasis on the strict prison regime they had thus far been subject to in the United Kingdom, and saw this as potential justification for strict conditions in the United States.[52] At paragraph 65 of his November 2014 Affidavit, filed on behalf of the respondent, Joshua L. Dratel refers to a client who had been imprisoned in the United Kingdom for 8 years without any special security conditions and yet was imprisoned under SAMs (entailing solitary confinement) when transferred to the United States.

35. As discussed further below, case law in this jurisdiction, although far from determinative as to a maximum period of solitary confinement, points to the need for regular review, and that such confinement should be measured in days and months rather than years.

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[52] *Babar Ahmad* at para. 221: *"as the applicants' current detention in high security facilities in the United Kingdom demonstrates, the United States' authorities would be justified in considering the applicants, if they are convicted, as posing a significant security risk and justifying strict limitations on their ability to communicate with the outside world"*.

36. Hedigan J. in *Killeen v. Governor of Portlaoise Prison*[53] did not see any significant difference in approach between the Irish and Strasbourg courts on the issue of segregation. The three applicants in that case were not in solitary confinement but rather were being held together, segregated from the rest of the prison population. Having considered the Irish and ECtHR case law, Hedigan J. summarised as follows:

> *"Thus national and international requirements are broadly the same:-*
>
> *(a) There must be good reasons – the segregation must be necessary – the onus is on the authority to justify.*
>
> *(b) It should be no more than is necessary to meet the requirements of the occasion i.e. safety and security.*
>
> *(c) It should be proportionate to the objective sought.*
>
> *(d) There should be ongoing review.*
>
> *"In the event of prolonged segregation there should be available judicial review of the necessity and proportionality of the measure."*

37. Whilst it is perhaps true to say that the ***principles*** applied by the Irish and Strasbourg courts on the issue of solitary confinement are similar, the *amicus curiae* is of the respectful view that the case law of this jurisdiction, most likely on the basis of the additional Constitutional guarantees over and above the minimum protections provided by the ECHR, show a lesser tolerance for prolonged solitary confinement. In light of the comments of Hogan J. in *Kinsella* and *Connolly*, those of Hedigan J. in *Killeen*, and of Edwards J. in *Devoy*, it seems difficult to argue that the Constitution allows for solitary confinement in terms of years rather than months. In this regard, the *amicus curiae* notes the seemingly undisputed evidence that all prisoners referred to ADX Florence must spend a minimum of 18 months in solitary confinement of at least 22 hours per day in their cell. If this Court was to find on the evidence that there is a real risk of the respondent being referred to ADX Florence, or a prison with similar conditions, following extradition, then the *amicus curiae* is of the respectful view that extradition in such circumstances would be prohibited by the protection of the Irish citizen guaranteed by Article 40.3.2 of the Constitution.

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53 [2014] IEHC 77.

38. As regards whether extradition in such circumstances would be in breach of Article 3 of the ECHR on the basis of the jurisprudence of the ECtHR, the case of *Babar Ahmad* would seem at first blush to be an obvious comparator. However, the *amicus curiae* notes that the ECtHR in that case was satisfied that, given that it had been deemed necessary to house those applicants in high-security conditions in the United Kingdom, the United States authorities would be justified in seeing them as posing a significant security risk. Furthermore, although the Court was satisfied that there was not a real risk of the applicants being subjected to conditions in ADX Florence which would constitute a breach of Article 3 ECHR, the Court did comment at paragraph 223 of its judgment that there *"may well be"* serving inmates in that prison who were subject to conditions which would reach the minimum level of severity required for a violation of Article 3. Further, it is not clear from the ECtHR's decision in *Babar Ahmad* whether there was evidence put before it to the effect that U.S. prosecutors have the power to recommend or not recommend solitary confinement depending on whether an accused accepts a plea bargain. Such evidence appears to be undisputed in the present case, and appears to indicate that the imposition of solitary confinement can in certain circumstances be for punitive, rather than security or good order, purposes. As discussed above, in the view of the *amicus curiae* , the imposition of solitary confinement as punishment following conviction[54] is unlikely to be a proportionate measure, given the health risks and the alternative option of simply increasing the length of the normal sentence of imprisonment.

Irreducible sentence

39. In the case of *Vinter v. United Kingdom*,[55] the Grand Chamber of the ECtHR held that the type of life sentences which were imposed on the applicants under U.K. legislation was in breach of Article 3 ECHR because of their irreducible nature. The applicants could only be released on the discretion of the Secretary of State for the Home Department on compassionate grounds where the prisoner became terminally ill or seriously incapacitated.

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[54] As distinguished from punishment for a breach of prison discipline.

[55] App. Nos. 66069/09, 130/10 and 3896/10, 9th July 2013 – Grand Chamber.

40. Whilst the Attorney General has submitted in the present case that the ECtHR's judgment in *Vinter* focused on the "arbitrary" nature of a life sentence, given that its duration will depend on the age of the person at the time of sentence, the *amicus curiae* respectfully differs. In the *amicus curiae*'s respectful view, the main focus of the Grand Chamber's judgment is on the role that rehabilitation should play in a criminal justice system. The Grand Chamber commented: "*there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"*.[56] The sentences in *Vinter* were found to be in breach of Article 3 because they failed to provide for *"a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds*".[57]

41. In the March 2014 decision of the European Court of Human Rights in *Ocalan v. Turkey (No.2),*[58] the death sentence originally imposed on the applicant had been commuted into an *"aggravated life sentence"*. The judgment is currently available only in French but a press release in English issued by the Registrar of the Court indicates that this had the effect that the applicant would remain in prison for the rest of his life, without any assessment of his dangerousness and without any possibility of conditional release. The Court found that such a sentence, because of its irreducible nature, amounted to a violation of Article 3.[59]

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[56] *Ibid*, at para. 114.

[57] *Ibid*, at para. 119.

[58] App. Nos. 24069/03, 197/04, 6201/06 and 10464/07, 18th March 2014 – judgment available only in French, press release in English available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4703714-5709561

[59] Further discussion of the issue is to be found at paragraph 264 of *Harakchiev v. Bulgaria*, App. Nos. 15018/11 and 61199/12, 8th July 2014, where it was stated *"While the Convention does not guarantee, as such, a right to rehabilitation, and while its Article 3 cannot be construed as imposing on the authorities an absolute duty to provide prisoners with rehabilitation or reintegration programmes and activities, such as courses or counselling, it does require the authorities to give life prisoners a chance, however remote, to someday regain their freedom."*

42. The principles set out in *Vinter*[60] were applied in the recent judgment of the ECtHR in *Trabelsi v. Belgium*,[61] where it was held that an extradition to the United States would violate Article 3 because the applicant faced the prospect of a whole-life and irreducible sentence. The existence of the possibility of a presidential pardon was found not to constitute an adequate review for the purposes of reducibility.

43. Whilst the respondent in the present case does not face a life sentence, the *amicus curiae* respectfully submits that this Court should focus on the issue of rehabilitation, and what provision is made in the U.S. system to provide effective access for prisoners to rehabilitate. This is particularly important in light of the respondent's age and the possibility of a sentence which would, in practical terms, be in place for the remainder of his life. The *amicus curiae* respectfully submits that, on the evidence, it does not seem that the U.S. system provides for rehabilitation for prisoners who are convicted of terrorism offences in the manner set out in *Vinter*. If this Court was to find on the evidence that the respondent is at real risk of facing a *de facto* life sentence, without an effective system of review based on access to rehabilitation, then the *amicus curiae* submits that the *Vinter* and *Trabelsi* principles apply such as to put in issue whether extradition would violate Article 3.

Uncharged, or unproven, conduct going to sentence

44. There appears to be agreement in the evidence put forward by the parties in the present case that, at a sentencing hearing in the United States, the Court in determining the appropriate sentence can justify an increase in punishment on the basis of conduct in respect of which the convicted person was not charged and also conduct in respect of which the person was acquitted.[62] However, the sentencing judge must be satisfied on the *"preponderance of the evidence"* (seemingly equivalent to the balance of probabilities) that the conduct in question occurred. Furthermore, although a sentence may be increased on the basis of uncharged or acquitted conduct, the sentence

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60 Which in turn was applying earlier case law of the Court in *Kafkaris v. Cyprus*, App. No. 21906/04, 12th February 2008.

61 App. No. 140/10, 4th September 2014.

62 See paragraph 50 of the March 2014 Affidavit of Joshua L. Dratel filed on behalf of the respondent and paragraph 37 of the August 2014 Affidavit of Jennifer Arbittier Williams filed on behalf of the Attorney General.

imposed must still remain within the maximum limit provided for in respect of the offence for which the person has been convicted.

45. It is the respectful view of the *amicus curiae* that the imposition of a criminal sanction, in the form of an increased prison sentence, on the basis of factual findings made on the balance of probabilities, violates a fundamental requirement of a criminal trial and is contrary to international norms.

46. Commenting on Article 14 of the International Covenant on Civil and Political Rights,[63] the UN Human Rights

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[63] *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been

Committee, in its General Comment No. 13,[64] states (underlining added):

"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 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."

47. 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."

48. The ECtHR, when interpreting the ECHR, relies on international treaties and conventions for guidance. In *Demir and Baykara v. Turkey*,[65] 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

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reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

64 Twenty-first session, 1984, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994).

65 App. No. 34503/97, 12th November 2008.

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).*

49. Whilst under the U.S. system, the sentenced person must have been convicted of *some* offence in order to have a sentence enhanced for another offence for which they have been acquitted, there remains potential for the offence on which there has been a conviction to be significantly more minor in nature than the offence on which there has been an acquittal. This problem is mitigated somewhat by the fact that the enhanced sentence, which takes into account both convicted and acquitted conduct, cannot exceed the maximum penalty prescribed for the offence on which there has been a conviction. However, the *amicus curiae* notes that extradition is sought in respect of two offences, one more serious than the other, and there is therefore a possibility of the respondent being acquitted on one and convicted on the other. Furthermore, there appears to be a wide-ranging factual background which could include alleged activity on the part of the respondent in respect of which additional charges could have been laid.

50. In *amicus curiae*'s respectful view, to increase a custodial sentence on the basis of facts not proven beyond a reasonable doubt, which may have been the subject of an acquittal, or which do not form part of the charges laid against the respondent, strikes at the very core of his right, under the Constitution and international norms, to a fair criminal trial, such as to constitute a flagrant denial of justice.

Plea bargaining

51. In *Natsvilshvili and Togonidze v. Georgia*, App. No. 9043/05, 29th April 2014, the ECtHR considered whether

the plea bargaining process in Georgia complied with Article 6 of the ECHR.

52. In finding that there was no violation of Article 6 on the facts, the Court stated that it was necessary that the plea bargain was accompanied by the following conditions:
(a) the bargain had to be accepted by the accused in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and
(b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.

Evidential value of country reports

53. In extradition and deportation cases the courts have recognised that it is appropriate, and even desirable, to admit as evidence expert reports from reputable bodies. The Supreme Court has expressly approved this practice, with Denham J. setting out as a principle in *Rettinger*[66] that *"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"*.

54. The weight to be given to such reports is a matter for the decision-maker (ORAC or the RAT in a refugee case, the Superior Courts in an extradition case), and the source of the report, and its reputation for accuracy and fairness, are relevant factors to be weighed.

55. The *amicus curiae* submits that reports from U.N. bodies should command particular respect. In the area of refugee law, Article 8(2)(b) of Directive 2005/85/EC requires decision-makers to ensure that "*precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum …*".

56. In the *amicus curiae's* view, the reports of U.N. monitoring committees, such as the U.N. Committee against Torture, are of particular importance.

57. Where decision-making bodies are presented with conflicting reports, it has been held by the High Court that

[66] [2010] 3 IR 783, at paragraph 31.

they cannot *"arbitrarily prefer one piece of country of origin information over another"*.[67]

58. It is noteworthy that the ECtHR often makes extensive reference to country reports, from a wide range of sources: see, for example, *Harakchiev and Tolumov v. Bulgaria*[68] in which relevant reports from the European Committee against Torture, Inhuman and Degrading Treatment or Punishment are cited at length, as well as a report by the Bulgarian Helsinki Committee on Life Imprisonment without Commutation.

Conclusion

59. It is the *amicus curiae's* view, as reflected above, that this case raises very serious human rights issues. If the *amicus curiae* can assist the Court with any queries the Court might have, it will be very happy to offer as much assistance as it can.

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

9th December 2014

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

[67] *DVTS v. MJELR & Refugee Appeals Tribunal* [2008] 3 IR 476 – Edwards J., at paragraph 44.

[68] App. Nos. 15018/11 and 61199/12, 8th July 2014.