Neutral Citation Number: [2014] IEHC 443

THE HIGH COURT

JUDICIAL REVIEW

Record No: 2014/ No 166 J.R.

Between:

ERIC EOIN MARQUES

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

Judgment of Mr Justice Edwards delivered on the 9th day of September, 2014

Introduction:

This is an application for leave to apply for judicial review in which the applicant seeks relief under several headings.

The applicant seeks, *inter alia*, an order of *certiorari* to quash a decision of the first named respondent declining to prosecute the applicant in this jurisdiction in respect of certain offences for which his extradition is sought by the United States of America. This relief is sought on diverse grounds, in respect of which various declarations are also sought in addition to the primary relief of *certiorari*, including

that the said decision was an abdication of the first named respondent's responsibility as prosecutor (presumably referring to her statutory functions under the Prosecution of Offences Act 1974); that it was made without sufficient regard to relevant considerations; and that it was disproportionate, unreasonable and amounted to a failure to vindicate certain rights guaranteed to the applicant under the Constitution and under the European Convention on Human Rights ("ECHR").

The applicant also seeks an order of *certiorari* quashing an alleged decision of the first named respondent refusing to provide the applicant with reasons for her decision not to prosecute him, as well as an order of *mandamus* and/or an injunction requiring the first named respondent to give such reasons. These remedies, and various declarations further claimed in this context, are also sought on diverse grounds including an alleged failure on the part of the first named respondent to perform her functions in a manner consistent with the obligations of the State under articles 3, 5, 6, 8 and 13 of the ECHR; an alleged breach of the applicant's right to fair procedures as protected by Article 40.3 of the Constitution; and alleged undue hindering of the applicant's right of access to the courts, as protected by Article 38.1 of the Constitution.

The applicant further claims a declaration that s. 15 of the Extradition Act 1965 as substituted by s. 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 is repugnant to the Constitution; and a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that the said s. 15 (as substituted) is incompatible with the obligations of the State under Articles 3, 5, 6, 8 and 13 of the ECHR.

Relevant Background and Facts

The Extradition Proceedings

The applicant has been charged in the United States of America with a number of charges that, for the purposes of this judgment, can be broadly described as involving (i) aiding and abetting, and conspiracy in relation to, the advertisement of child pornography; (ii) conspiracy to distribute child pornography; (iii) advertising child pornography and (iv) distributing child pornography. Without getting into specifics, these matters involve various alleged contraventions of the provisions of Title 18 of the United States Criminal Code. Arising from these charges, the United States District Court in Maryland has issued a domestic warrant for his arrest. However, it has not been possible for the U.S. authorities to arrest the applicant on foot of that domestic warrant because at the time it was issued, and at all material times since then, he has been resident in Ireland. In the circumstances, the United States of America is requesting that Ireland extradite the applicant to their jurisdiction pursuant to a request in that regard made to this State under the extradition treaty that exists between Ireland and the United States of America.

The applicant was arrested in this jurisdiction on the 1st of August 2013 on foot of a provisional extradition warrant issued by this Court (Gilligan J.) pursuant to s. 27(1) of the Extradition Act 1965 as amended (hereinafter referred to as the Act of 1965). He was brought before the High Court (once again, Gilligan J.) on the same day in accordance with s. 27(6) of the Act of 1965, and was remanded in custody pending (a) the receipt by him of a certificate of the Minister for Justice and Equality under s. 26(1) (a) of the Act of 1965 stating that a request for his extradition had been duly made, or (b) his release either under s.27 (7) of the Act of 1965.

A provisional warrant issued under s.27 of the Act of 1965 remains effective for a maximum of eighteen days from the date of the person's arrest. Under s. 27(7) of the Act of 1965, if, within the period of eighteen days after such person's arrest, no certificate of the Minister under s. 26(1)(a) of the Act of 1965 stating that a request for his extradition had been duly made is produced, he is required to be released.

A certificate of the Minister under s. 26(1)(a) of the Act of 1965 stating that a request for his extradition had been duly made was in fact presented within the required eighteen day period. Accordingly, the applicant was produced before the High Court (Kearns P.) and he was further remanded in custody to await a hearing under s. 29 of the Act of 1965 to determine whether he is to be committed to await the order of the Minister for his extradition, or be discharged.

The s.29 hearing in respect of the request for the applicant's extradition was formally opened before this Court on the 25th of March 2014, following which it was adjourned *sine die*, upon the application of the applicant herein, pending the outcome of the present judicial review proceedings.

Outline of the offending conduct in respect of which extradition is sought

The alleged facts of the case are set forth in various affidavits filed in support of the extradition request. The Court will attempt to briefly summarise the principal evidence relied upon therein. In that regard it is important to state that what follows is merely a summary or outline of the main evidence relied upon, that significant details have been omitted in the interests of brevity, and that it does not purport to be, by any means, comprehensive. However, the Court's intention is that it should be sufficiently

detailed to enable the legal issues raised in this judicial review to be appreciated and considered in their proper context.

According to the extradition papers filed in support of the request for the applicant's extradition to the United States of America, the applicant was born on the 28th of April 1985 and is a dual citizen of Ireland and of the United States of America. At all material times, he has resided at Apartment 5, Russell House, 33 Mountjoy Square, Dublin, Ireland. He is believed to have considerable expertise in computers and in particular with respect to the provision of internet web hosting services.

A computer network ("the Network") that allows its users to communicate and to host entire websites anonymously was being investigated by the FBI in the United States of America for approximately two years prior to the extradition request with which the Court is now concerned. The Network protects user's privacy online by bouncing their communications around a distributed network of relay computers run by volunteers all around the world. The Network also allows users to set up entire websites within the Network that are only accessible to users of the Network. In the course of the said investigation, the FBI claims to have encountered an anonymous web hosting service ("the AHS") operating exclusively on the Network and to have identified the applicant as being the administrator of it. It is specifically alleged that, between the 24th of July 2008, and the 29th of July 2013, the applicant obtained, accessed and controlled the AHS and a computer server (the "Target Server") from his residence in Ireland and via a virtual private server, bank account and private mail facility in the United States. The AHS was allegedly used during the period in question to globally disseminate child pornography images on a vast scale via the Network. It was found to be providing hosting services for over one hundred illegal

child pornography websites. These websites (the “Target Websites”) are said to have thousands of members who have posted millions of images or videos of child pornography, some of which depict minors as young as infants engaged in graphic sexual acts with adults.

An investigation was opened to target the administrator of the AHS, as well as the administrators and users of the Target Websites, in order to identify and apprehend individuals who are sexually abusing children and to rescue their victims from abuse. It is alleged that through the use of undercover investigations and other investigative techniques, the FBI was able to identify a particular internet protocol (IP) address that appeared to be associated with both the AHS and the Target Websites. This IP address resolved to an internet service provider (the “ISP”) that is located in France. Subscriber records and business records obtained from this ISP disclosed that the IP address in question was associated with a single computer server at the ISP, i.e., the Target Server. A single subscriber, namely the applicant herein, is allegedly recorded as having contracted with the ISP for use of the Target Server. No other customers of the ISP use the Target Server. The billing address for the Target Server is a mailbox at a private mail facility in the United States. The aforementioned mailbox is allegedly assigned to a customer “Eric Marques”. Mail from the account is forwarded to Apartment 5, Russell House, 33 Mountjoy Square, Dublin, Ireland, which is the applicant’s residential address. Payment for the Target Server is said to have been accomplished by debit card in the applicant’s name from a U.S. based bank.

It is further alleged that the ISP allows users to log into a customer account via the internet. Access logs for the ISP customer account associated with the Target

Server reveal that that account has been accessed from a single IP address belonging to a virtual private server (VPS) provider in the U.S. Records and information obtained by the FBI from the VPS provider in question revealed a single listed subscriber for that IP address, i.e., the applicant. It is alleged that the VPS provider's records further disclose that the applicant's account with them was in turn accessed from another IP address assigned to an ISP in Dublin. With the assistance of An Garda Síochána the FBI established that this further IP address was assigned to a subscriber based at Apartment 5, Russell House, 33 Mountjoy Square, Dublin, Ireland. Subsequent investigations indicated that from time to time, in addition to being accessed indirectly via the VPS provider, the Target Server was remotely accessed directly from that Dublin IP address using an authentication key (effectively a complex password). It is contended that the evidence establishes that the applicant operated the AHS from his residence in Ireland, sometimes connecting directly to the AHS, and at other times connecting indirectly to it using a proxy server (such as the VPS located in the U.S.) to obscure his identity.

On July 29 2013, members of An Garda Síochána, pursuant to a request for mutual legal assistance and armed with a search warrant, searched the applicant's home at 33 Mountjoy Square, Apartment 3, Russell House, Dublin, Ireland. The applicant was present when gardaí entered the residence. At the time of entry, he was sleeping on a couch. When the gardaí entered, the applicant immediately ran towards a desktop computer in the residence. He was stopped by gardaí before he reached it. There was a wireless router and a wireless network in the home. Analysis of wireless network traffic at the premises revealed that a computer in the home was connected to the AHS server at the time of the search.

The desktop computer the applicant allegedly ran towards was running but with a screen-saver that was password-protected. Police investigators were unable to determine the password in order to access the computer so that they could make a full copy of all data and information on the computer in order to examine it. However, they were able to copy "random access memory" or "RAM" from that computer. RAM is a form of computer data storage. It is considered to be volatile data storage - data that is stored in RAM requires power to the device to maintain information, and, accordingly, is lost when a device is turned off. Data stored in RAM, therefore, commemorates only activity conducted since the computer was last turned off. For that reason, RAM data generally pertains to more recent activity on a computer.

Analysis of the RAM data for the applicant's desktop computer provided numerous links between that computer and the Network, the AHS, the Target Websites and child pornography.

Subsequently, investigators obtained, via search warrant, the content of the e-mail account that is posted on the AHS website in order to contact the AHS administrator. Review of the content of this e-mail account revealed that the applicant corresponded frequently with several administrators of Target Websites. Moreover, the said content indicates that the applicant was well aware of the fact that the Target Server and the AHS hosted child pornography. Comments by administrators of Target websites in e-mails to Target Website users also indicate that the applicant had knowledge of the content of Target Websites.

Relevant Legislation:

The Act of 1965 as originally enacted provided that if a case was capable of being prosecuted in Ireland because it was regarded under the law of the State as having been committed in the State, that was a total bar to extradition. It mattered not whether the Director of Public Prosecutions (the DPP) had considered, or had not considered, possible prosecution in this jurisdiction, or whether the DPP wished, or did not wish, to prosecute in this jurisdiction. Once an offence was regarded under the law of the state as having been committed in the State, extradition was absolutely barred. To correctly characterise it, the original s. 15 of the Act of 1965, which had so provided, created a "territoriality bar".

S. 15 of the Act of 1965 in its original form provided:

> **"15.**—Extradition shall not be granted where the offence for which it is requested is regarded under the law of the State as having been committed in the State."

On the 24th July 2012, the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (hereinafter "the Act of 2012") was signed into law. Section 27 of the Act of 2012 substituted for the former s.15 of the Act of 1965 the following:

> **"15.**— (1) Extradition shall not be granted for an offence which is also an offence under the law of the State if—

(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings for the offence against the person claimed, or

(b) proceedings for the offence are pending in the State against the person claimed.

(2) Extradition may be refused by the Minister for an offence which is also an offence under the law of the State if the Director of Public Prosecutions or the Attorney General has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence."

This Court held in *Damache v. the Director of Public Prosecutions* [2014] IEHC 114 (Unreported, High Court, Edwards J., 31st January 2014) (hereinafter "*Damache No 1.*"), and re-iterated in *Damache v. the Director of Public Prosecutions* [2014] IEHC 139 (Unreported, High Court, Edwards J., 28th February 2014), (hereinafter "*Damache No 2.*"), that the import of the substitution effected by s.27 of the Act of 2012 was to remove the absolute territoriality bar that had existed up to that point. The present (post 2012 amendment) position is that where there is a concurrency of possible jurisdiction between this State and a requesting state, an extradition request may be entertained if the Director of Public Prosecutions has decided either not to institute, or to terminate, proceedings in this jurisdiction against the person concerned. In *Damache No 1.*, this Court expressed the view that, in practical terms, the substituted provision provides that:

> "…the DPP is given a right of first refusal on prosecution where the offences are regarded as having been committed in the state and the offender is also wanted for prosecution for the same offences in another state, which has requested, or it is anticipated may request, that person's extradition."

This is not to imply that the new s.15 gives the DPP a choice as between potential fora in which an offender might be prosecuted. It does not. Rather, as has always been the case, the DPP's scope for decision is confined to whether she should or should not prosecute the person concerned in Ireland in respect of the offending conduct. It remains the case that the relevant criteria to which she must have regard are (i) the availability and sufficiency of relevant evidence, and (ii) the public interest in prosecuting the case in this jurisdiction. Clearly, however, what are sometimes referred to as "forum issues" might now have a bearing upon the public interest consideration in a particular case.

Be that as it may, if the DPP is considering whether to proceed, or has decided to proceed, in this jurisdiction, for the same offences as those comprising an extradition request (i.e., in respect of the same offending conduct), the extradition request cannot be entertained (unless the DPP subsequently terminates proceedings she has commenced). Such ongoing consideration or decision by the DPP creates a total bar to surrender having regard to the terms of s. 15(1) of the Act of 1965 as amended. However, even if the DPP decides not to prosecute that does not have the automatic effect of clearing the way for the offender's extradition. It merely means than the extradition request can at least be considered. In the event that the extradition request is not barred under subsection (1) of s. 15 of the Act of 1965, as substituted, the matter proceeds in the normal way, and all of the usual grounds for resisting extradition may be relied upon by the requested person at a s. 29 committal hearing before the High Court. If the High Court, following such a hearing, is disposed to make a committal order, it is then up to the Minister to decide whether or not to extradite the requested person. The Minister has a residual discretion to refuse

surrender in those circumstances under subsection (2) of s. 15 of the Act of 1965, as substituted.

The Evidence (including relevant correspondence)

The evidence adduced by the applicant is entirely uncontroversial and consists of an affidavit sworn by Caroline Egan, solicitor for the applicant, describing the history of the extradition proceedings to date, exhibiting the pleadings, the relevant exhibits and supporting documentation filed in the extradition case, and exhibiting certain correspondence exchanged between her and the office of the first named respondent. The contents of that correspondence are important and they are of great material relevance to this application for leave to apply for judicial review.

Following the receipt in this jurisdiction of a formal request from the United States of America for the respondent's extradition, and pending the matter coming on before the High Court for the purposes of a s.29 committal hearing, the said solicitor for the applicant wrote a letter to the first named respondent (the DPP), dated the 8th of November 2013, in the following terms:

> "Dear Madam,
>
> We act on behalf of Mr Eric Marques who is presently the subject matter of an extradition request by the United States of America pursuant to the treaty on extradition between the United States of America and Ireland, signed July 13, 1983.
>
> The Minister for Justice and Equality issued his certificate under Section 26(1)(a) of the Extradition Act, 1965 on the 14th August 2013. At present Mr Marques' case is pending before Mr Justice Edwards in Court 21 in the CCJ and presently stands adjourned to the 12th November 2013.
>
> The purpose of this letter is to request that you give consideration to prosecuting Mr. Marques in this jurisdiction for the offences which are the subject matter of the

extradition request. Mr. Marques is prepared to plead guilty to all matters in the District Court on signed pleas and be sent forward for sentence on that basis to the Dublin Circuit Criminal Court. The extradition matter can of course be adjourned to a date after the date fixed for sentence. For the reasons set out below there can be no doubt but that the Irish Courts have jurisdiction over the charges the subject matter of the extradition request.

The reason for Mr. Marques' request is to permit him serve whatever sentence imposed upon him in this jurisdiction, where he has family, and be subject to the maximum sentence for the offences under Irish law which, pursuant to Section 5 of the Child Trafficking and Pornography Act, 1998 would appear to be 14 years imprisonment.

Mi Marques is a dual citizen of the United States of America and Ireland. He was born on the 28th April 1985 and is now 28 years of age. He has lived in Ireland since he was approximately 6 years old. His parents, while separated, also reside in Ireland as does one of his sisters. His other sister resides in Italy. Our client is single and has no children. Were he to be extradited to the United States of America he would have little or no contact with his family, none of whom reside in the United States of America.

It is undoubtedly the case that Section 5 of the 1998 Act is sufficiently broad to encompass all of the charges the subject matter of the extradition request and it appears to us that the act of distribution occurred in this jurisdiction and it was but the end result of the distribution - viewing of the contents of the websites which was observed by undercover agents in Maryland, USA. That could be said of any country in the world where a person had internet access.

In support of our proposition that the Irish Courts have jurisdiction we would respectfully refer you to a number of authorities, and in particular:-

- *The Minister for Justice, Equality and Law Reform* v *Anthony .John Hill,* Unreported Supreme Court, 11th November. 2010
- *Minister for Justice, Equality* v *Adam Stuart Busby,* Edwards, J., 30 July 2013
- *Director of Public Prosecutions* v *Doot & Others* [1973] 2 WLR 532
- *Director of Public Prosecutions* v *Stonehouse* [1978] AC 55, [1977] 3 WLR 143, [1977] 2 AER 909

- The case *of Fellows and Arnold* [1997] 1 Cr App R 244 is of assistance on the issue of distribution ("showing" an image) by the provision of a password to access a computer.

Copies of each of these judgements are attached herewith.

It can be seen from the diplomatic note accompanying the extradition request that on the 8th August 2013, Special Agent Daniels of the FBI filed an amended criminal complaint before Chief US Magistrate Judge Williams Connolly in the District of Maryland. The amended complaint charges on four counts that Eric Marques committed the following offences from on or about the 24th of July 2008 through on or about 29th July 2013 in *Ireland* [emphasis added], the United States and elsewhere:

> Count 1: conspiracy to advertise child pornography in violation of 18 U.S.C. SS 2251 (d) (1) and (e), which carries a maximum of 30 years imprisonment;
>
> Count 2: conspiracy to distribute child pornography in violation of 18 U.S.C. SS for Sections 2252A(a)(2) and (b)(1), which carries a maximum of 20 years imprisonment;
>
> Count 3: advertising child pornography and aiding and abetting, in violation of 18 U.S.C SS 2251(d)(1) and (2), which carries a maximum of 30 years imprisonment; and
>
> Count 4: distribution of child pornography and aiding and abetting, in violation of 18 U.S.C. SS 2252A (a) (2) and (2), which carries a maximum of 20 years imprisonment.

On the penultimate page of the diplomatic note the author writes as follows:

> "the evidence shows that Marques committed the crimes charged in this ease between on or about 24th July 2008 and on or about 29th July 2013, in *Ireland* [emphasis added] and the United Slates."

It is alleged that Eric Marques was the administrator of an anonymous web hosting service referred to in the diplomatic note as the "AHS" which operated on a computer network that allowed its users communicate and to host entire websites anonymously. It is alleged that the websites have thousands of members who have posted millions of images and videos of child pornography. It is alleged that the network protects

user’s privacy online by bouncing their communications around a distributing network of relay computers run by volunteers all around the world. The diplomatic note goes onto state that the FBI has observed more than 130 child pornography-related websites ("target websites") operating on the AHS. It is alleged that the AHS provided website hosting services to all of the target websites, which were located on a single server ("target server"). It is alleged that during the course of the investigation, law enforcement agents acting in an undercover capacity viewed and accessed these target websites from network connected computers in the United States in the District of Maryland and observed them to be facilitating the illegal production, advertisement, and distribution of child pornography. It is noted that because the target websites are accessible anywhere in the world, users can upload content to and download content from the target websites from anywhere in the world, including Ireland.

It is alleged that the ISP for the AHS, a single subscriber, Marques contracted for the target server. It is alleged that the billing address on the Marques account is 848N, Rainbow Boulevard, #1854, Las Vegas, NV, which is a mailbox at a private mail facility. It is alleged that according to information obtained from the private mail facility, mailbox //1854 is assigned to the customer Eric Marques. Mail from the account is forwarded to 33, Mountjoy Square, Apartment 5, Russell House, Dublin, Ireland.

It is alleged that configuration information for the AHS from the AHS internet service provider (ISP) confirms the target websites were co-located on the same single server. We note that it is alleged that when the target server was taken offline on the 22nd July 2013 the target websites which were accessible to network users including law enforcement officers ceased to be accessible and remained inaccessible while the target server was offline for the purposes of copying. After copying was completed and the target server was placed back online the target websites and other websites on the AHS became accessible again, confirming that the AHS and target websites were all located on the target server.

On the 29th July 2013 gardai executed a search warrant at Eric Marques' Dublin address in Mountjoy Square. A wireless router located in the home contained traffic is said to have been analysed and revealed that a computer in the home was connected to the AHS server at the time of the search.

It is further alleged that analysis of the RAM data stored on our client's computer revealed numerous links between our client and the network, the AHS, the target websites and child pornography. In addition the analysis of the RAM data revealed URLs of three of the target websites.

We note that access logs for the ISP customer account associated with the target server reveal that between the 5th June 2013 and the 7th June 2013 the account was accessed from a single IP address located in the United States. This IP address belongs lo a virtual private server (VPS) provider in the United States. IP address information from the VPS provider demonstrates that Eric Marques accessed that VPS as a recently as the 12th June 2013 from an IP address traced to 33 Mountjoy Square, Apartment 5, Russell House, Dublin, Ireland.

In addition it is alleged that there was only one authentication key on the target server and a single user account named "Root". Information associated with the authentication key was displayed as "eric@eric-pc." The only IP address that remotely accessed the target server using authentication key authentication since the 28th April 2013 was our client's Irish IP address associated with access to Marques' VPS account and which was then assigned to Marques' Dublin home.

If one works on the assumption that the evidence to which reference is made in the diplomatic note is correct then it seems incontrovertible but that Mr Marques in guilty of an offence contrary to Section 5 of the Child Trafficking and Pornography Act, 1988.

This provides as follows: -

> "5.—(1) Subject lo sections 6 (2) and 6 (3), any person who—
>
> (a) knowingly produces, distributes, prints or publishes any child pornography.
>
> (b) knowingly imports, exports, sells or shows any child pornography,
>
> (c) knowingly publishes or distributes any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, prints, publishes, imports, exports, sells or shows any child pornography,

(d) encourages or knowingly causes or facilitates any activity mentioned in paragraph (a), (b) or (c), or

(c) knowingly possesses any child pornography for the purpose of distributing, publishing, exporting, selling or showing it,

shall be guilty of an offence and shall be liable—

(i) on summary conviction to a line not exceeding £1,500 or lo imprisonment for a term not exceeding 12 months or both, or

(ii) on conviction on indictment to a fine or to imprisonment for a term not exceeding 14 years or both.

(2) In this section "distributes", in relation to child pornography, includes parting with possession of it to, or exposing or offering it for acquisition by, another person, and the reference lo "distributing" in that context shall be construed accordingly."

You may or may not be aware that during a bail hearing before Mr. Justice Gilligan in the High Court on the 2"[d] August 2013 Special Agent Brooke Donoghue of the FBI gave evidence that the offences were so serious that under US law Mr Marques was, if convicted, likely to receive a sentence well in excess of the remainder of his natural life span. Indeed Special Agent Donoghue went to some lengths to impress upon the court the severity of such a sentence as being akin to a life sentence without any prospect of parole.

On the 12th September 2013, when Special Agent Donoghue gave evidence at a second bail hearing in the High Court, he reaffirmed the type of likely sentence to be imposed in the United States and agreed that this sentence was effectively a non-reducing life sentence.

The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrents (*sic*) and rehabilitation may have transformed him into a person who no longer poses any threat to the public. If,

despite this, he will remain imprisoned for the rest of his life it is clear that this amounts to inhumane treatment.

The potential sentence indicated by Special Agent Donoghue has the strong potential to be regarded as inhumane treatment, particularly when one places it alongside the maximum sentence provided for by our Section 5 of the 1998 Act. Whilst distribution of child pornography is a serious offence it is not considered by our legislators to amount to a crime so heinous that it justifies imprisoning an offender for the rest of his life, however long that may be. The sentencing regime to which Mr Marques may potentially be exposed to would appear to proceed on utterly contrasting lines to what is applicable in this jurisdiction.

As such it is our contention that his extradition would be entirely disproportionate having regard to the marked disparity between the applicable sentencing regimes. On the one hand Mr Marques might face a determinate if lengthy sentence on conviction here whereas he faces the prospect of life without the possibility of release in the US.

We are also conscious of the recent decision of the Grand Chamber of the European Court of Human rights in the case of UK nationals *Vinter, Bamber & Moore* dated 9th July 2012. In this case the Court held that the whole life sentences imposed on the applicants were inhuman and degrading giving rise to a breach of Article 3 of the European Convention on Human Rights.

In all of the circumstances it is our contention that there exists an obligation on the DPP to prosecute Mr Marques on foot of the intimated plea of guilty in this jurisdiction for the following reasons:

(i) He is a citizen of Ireland and his main centre of family life is here. As such he ought to be allowed to serve any sentence in respect of these offences here;

(ii) It is beyond argument but that the DPP would have jurisdiction to prosecute him here for the reasons already outlined above. We would specifically call upon you to indicate whether or not you agree with this aspect of our submission as it is an issue of law.

(iii) In the event that Mr Marques is not prosecuted here he will potentially be extradited to the US where he will face a wholly

disproportionate sentence as compared with that which might be imposed in this jurisdiction. Given that he faces sentence for what is the same offence this would be wholly oppressive and disproportionate.

(iv) In circumstances where Mr Marques has offered to plead guilty to the offences there can be no issue in relation to sourcing of evidence nor cost as reasons predicating against his prosecution here. Indeed, it might be noted in passing that a decision to prosecute him here will obviate the necessity for lengthy and costly extradition proceedings.

We look forward to hearing from. (*sic*) Please also be advised that in the event that the DPP elects not to prosecute Mr Marques we will be seeking reasons for such decision.

We look forward to hearing from you."

The first named respondent replied to this letter by a letter dated the 16th of December 2013, which was in the following terms:

"Dear Sirs,

I refer to your letter of 8th November 2013 to the Director of Public Prosecutions in relation to your above mentioned client.

The Director has very carefully considered the matters set out in your letter and has consulted with the investigating Gardai and Counsel.

The Director has decided not to prosecute your client in relation to the conduct the subject of the extradition application by the United States Authorities.

In arriving at that decision the Director has taken into account the Director's Guidelines for Prosecutors, available on our website, www.dppireland.ie

It is not the practice of the Director to give reasons for a decision not to prosecute.

Yours faithfully"

The impugned decisions and the challenges thereto

The applicant has isolated two separate decisions from this correspondence. The first is the first named respondent's decision not to prosecute the applicant in relation to the conduct the subject of the extradition application. The second is what he characterises as "the DPP's refusal to give reasons" for her decision not to prosecute the applicant in relation to the conduct the subject of the extradition application.

In an exchange with the Court at the hearing of the leave application, counsel for the applicant conceded that his ultimate objective was to persuade the Court that the first named respondent's decision not to prosecute was reviewable and ought to be quashed on the grounds that it was irrational, or alternatively, based on irrelevant considerations, or alternatively, a decision made in circumstances where the first named respondent had abdicated her statutory responsibilities, so that the first named respondent might then be required to re-consider the matter. He readily acknowledged that it would be potentially easier for both sides to address that case if the first named respondent had in fact made available the reasons for her decision. However, she had not done so.

Counsel for the applicant told the Court that it would be preferable from his client's perspective if the challenge to the decision not to provide reasons could be determined first. Consideration had been given to confining the application to judicial review of the decision to refuse to provide reasons in the first instance, on the basis that if the applicant was successful in that there would then be a second application for judicial review at a later stage challenging the decision not to prosecute. However, counsel had been concerned that if that approach was adopted, the applicant might be

accused of “fishing”; and also that he might be met with a *Henderson v Henderson* type objection suggesting that his failure to bring forward all possible claims in the one set of proceedings was an abuse of the process. On balance, therefore, it was decided to challenge both decisions in the same set of proceedings.

Counsel for the applicant contended that, notwithstanding the absence of reasons at the present time, he believed his client could still advance an arguable case in support of the challenge to the decision not to prosecute. This was in circumstances where the first named respondent’s reasons for the decision not to prosecute were “not obvious”, and the actual decision not to prosecute itself was entirely counter-intuitive and inexplicable, having regard to the absence of any potential evidential difficulties for the first named respondent, having regard to his client’s offer to plead guilty and the existence of a manifest public interest in the case being prosecuted in Ireland. If, however, his client were to be unsuccessful at this time in obtaining leave to challenge the decision not to prosecute, but was successful, both in obtaining leave to challenge the decision refusing to give reasons and in ultimately obtaining the reliefs sought by way of judicial review in respect of that decision, he wished to reserve his right to bring a fresh application, seeking leave to challenge the decision not to prosecute by way of judicial review, in the light of any reasons then provided by the first named respondent.

The Court indicated that it appreciated the applicant’s difficulty and that it would not see him procedurally disadvantaged.

Further, in accordance with the principle that the Court should arrive at constitutional issues last, it was agreed that in the first instance the Court would hear,

determine and rule upon the application for leave to apply for all reliefs claimed by way of judicial review other than:

> (i) the claim for a declaration that s. 15 of the Extradition Act 1965 as substituted by s. 27 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 is repugnant to the Constitution.;
>
> (ii) the claim for a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 that the said s. 15 (as substituted) is incompatible with the obligations of the State under Articles 3, 5, 6, 8 and 13 of the European Convention on Human Rights;

and that these matters would be left over to be determined later, if that were still necessary. Although (ii) is not a constitutional challenge in the narrow domestic sense of that term, many similar considerations apply and so it makes logical sense to also leave it over for determination at a later stage, if still necessary.

Threshold for the Granting of Leave

There is no controversy as between the parties as to the applicable law which is well settled. The threshold to be met by an applicant for leave to apply for judicial review was considered in detail in the case of *G. v. The Director of Public Prosecutions* [1994] 1 I.R. 374 at p.377, Finlay C.J., stated:

> "An applicant must satisfy the Court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:

(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).

(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.

(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.

(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in Order 84, r.21(1), or that the Court is satisfied that there is a good reason for extending the time limit. The Court, in my view, in considering this particular aspect of an application for liberty to institute proceedings by way of judicial review should, if possible, on the *ex parte* application satisfy itself as to whether the requirement of promptness and of the time limit have been complied with, and if they have not been complied with, unless it is satisfied that it should extend the time, should refuse the application. If, however, an order refusing the application would not be appropriate unless the facts relied on to prove compliance with rule 21(1) were subsequently not established the Court should grant liberty to institute the proceedings if all other conditions are complied with, but should consider leaving as a specific issue to the hearing, upon notice to the respondent, the question of compliance with the requirements of promptness and of the time limits.

(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

The applicant is, therefore, required to establish that he has made out a stateable case or an arguable case in law. This initial process was described by Lord Diplock in *R. v. Inland Revenue Commissioners, ex parte National Federation of Self-*

Employed and Small Businesses Limited [1982] A.C. 617 at pp. 643-644 where he stated:-

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

In the present case, this Court has required that this application for leave should be brought on notice. In *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] 1 I.L.R.M. 58 the High Court held that, even though the application was made on notice, the test remained one of arguability.

In *D.C. v. The Director of Public Prosecutions* [2005] 4 I.R. 281, the Supreme Court confirmed that the applicable threshold, even in an on-notice leave application, is that of arguability. Denham J. (at p. 289) spoke against "the danger of developing a multiplicity of different approaches" and proceeded to apply the arguability test notwithstanding that the application was on notice to the Director of Public Prosecutions.

Finally, the Court must bear in mind that the standard for obtaining leave has been described as "light" (by Denham J., in *G. v. The Director of Public Prosecutions*

[1994] 1 I.R. 374 at 381); and that it should also bear in mind the purpose behind the filter that the leave procedure represents. In regard to the latter, it is noted that Denham J. further observed in *G. v. The Director of Public Prosecutions* (at p. 382) that the aim of the "preliminary process of leave to apply for judicial review... is... to effect a screening process of litigation against public authorities and officers. It is to prevent an abuse of the process, trivial or unstateable cases proceeding, and thus impeding public authorities unnecessarily".

Reviewability of decisions to prosecute or not to prosecute

It is clear that although the jurisdiction to judicially review decisions of the first named respondent, either in favour of, or against, prosecuting in a particular case, is both narrow and limited, her decisions are potentially reviewable both in theory and in fact. This was emphasised by the Supreme Court only recently in *Murphy v. Ireland & ors* [2014] IESC 19 (Unreported, Supreme Court, 11th March 2014). In delivering judgment for the Supreme Court in that case, O'Donnell J., *nem diss*, stated (at para 38):

> "….even a superficial review of decided cases over the last 15 years shows that the Director's decision is reviewable both in theory and in fact. Prosecutorial decisions of the Director of Public Prosecutions have been challenged on a number of occasions. See by way of example only: *Eviston v. The Director of Public Prosecutions* [2002] 3.I.R. 260, *Dunphy v. The Director of Public Prosecutions* [2005] 3 I.R. 585, *Cunningham v. The President of the Circuit Court* [2006] 3 I.R. 541, *Hobson v. The Director of Public Prosecutions* [2006] 4 I.R. 239, *L.O'N. v. The Director of Public Prosecutions* [2007] 4 I.R. 481, *N.S. v. Anderson* [2008] 3 I.R. 417, *R.G.G. v. The Director of Public Prosecutions* [2008] 3 I.R. 732, *Keane v D.P.P* [2009] 1 I.R.260. *G.E. v. The Director of Public Prosecutions* [2009] 1 I.R. 801 and *Carlin v. The Director of Public Prosecutions* [2010] 3 I.R. 547. On three of those occasions, in *Eviston v. The Director of Public Prosecutions, L.O'N. v. The Director of Public Prosecutions* and *Keane v. The Director of Public Prosecutions*, such challenges have

succeeded. In all cases, the applicant sought to adduce facts which made the decision of the Director at least questionable. In *Carlin v. The Director of Public Prosecutions*, this court explained that the decision of the Director of Public Prosecutions, though in a narrow and sensitive area, was still subject to the obligation of fair procedures. As Denham J. put it:

"It is essential that [the DPP] remain independent. However, he is subject to the constitutional requirement of fair procedures. While the fair procedures appropriate at the investigation stage of a prosecution are not equivalent to those at trial in a court of law, the process requires to be constitutionally firm." (para. 9)

That obligation arose in particular when facts were put before the court which would throw substantial doubt upon the decision made. It is however essential, as observed in other areas of judicial review, that any applicant should engage with the facts of the case. Even then it has been established that the plaintiff is not entirely dependent on the evidence available from his or her own resources. In an exceptional case the court was prepared to grant limited discovery in advance of a judicial review challenge to a decision of the Director. See, for example, *Dunphy v. The Director of Public Prosecutions*, and *Cunningham v. The President of the Circuit Court*. Thus the courts have rejected any contention that a decision of the Director is unreviewable and have, in exceptional but real and justifiable cases, been prepared to review and if necessary quash such a decision. The fact that a jurisdiction is for good reason narrow, does not mean that it should be dismissed as non-existent. On the contrary such an outcome should direct attention to the considerations limiting review. In these cases a careful balance has been struck between a general principle restricting review and specific circumstances in which it will be permitted. …"

The scope of the jurisdiction is that set forth by Finlay C.J. in *The State (McCormack) v. Curran* [1987] I.L.R.M. 225, and as qualified by the Supreme Court in subsequent decisions, particularly that of *Eviston v. The Director of Public Prosecutions* [2002] 3 I.R. 260. Finlay C.J. had said in *The State (McCormack) v Curran* that:

> "If … it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court." (p. 237)

Speaking of this quotation, O'Donnell J. said in *Murphy v. Ireland and ors* (at para 22):

> "In the light of subsequent decisions of this court quashing decisions of the Director, it is necessary to qualify that statement so as to provide that a decision of the Director 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*. However, as so qualified, the decision in *The State (McCormack) v. Curran* has remained the law."

As to what may constitute *"other exceptional circumstances"* there is no definitive guidance, though some limited assistance is to be gleaned from those reported cases in which prosecutorial decisions have been challenged on grounds other than *mala fides*,or improper motive, or improper policy, and, in particular, the small number of such cases in which the courts have intervened to review decisions of the first named respondent, namely *Eviston v. The Director of Public Prosecutions* [2002] 3 I.R. 260; *L.O'N. v. The Director of Public Prosecutions* [2007] 4 I.R. 481; and *Keane v. The Director of Public Prosecutions* [2009] 1 I.R.260.

For example, in his judgment in the Supreme Court in *Eviston*, Keane C.J., stated (at p. 290):

> "I would, with respect, question whether the High Court Judge was altogether correct in describing these functions as "*quasi* judicial",at least as that expression has generally been understood. It is usually applied to executive functions which involve the exercise of a discretion but require at least part of the decision making process to be conducted in a judicial manner. That would normally involve observance of the two central maxims of natural justice, *audi alterem partem* and *nemo iudex in causa*

> *sua*. Those canons are of limited, if any, application to the respondent who, like other litigants, initiates and conducts a prosecution but does not ultimately decide any of the issues himself and, specifically, has no role in determining the guilt or innocence of an accused person.
>
> Undoubtedly, the respondent remains subject to the Constitution and the law in the exercise of his functions and it has been made clear in decisions of this court that, while the nature of his role renders him immune to the judicial review process to a greater extent than is normally the case with *quasi*-judicial tribunals properly so described, he will be restrained by the courts where he acts otherwise than in accordance with the Constitution and the law."

Clearly, if the first named respondent were to act "otherwise than in accordance with the Constitution and the law" that could constitute exceptional circumstances. In the particular circumstances of the *Eviston* case, the Supreme Court held that the then DPP's decision to reverse his earlier decision not to prosecute the applicant in that case (for dangerous driving) was fatally vitiated by his failure to afford the applicant fair procedures. Keane C.J. stated (at pp. 298-299):

> "It was undoubtedly open to the respondent in this case, as in any other case, to review his earlier decision and to arrive at a different conclusion, even in the absence of any new evidence or any change of circumstances, other than the intervention of the family of the deceased. The distinguishing feature of this case is the communication by the respondent of a decision not to prosecute to the person concerned, followed by a reversal of that decision without any change of circumstance or any new evidence having come to light. In the light of the legal principles which I have earlier outlined, I am satisfied that the decision of the respondent was *prima facie* reviewable by the High Court on the ground that fair procedures had not been observed.
>
> Whether, in the particular circumstances of this case, fair procedures were not in fact observed is a difficult question. As I have emphasised more than once in this judgment, stress and anxiety to which the presumably innocent citizen is subjected when he or she becomes the accused in a criminal process could not conceivably be, of itself, a sufficient justification for interfering with the undoubted prosecutorial

> discretion of the respondent. It is, however, beyond argument that the degree of such stress and anxiety to which the applicant was subjected was exacerbated by the decision of the respondent to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and had not given her the slightest intimation that this was a decision which could be subjected to review in accordance with the procedures in his office. If those review procedures formed part of the law of the land, then, the applicant would be assumed, however artificially, to have been aware of that law. The review procedures of the respondent, however, are not part of the law: they constitute a legitimate, and indeed salutary, system of safeguards to ensure that errors of judgment in his department which are capable of correction are ultimately corrected. No reason has been advanced, presumably because none existed, as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in fact be reviewed at a later stage. In the result, she was subjected to a further and entirely unnecessary layer of anxiety and stress. Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in circumstances where the respondent candidly acknowledges that there was no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the respondent in the present case were to succeed."

A similar approach was adopted by MacMenamin J. in the case of *L.O'N v. The Director of Public Prosecutions*. That case involved a reversal by the then D.P.P of a decision made by him thirteen years earlier not to prosecute the applicant in that case for indecent assault. The applicant, having been subsequently charged and returned for trial, had successfully secured an adjournment of his trial to enable him to bring judicial review proceedings challenging the DPP's decision, and of necessity, the order returning him for trial. In holding that the applicant is entitled to an order of *certiorari* quashing the order of return for trial both on the grounds of prosecution delay and want of fair procedures on the part of the respondent in reversing his decision not to prosecute, MacMenamin J. stated (at para 44):

> "…..effectively what took place in this case was a review of the review. No information was imparted to the applicant that the position or the decision was subject to review or reversal. The respondent had no new significant matters of an evidential nature before him. No evidence has been adduced that any fresh or additional material was put before the respondent between the second decision not to prosecute in February, 2004 and the decision to initiate a prosecution in July of that year. While correspondence may have been received from the solicitor for A.G. and from the superintendent inviting the respondent to consider reviewing his decision, it cannot be contended that such letters or correspondence could, on any reasonable view, be considered as matters of an evidential nature. Finally the time period which elapsed in *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260 between the communication of the decision not to prosecute and the issue of the summons was a period of three weeks. In *M.Q. v. Judge of the Northern Circuit* (Unreported, High Court, McKechnie J., 14th November, 2003) the period was four and a half years for which there was no satisfactory explanation. The delay in the instant case between the date of communication in November, 1987 and the arrest and charge of the applicant in the year 2000 is in the order of thirteen years. Having regard to the circumstances therefore it seems to me that this case comes within the category of exceptional cases envisaged by *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260, where because of the nature of the communication and conduct an issue of fair procedures arose."

The case of *Keane v. The Director of Public Prosecutions* also turned on want of fair procedures. In that case the applicants, a husband and wife, were charged with offences under s. 13 of the Non-Fatal Offences Against the Person Act 1997 in relation to the malfunction of a boiler within a house owned by them which, it was alleged, caused the death of two persons renting the property. Following preliminary investigations, a decision was made by the respondent not to prosecute the applicants in April, 2006. No *caveat* was given to the applicants as to a possible review of the said decision in the future. The respondent subsequently revisited the decision not to prosecute and in December, 2006, the applicants were informed that the prosecution against them would proceed. The applicants sought to judicially review the DPP's

decision to prosecute them. Giving judgment for the applicant's in the High Court, Hanna J. stated (at paras 43-48):

> "**[43]** Turning to what is in reality, the applicant's main case, as I have already observed, the respondent is entirely within his rights to revisit decisions taken not to prosecute and to subsequently reverse them. This can be done without a requirement for new evidence and he does not have to give reasons for changing his mind. Even where an initial decision not to prosecute is communicated to the party concerned and later reversed, this would not, of itself, entitle that party to halt the prosecution. Similarly, even when, as occurred here, the party charged had not been told of the internal review procedure, that too would not afford grounds stopping a prosecution as a matter of course.
>
> **[44]** As the Supreme Court makes clear, ultimately each case falls to be decided upon its own facts. It seems to me that the following facts are material to the consideration of this court. Firstly, it is clear that at an early stage, the applicants were made aware of the fact that they were potential defendants in criminal proceedings. I accept their evidence that this was a matter of considerable distress and anxiety to them. I also accept (it is not disputed) that the second applicant was, at all material times, suffering from frail health and that the stress and strain, impacted heavily upon the first applicant, and all the greater on his wife. Perhaps some solace was derived from Detective Garda Glynn's opinion, which I accept was expressed, that the case might not be proceeded with. However, I have no evidence as to the extent, if any, that this acted as a sort of balm on the anxiety experienced by the applicants, nor indeed if it rendered all the more shocking the subsequent reversal of the decision not to prosecute. On the available evidence, I consider it safer not to weigh it significantly in the balance.
>
> **[45]** I am satisfied that the applicants were greatly relieved when the decision not to prosecute was communicated to them. I am satisfied that no *caveat* was given. The failure to give a *caveat* does not, as a matter for course, entitle an applicant to succeed. However, it seems to me that as a matter of common sense, not to mention simple humanity, some mention should be made of the possibility of review of a decision not to prosecute. In this case, the applicants were fully co-operative with the Gardaí. Detective Garda Glynn was a *conduit* between the machinery of State and the applicants. He was the private face of the prosecutorial/investigative arm of the State.

> He travelled on two occasions to Limerick to interview the first applicant. The news imparted in April, 2006 must have been an overwhelming relief, coming as it did from him. There was no exchange of correspondence between solicitors at this stage. It would, in my view, be somewhat unreal to import into this state of affairs, the *minutiae* of *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260 regarding the possibility of a review of the decision not to prosecute. A policy decision taken after a period of considerable investigation, was communicated to them without qualification, by, in effect, the prosecution spokesman and they were entitled to rely on it. Yet again, that, of itself, is not enough to prevent the prosecution process.
>
> **[46]** Having been informed of the decision of the respondent in April, five months then elapsed. This contrasts with the period of some three weeks in *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260. I accept fully what the first applicant says, that after this period the news coming "out of the blue" was indeed a very great shock.
>
> **[47]** I do not attach much importance as to whether or not the applicants were obliged to make submissions to the respondent.
>
> **[48]** I am satisfied that the news of the review of the case and the subsequent prosecution exposed the applicants to a level of stress and anxiety significantly beyond that which they bore as the unpleasant but necessary by, product of their being subject to a criminal investigation. In the circumstances of this case, this additional layer of distress and anxiety surpassed that which citizens, presumed innocent and labouring under the yoke of impending criminal prosecution, ought reasonably to endure. In my opinion, the respondent's actions in reviewing and reversing the decision to prosecute and the circumstances surrounding these actions, taken all together, amount to a breach of the applicants' constitutional right to fair procedures."

While these cases make clear that a failure on the part of the first named respondent to observe fair procedures may constitute the type of "exceptional circumstances" that might open the door to possible judicial review, they do not foreclose on the possibility that other circumstances of an exceptional nature could also do so. What does seem clear, however, is that circumstances said to be

exceptional, and relied upon as justifying deviation from the principle that decisions of the DPP are not generally reviewable, must be integral to the decision making process itself and/or the procedures associated with it, including communication of the outcome of that process. They cannot relate solely to the individual and peculiar circumstances of the person affected.

That is not to say that account may not be taken by the DPP of circumstances individual and peculiar to a person affected in the decision making process. That is a wholly different thing and indeed it is clear from the Director of Public Prosecution's Guidelines that account ought to be taken of such matters in considering the public interest in a particular possible prosecution.

However, in considering whether or not there is a jurisdiction to judicially review a particular decision of the first named respondent, the focus of the Court must be firmly on the decision making process itself and any direct consequences thereof inuring to the prejudice of an identified right enjoyed by a person or persons affected or potentially affected; rather than upon the individual and peculiar circumstances of such person or persons.

Be that as it may, where the decision making process is considered to have been deficient in some respect and possibly tainted on that account, the effect of such taint on the individual, which will inevitably vary according to his or her peculiar circumstances, can certainly be taken into account. Thus, in *Keane* cited above, the deficiency in the process giving rise to the jurisdiction to judicially review it was the failure of the DPP to observe fair procedures to which the applicants were entitled as a constitutional right. Among the consequences of this deficiency was that it added to the stress and anxiety of the applicants. Both applicants were experiencing stress and

anxiety as a result of the impugned decision, but that was particularly so in the case of the second applicant who was suffering from what Hanna J. characterised as “frail health”. The important point, however, is that what was “exceptional” about the circumstances of the *Keane* case was that the decision making process had breached the applicants’ rights to fair procedures. The case was not exceptional merely on account of the applicants being very stressed and anxious; or, indeed, because in the wife’s case her stress was “all the greater” on account of her frail health. The existence of such circumstances individual and peculiar to the applicants would not, in and of themselves, have justified deviation from the principle that decisions of the DPP are not generally reviewable. It was the unfairness in the process that justified that deviation. However, once exceptional circumstances justifying possible judicial review of the prosecutorial decision were found to exist, the court was then entitled to, and did in fact, take into account how that decision may have affected the applicants given their individual and peculiar circumstances in considering whether and/or to what extent to grant them relief.

The decision not to prosecute the applicant

The applicant seeks leave to make the case that the said decision was made without regard to relevant considerations, was unreasonable, was disproportionate, that it amounted to a failure to vindicate the applicant’s rights under the Constitution and/or under the European Convention on Human Rights, and, that it amounted, in all the circumstances, to an abdication by the first named respondent of her responsibility as prosecutor. The applicant further maintains that the said decision is judicially reviewable on those grounds, notwithstanding the principle that decisions of the DPP

are not generally reviewable, because he maintains that the impugned decision affects his interests and that his case involves “exceptional circumstances”.

In so far as the applicant contends that the impugned decision affects his interests, his case is that, although he has no “right” to be prosecuted, his interests are nonetheless affected because the effect of the impugned decision is to expose him to possible extradition, and he is entitled to be satisfied that the first named respondent asked herself the right questions; and to challenge the decision if there is reason to believe that she did not.

The applicant seeks to come within the category of exceptional circumstances for the purposes of seeking to challenge the decision not to prosecute him by way of judicial review because he identifies the following features of the present case as being unusual:

- It involves a proposed extraditee;
- The applicant has offered to plead guilty;
- The offending conduct was largely committed in Dublin;
- The applicant's family are all based in Ireland (with the exception of one sister) and he has absolutely no family connections in the United States of America;
- A very clear and detailed letter was sent on the 8th of November, 2013 to the first named respondent drawing salient facts to her attention;
- The response from the DPP in the refusal letter of the 16th of December, 2013 is, in the applicant’s belief, uninformative, not transparent, and does not engage with the facts of the case;

- In particular, the letter of the 16th of December does not treat of the implications of the applicant's offer to plead guilty to offences in this jurisdiction. It merely says that the first named respondent has taken into account the guidelines for prosecutors on the Director of Public Prosecutions website, without indicating what is meant by this or to which particular guidelines regard was had;
- The guidelines for prosecutors have nothing to say about prosecutorial decisions which are required to be made in the context of persons being sought for extradition. The guidelines concern conventional decisions on whether to prosecute, without any reference to what happens if an extradition issue arises. The guidelines are silent as to the factors to be taken into account in a situation where another country asserts jurisdiction over an offence committed in Ireland;
- The reasons for the first named respondent's decision are not obvious;
- The decision is entirely counterintuitive and inexplicable having regard, firstly, to the absence of any potential evidential difficulties for the first named respondent having regard to the applicant's offer to plead guilty and , secondly, to the existence of what the applicant contends is a manifest public interest in the case being prosecuted in Ireland;
- The first named respondent has refused to provide reasons for her decision.
- No public interest consideration has been identified that might have prevented the DPP from giving reasons in the rare and unusual circumstances of this case;
- If the applicant is extradited to the United States he will be completely isolated there. His family live in Ireland. If convicted and sentenced in

America he will be deprived of the support of his family potentially for the rest of his life.

In written submissions prepared for the Court, and in oral argument, counsel for the applicant has placed some reliance on the following passages from this Court's judgement in *Damache No 2*, where I stated:

> "**67.** Before directing a prosecution in this State the D.P.P. must be satisfied that there is a *prima facie* case against the suspect based on credible and reliable evidence, that it is in the public interest to prosecute in this State, and that the necessary evidence is either in her possession or will be available and forthcoming at the trial. If all of these requirements are met the first named respondent has no choice. Her duty is to prosecute in this jurisdiction. That duty was what Walsh J. was referring to in the quotation from the *State (McCormack) -v- Curran & Ors* [1987] ILRM 225 reproduced at paragraph 42 above, and upon which the applicant has placed some reliance.
>
> **68.** Accordingly, it would be wholly wrong of the first named respondent to refuse to prosecute a suspect in Ireland simply because in her view the courts of another state that happened to be requesting, or it was anticipated might yet request, the extradition of the suspect, represented the *forum conveniens*."

The following written submissions were made on the basis thereof:

> "Going through each of those criteria in the present case, it is submitted that the DPP must have been satisfied that there was a *prima facie* case against the applicant. That is amply clear from the detailed outline of the evidence in the extradition warrant. In addition, the applicant has made an open and unconditional offer to plead guilty to the mirror offences in Ireland and furthermore has offered to postpone the extradition proceedings until after he is convicted and sentenced on those offences, so as to ensure that the DPP's position is protected and there is no means for the applicant to wriggle out of being successfully prosecuted in Ireland. Secondly, there is no question but that it would be in the public interest to prosecute in this State. The offences that the applicant has offered to plead guilty to in Ireland are profoundly serious. It is imperative that Ireland is not seen as a safe haven for such offenders,

particularly for the growing number of serious internet crimes committed from this jurisdiction in the past number of years. If the applicant is not sentenced in Ireland on foot of a prosecution brought by the DPP here, there will at a minimum be a significant delay in bringing a prosecution, having regard to the present judicial review proceedings and to the contested extradition proceedings. There is the possibility that the applicant may successfully oppose his extradition. Even if he is extradited, the applicant will not be bound by the guilty plea that has already been offered to the Director. Accordingly there is a strong public interest in favour of prosecuting the applicant here, to ensure that the serious offences are speedily and successfully prosecuted.

If the applicant is extradited, it may be necessary for Gardai to travel to give evidence at his trial. One of the main allegations to be proved against the Applicant is that he controlled, from his apartment in Dublin, a server located in France. For this reason, evidence of the contents of a computer seized during the search of the applicant's apartment and of the investigations carried out by An Garda Síochána subsequent to the search are centrally relevant to the trial.

In respect of the cost and the burden on the State and An Garda Síochána of proving the case against the applicant, there is therefore a strong public interest and a strong presumption in favour of Ireland *as forum conveniens* Relevant cost considerations also arise in respect of the proceedings herein and in respect of the substantive extradition proceedings.

It is apparent that the crime alleged against the applicant would have impacted globally, with no specific jurisdiction targeted. The jurisdiction which can claim to have been most adversely affected, however, is Ireland. Under the 'harm principle', often recognised as a primary way of distinguishing between jurisdictions which are competing to prosecute, Ireland is the *forum conveniens* in respect of these offences. The harm principle is also a practical manifestation of and a major justification for the central duty of the first named respondent to prosecute offences committed in this jurisdiction.

It is submitted that as a part of the duty referred to by Walsh J, and acknowledged by Edwards J in the more recent cases of *Attorney General v Garland* [2012] IEHC 90 (unreported, High Court, Edwards J, 27th of January 2012) and *Damache v The Director of Public Prosecutions*, [2014] IEHC 114 (unreported, High Court, Edwards J, 31st January 2014) it is incumbent on the Gardai and the first named respondent to

> proactively investigate and prosecute high-profile and serious internet crimes for deterrent purposes, so that Ireland is not seen as a safe haven for such offenders. This is another strong public interest consideration in favour of a prosecution in Ireland.
>
> The third matter the DPP must be satisfied about, according to Edward J's decision in the second *Damache* application, is that the necessary evidence is either in her possession or will be available and forthcoming at the trial in Ireland. As matters stand, there is no suggestion whatsoever that there is any difficulty about adducing all relevant evidence in an Irish prosecution. It is established on the evidence that An Garda Síochána arrested the applicant in his dwelling in Merrion Square (*sic*) on the 29th of July, 2013. Evidence was obtained from An Garda Síochána. There is no suggestion being made that an Irish prosecution would or might founder on evidential grounds. Nor is there any suggestion being made, as matters stand, that the American Authorities are somehow reluctant to share any evidence with their Irish counterparts. It is submitted that, if it were the case that there was some evidential difficulty standing in the way of the DPP prosecuting in this jurisdiction, we would have heard all about that, as same could have been stated in a sentence in the replying letter from the Director. It would be most surprising indeed if there were any such difficulty, particularly in circumstances where everybody is agreed the criminal offences in question had as their organisational hub the applicant's apartment in Merrion Square (*sic*)."

Decision in respect of the first challenge

The Court is not disposed to grant the applicant leave to apply for judicial review to enable him to challenge the first named respondent's decision not to prosecute him. The Court's reason for doing so is that the applicant does not contend that there was *mala fides* on the part of the first named respondent, or that she had an improper motive in deciding as she did, or that her decision was the product of the adoption and application of some improper motive policy on her part. In the circumstances, the law is clear. The decision of the first named respondent is not judicially reviewable unless the applicant can demonstrate the existence of "other

exceptional circumstances". The Court is not persuaded that the applicant has successfully demonstrated the existence of "other exceptional circumstances."

The circumstances upon which the applicant relies, and which are said by him to render this case "exceptional" such that the Court should grant him leave to challenge the impugned decision by way of judicial review, do not relate to, and are not integral to, the decision making process that the first named respondent was engaged in. Moreover, the impugned decision does not operate so as to prejudice any identified constitutional or fundamental right enjoyed by the applicant. He does not enjoy a right to be prosecuted. The effect of the decision is that the request for his extradition will not be barred. He has no "right" to have it barred. He has no "right" not to face extradition proceedings. The decision not to prosecute him domestically does not mean he will necessarily be extradited. It merely means that that the United States of America's request for his extradition can proceed to be considered. No more than that. The applicant retains the right to challenge that extradition request at the s.29 committal hearing before the High Court, which will be conducted in accordance with fair procedures and at which he will be afforded due process. At that hearing he can raise the full range of potential objections provided for under relevant legislation and treaties, and, if necessary, also invoke and call in aid rights guaranteed to him under the Constitution of Ireland and the European Convention on Human Rights.

The Court does not gainsay that the individual and peculiar circumstances of the applicant's case are uncommon, and that a case such as his might only rarely be encountered. However, in truth, every case considered by the first named respondent will be individual and different, to a greater or lesser extent. However, the unusualness and rarity of circumstances of the individual case could not, in and of

itself, justify a court in embarking upon a review of a decision to prosecute or not to prosecute in the absence of something more, in particular in the absence of something tending to suggest that the decision making process had, due to some exceptional factor, been deficient. There is nothing of that sort in the present case.

The fact that the applicant may possibly face extradition if he is not prosecuted in this jurisdiction, and the other individual and peculiar circumstances of the applicant that he and his lawyers have identified, are indeed potentially relevant matters, of which some account ought to have been taken by the first named respondent, in determining whether to prosecute the applicant in this jurisdiction would be in the public interest. There is, however, absolutely no reason to believe that there was any failure on her part to do so. Indeed, there are significant indicators to the contrary.

First, the individual and peculiar circumstances of the applicant were expressly brought to the attention of the first named respondent in the applicant's solicitor's letter of the 8th of November 2013.

Secondly, the reply dated the 16th of December 2013 expressly asserts that *"The Director has very carefully considered the matters set out in your letter"*

Thirdly, the reply on behalf of the first named respondent indicates that in deciding not to prosecute the applicant *"the Director has taken into account the Director's Guidelines for Prosecutors, available on our website, www.dppireland.ie"*.

Fourthly, chapter 4 of the said guidelines deals with the decision to prosecute. While the applicant is correct in stating that the guidelines do not specifically address the situation where an alleged offender is the subject of an extradition request, it is

clear from a consideration of the said chapter 4, as a whole, that the first named respondent considers it appropriate, and is prepared, to take account of the individual and peculiar circumstances of an offender where that is potentially relevant to an assessment of the public interest. Thus, by way of illustration, in dealing with the public interest consideration, paragraph 4.22 (d) of the said guidelines expressly identifies the following matter as being a potentially relevant consideration:

> "4.22 In addition to factors affecting the seriousness of an offence, other matters 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;"

The Court cannot lose sight of the fact that the Director of Public Prosecutions Guidelines for Prosecutors are no more than what they claim to be, i.e., guidance to be followed where appropriate. They are neither prescriptive nor restrictive. The fact that they may not expressly cater for the precise circumstances of every particular case, or alternatively, for every aspect of every case, is neither here nor there. The value of the document is in promoting consistency of approach and transparency in the process as an aid to maintaining public confidence in the office of the Director of Public Prosecutions. In a case where it does not speak directly to some peculiar aspect of a particular case, the general approach or ethos expressed in the published guidance may nevertheless still be called in aid. The fact that the guidelines as published do not expressly refer to the situation where an alleged offender is the subject of an extradition request does not mean that the first named respondent could not, or would not, have taken that fact, and the individual and peculiar circumstances of the applicant, into account. It seems to this Court that if it is the first named respondent's

express policy to take account of whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of the offender, it is inherently likely that she would be equally ready to take account of the consequences of an outward extradition for an offender as a circumstance in assessing the public interest in a domestic prosecution notwithstanding that the published guidelines make no express statement to that effect.

In circumstances where the fact that the applicant was the subject of an extradition request was expressly drawn to the attention of the first named respondent; where the consequences of extradition for the applicant were expressly spelt out to the first named respondent; where the applicant's belief that his extradition would be a disproportionately harsh and oppressive measure in his particular circumstances was made known to the first named respondent; where specific circumstances indicating that Ireland was a *forum conveniens* were highlighted to the first named respondent; and where the first named respondent has acknowledged receiving these representations and has stated that she has very carefully considered them, it readily invites the inference that these matters were in fact taken into account.

Moreover, although the Court accepts that the reasons for the first named respondent's decision are not obvious, this Court does not accept the applicant's contention that the said decision is either counterintuitive or to be regarded as inexplicable. It does not do so in circumstances where the dual premises on which those contentions are based are flawed, in the Court's view, and do not stand up to any kind of critical analysis.

The first premise offered is that the first named respondent faces no potential evidential difficulties having regard to the applicant's offer to plead guilty. That cannot be taken for granted in the Court's view. The Court notes that the letter of the 16th of December 2013 on behalf of the first named respondent refers to the fact that the Director *"has consulted with the investigating Gardai and Counsel"*. This statement has to be considered in conjunction with the further statement, already alluded to, that *"the Director has taken into account the Director's Guidelines for Prosecutors, available on our website, www.dppireland.ie ."* Those guidelines expressly state, at paragraph 4.12 thereof, that *"[i]n evaluating the prospects of a conviction, the prosecutor has to assess the admissibility, sufficiency and strength of the evidence which will be presented at the trial."* So considered, it is a reasonable inference that the first named respondent's consultation with Gardai and with counsel was in connection with an assessment and evaluation of the admissibility, sufficiency, and strength of the available evidence.

As the guidelines make clear any such assessment and evaluation can involve a great many considerations. Indeed, the guidelines expressly acknowledge, at paragraph 4.14 thereof, that *"each case is unique, and the variety of human experience and behaviour so great as to make a comprehensive list of all possible considerations which could arise impossible"*.

The mere fact that the solicitor for the applicant has intimated an offer on the part of her client to plead guilty to certain offences, in the event of his being charged with those offences, would not have absolved the first named respondent from her responsibility to assess and evaluate the admissibility, sufficiency, and strength of the

available evidence to see if there is a *prima facie* case against the applicant, and at least some reasonable prospect of a conviction being secured. While the Court does not know whether the decision not to prosecute was on the grounds of deficiency of evidence in some respect, or insufficiency of public interest, or a combination of both, the applicant has utterly failed to persuade this Court that it must foreclose on the possibility that the impugned decision was a *bona fide* one rendered on the basis of a perceived evidential deficit. It is clear from the extradition papers that though much of the offending conduct may have been committed at the applicant's home at Mountjoy Square in Dublin, the crime was a transnational one, and the main investigators were law enforcement agencies of foreign nations, such as the Federal Bureau of Investigation in the United States of America. Thus, while some, and perhaps even a good deal, of potentially available evidence may exist in this jurisdiction, and be readily available for use in a domestic prosecution, certain further evidence, some of it possibly essential to a successful prosecution (e.g., concerning the Target Server in France, the VPS provider in the United States, and the private mail facility in the United States), is located outside of the jurisdiction and there might well be difficulties in adducing such at a trial in Ireland for a variety of readily appreciable reasons such as availability and compellability of witnesses and potential problems in regard to admissibility.

It is no answer to this to suggest, as the applicant does, that his offer to plead guilty obviated any need for first named respondent to be concerned with sufficiency or quality of evidence. It would be wholly wrong for the first named respondent to charge somebody without any regard to evidential requirements. The Director of Public Prosecutions Guidelines for Prosecutors expressly acknowledges this, e.g., at paragraphs 4.9 to 4.11 thereof, where it is stated (*inter alia*):

> "4.9 A decision not to prosecute because the evidence is not sufficiently strong could be considered as an aspect of the consideration of the "public interest". It can be said that it is not in the public interest to use public resources on a prosecution case which has no reasonable prospect of success. Furthermore, if there was a very high rate of prosecutions resulting in acquittals this could undermine public confidence in the criminal justice system.
>
> 4.10 A prosecution should not be instituted unless there is a *prima facie* case against the suspect. By this is meant that there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the suspect. The evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged.
>
> 4.11 In considering the strength of the evidence the existence of a bare *prima facie* case is not enough. Once it is established that there is a *prima facie* case it is then necessary to give consideration to the prospects of conviction. The prosecutor should not lay a charge where there is no reasonable prospect of securing a conviction before a reasonable jury or a judge in cases heard without a jury. …"

Accordingly, the first named respondent would have been obliged to consider the sufficiency and quality of the available evidence. The fact that the applicant had offered, through his solicitors, to plead guilty in the event of him being charged would not have assisted the first named respondent in that task. Such an offer does not constitute admissible evidence that could be taken into account. Indeed, it is not insignificant that the said solicitor's offer was not accompanied by any kind of confession executed by the applicant, or even an offer on the part of the applicant to make himself available to Gardai for the purpose of being interviewed or giving a statement. The applicant has, of course, an absolute entitlement not to incriminate himself, but in circumstances where his solicitors make an offer on his behalf that he would plead guilty if charged, and he offers no assistance in terms of the provision of unequivocal evidence upon which the first named respondent might act, he cannot

complain if such evidence, as was otherwise available, was possibly judged insufficient or inadequate to justify the preferment of charges.

Indeed the applicant's offer to plead guilty is quite extraordinary in that it is addressed to the first named respondent, without the applicant having previously sought to engage in any way with An Garda Síochána. It is by no means unheard of for people to give themselves up to the police. It happens from time to time. A typical example would be where a person kills another in anger, and panicking in the immediate aftermath attempts to conceal or dispose of the body, or dispose of a weapon or other relevant evidence. Then later, when passions have cooled, and panic has subsided, he or she, motivated by remorse, goes to a police station and voluntarily informs the police about what has occurred. In this case, however, the approach to the first named respondent is clearly not motivated by remorse, nor any form of regard for the public interest. Rather the offer to plead has been cynically and strategically advanced for nakedly self serving reasons, and only after a request has been made to this state by the United States of America for the applicant's extradition. In those circumstances the first named respondent would have been entitled to, and indeed would have been remiss if she did not, have regard to the risk that the offer to plead guilty, made as it was without any confession or even offer to confess to the crimes in question, might well be reneged upon and, therefore, could not be relied upon.

Moreover, as to the suggestion that the first named respondent could have requested, in her reply to the applicant's solicitor's letter, some further evidence or some comfort that the applicant would not renege on his offer, it would in this Court's view have been inappropriate for her to do so. The Director of Public Prosecutions

has no investigative or evidence gathering role. Those are matters for An Garda Síochána. It is not any part of her function to negotiate with suspects to secure evidence sufficient to allow charges to be preferred. A person has no right to be prosecuted. The first named respondent's duty is confined to considering possible prosecution where that is appropriate, and to actually prosecute in circumstances where the evidence available to her to assess, which is deemed credible and reliable, discloses a *prima facie* case against the suspect and she is satisfied that it is in the public interest that the case should be prosecuted in this State.

In all of these circumstances, the Court rejects the contention that the first named respondent could not possibly have been concerned about either the sufficiency or quality of the available evidence and, accordingly, the applicant's first premise falls away.

The second premise relied upon by the applicant is his assertion that a prosecution in this State was manifestly in the public interest. The Court has no hesitation in also rejecting this premise, as representing overstatement and hyperbole. While it is undoubtedly the case that there are a considerable number of factors, validly identified by or on behalf of the applicant, that arguably would favour the bringing of a prosecution in this State, it could not be credibly or tenably suggested that the argument must necessarily be regarded as being all one way, and that there could be no *bona fide* considerations sufficient to tip the scales the other way. It is not appropriate for the Court to speculate as to what factors in fact influenced the decision of the first named respondent. However, even at an abstract level the Court can readily conceive of a number of factors that might militate against domestic

prosecution in a case such as the present. Such factors might include best use of scarce resources, difficulties in securing the availability of crucial evidence and witnesses located abroad, the need to secure the necessary co-operation of investigators and law enforcement agencies located abroad, difficulty perhaps in sourcing competent experts and specialists within in this jurisdiction, the expense involved in mounting a highly technical prosecution of a transnational crime, and the fact that another state with which Ireland has an extradition treaty has both a substantial interest in, and is desirous of, prosecuting the suspect. While the Court has no idea as to whether any of these suggested possible anti-domestic prosecution factors in fact had any influence on the first named respondent's view of the public interest consideration, they serve to illustrate the Court's point that the applicant's contention that the public interest in his domestic prosecution was "manifest" should be treated as hyperbole and overstatement. The most that can be said is that a number of factors favouring domestic prosecution undoubtedly existed.

At the end of the day, the applicant's case is reduced to this. The reasons for the first named respondent's decision not to prosecute the applicant in this State are not immediately obvious. In the Court's view that is insufficient in itself to justify a suspicion that the decision making process was deficient in some respect, whether in terms of its *vires*, reasonableness, procedural fairness, or otherwise howsoever. It does not presumptively undermine the decision or provide, in and of itself, an arguable basis on which to seek to impugn the decision made. It would be an entirely different matter if known circumstances were such as to presumptively undermine the decision by effectively foreclosing on the reasonable possibility of the decision being a proper and valid one. However, absent any evidence, direct or circumstantial, tending to

suggest that the decision making process was in some respect materially deficient, or that exceptional circumstances bearing upon the actual decision making process, or suggesting a direct prejudice in consequence of the impugned decision to some constitutional or fundamental right enjoyed by the applicant, the Court does not consider that the applicant has advanced an arguable case and sees no basis for granting leave to the applicant to challenge the first named respondent's decision not to prosecute the applicant in this State.

The decision refusing to give reasons.

The applicant claims an entitlement to know the reasons for the first named respondent's refusal to prosecute him in the following circumstances. While he accepts that he does not enjoy a "right" to be prosecuted he contends that he was entitled to have his request to the first named respondent properly considered, with relevant considerations taken into account and irrelevant considerations excluded. In other words he is entitled to be satisfied that the first named respondent asked herself the right questions. He contends that in order to do this he needs to know the reasons for her decision.

The applicant firmly anchors his claim in this regard in the decision of the Supreme Court in *Murphy v. Ireland & ors* [2014] IESC 19 (Unreported, Supreme Court, 11th March 2014) which, he maintains, applies the administrative law jurisprudence of the Supreme Court (as represented by that Court's decisions in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701; *Rawson v. Minister for Defence* [2012] IESC 26 (Unreported, Supreme Court, 1st May, 2012);

and *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 I.R. 297 to the specific context of a challenge to a prosecutorial decision.

Citing the *Mallak* decision, in particular, counsel for the applicant contended that it represented a sizeable development on the administrative law side because it effectively reversed Costello J.'s decision in *Pok Son Shum & Others v. Ireland* [1986] I.L.R.M. 593, which had endorsed a long standing and persistent view that there was no general obligation in common law to give reasons for administrative decisions. Giving the judgment of the Supreme Court in *Mallak,* Fennelly J. departed from that persistent view and found that just because the Minister in that case had absolute discretion, it did not follow that he was not obliged to give reasons for his decisions, given that in order to act fairly and rationally decision-makers must not make decisions without reasons.

In particular, counsel for the applicant places much reliance on the following passage from the judgment of Fennelly J. in *Mallak* (at paras. 68 and 69):

> "66. 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 of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

> 67. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

This passage is in fact also quoted and commented upon by O'Donnell J. in his judgment in the *Murphy* case, a matter to which I will return.

The *Murphy* case did not involve a challenge to a decision to prosecute or not to prosecute. Moreover, it did not involve any challenge by way of judicial review. The case, in fact, involved an action commenced by Plenary Summons. The context in which it was brought was that the plaintiff was the subject of a decision of the then Director of Public Prosecutions to certify for the purposes of s. 46(2) of the Offences Against the State Act 1939 that in his opinion *"the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of [the plaintiff]."* The proceedings claimed declaratory relief, principally (*inter alia*) declarations that s. 46(2) of the Offences Against the State Act 1939 was unconstitutional and incompatible with the European Convention on Human Rights. Injunctive relief, restraining the plaintiff's trial from proceeding before the Special Criminal Court, was notionally claimed, although that aspect of the claim was not ultimately proceeded with. A Statement of Claim had been delivered which pleaded in support of the plaintiff's claims that:

> "Despite request in writing the third named defendant failed, neglected, and/or refused to inform the Plaintiff of the reason(s) for the issuing of the said certificate and has further failed, neglected, and/or refused to provide the Plaintiff with any information used by him to reach the decision to issue the said certificate."

In considering the power under s. 46(2) of the Offences Against the State Act 1939 in the context of the constitutional guarantee of trial "in due course of law",

O'Donnell J., having noted that "there can be no doubt that the Constitution intended trial by jury would be the standard template by reference to which all criminal trials were measured", went on to examine the circumstances in which persons might, exceptionally, be tried without a jury, including trial before the Special Criminal Court and summary trial in the District Court.

When he later came to consider the applicant's claim to be entitled to reasons for the decision he was seeking to impugn, O'Donnell J, having considered the import of the *Mallak* decision, which he regarded as being rather more nuanced than a simple citation of paragraphs 68 and 69 of the judgment of Fennelly J would suggest, concluded:

> "When the Director of Public Prosecutions is making the sole decision on whether a case which would otherwise be tried before a jury should be tried before the Special Criminal Court, and where the Director's decision is not subject to appeal or review, then fair procedures requires that the accused be provided with the Director's reasons for considering that the ordinary courts are not sufficient to secure the administration of justice in the particular case. By contrast, since a decision to direct trial in the District Court on an offence triable either way is always subject to review and decision by the District Judge who can refuse jurisdiction, such a decision does not require any reasons or hearing. Like the decision in *Mallak*, the conclusion here has no implications for the constitutional validity of the section. Since s. 46(2) does not prescribe the procedure to be followed or preclude the giving of reasons, there is no constitutional invalidity in the section as it currently stands. There is, moreover, in the view of the Court, no entitlement to obtain the gist of the information upon which the Director's conclusion is arrived at, and no requirement to have an oral hearing, cross-examination of witnesses or to provide for submissions."

In written submissions to the Court in the present case, counsel for the applicant urged:

> "In reliance on *Mallak* and on the Supreme Court's decision in *Murphy* we say fair procedures require that Mr. Marques be provided with the Director's reasons for not accepting his guilty plea and for not proceeding with the prosecution in this jurisdiction. We call in aid Mr. Justice O'Donnell's important distinction between a decision to direct summary trial in the District Court and a decision to certify the ordinary Court as not adequate. There is no duty to provide reasons in the case of the former because the District Court Judge can always review that decision and doubtless the accused person will have a right of submission. By contrast, other than by bringing this judicial review, there is no second gate at which the decision being impugned here can be challenged.
>
> The decision that is being impugned in this case, namely the decision of the Director not to direct charges, clearly impacts Mr. Marques' interests as a proposed extradite. Moreover, there is no right of appeal from the Director's decision not to direct charges and no means of varying the decision in a Court. Indeed, according to this Court's ruling in the *Damache* case the forum issue is not an issue for the Court in the extradition proceedings *at all.* It would seem from to O'Donnell J's analysis in *Murphy*, that is an indicator pointing in favour of, and not against, a duty to give reasons."

Decision in respect of the second challenge

The Court is also not disposed to grant the applicant leave to apply for judicial review to enable him to challenge the first named respondent's further decision refusing to furnish reasons for deciding not to prosecute the applicant. The Court's reasons for not doing so are because, as was pointed out by O'Flaherty J. in the Supreme Court case of *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589, and reiterated by O'Donnell J in his recent judgment in the Supreme Court in *Murphy v. Ireland & ors*, the obligation to give reasons is dependent upon, and a reflection of the reviewability of, the decision and the scope of that review.

The applicant's reliance on the *Murphy* decision as an authority that directly supports his case is misconceived. It does not in fact do so. The *Murphy* case is

distinguishable from the present case in very many respects. Some of those have already been touched upon i.e., the nature of the proceedings, the reliefs being sought, and the nature of the decision at the centre of the controversy. However, quite apart from all of that, the most fundamentally relevant distinguishing feature is that in the *Murphy* case the Court readily accepted that the decision that had been made on foot of the statutory provision that the plaintiff sought to impugn, i.e., the then DPP's decision to certify that in his opinion *"the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of [the plaintiff]"*, was unquestionably a decision that inured to the potential prejudice of a clearly identifiable constitutional right enjoyed by the plaintiff, namely his right to trial by jury. In that regard, O'Donnell J. stated (at paragraph 42):

> "42. It also follows from the decision of the government and the certificate of the Director of Public Prosecutions that it is highly likely that the reason why the Director of Public Prosecutions considered that the ordinary courts are not adequate to secure the administration of justice in the particular case must relate to the connections of the individual with organisations which are prepared to interfere with the administration of justice. Nevertheless, trial by jury is a constitutional requirement in those cases to which it applies. A decision which has the effect of removing a case which would otherwise be tried by a jury to be tried by a judge or judges alone is a decision which must comply with the dictates of the Constitution. Accordingly, the Court considers that it is necessary in such a case that the Director of Public Prosecutions, if requested, should either give such reason, or, as contemplated in *Mallak*, justify a refusal to do so. While this, in most cases, may be an entirely predictable step, it is nevertheless an important one in an area where there is a significant limit on the jurisdiction of the courts and it is desirable that such an obligation should be required where that duty to give reasons can be complied with without damage to the other public interests involved."

No such considerations arise in the present case. The decision of the first named respondent does not inure to the prejudice of any constitutional or fundamental right enjoyed by the applicant. He does not enjoy a right to be prosecuted. He does not enjoy a right not to have his extradition barred. It is true that as a direct consequence of the decision not to prosecute him in this jurisdiction the request that this State has received from the United States of America will now be considered. However, it means no more than that. It is by no means certain that he will ultimately be extradited. That remains to be determined in a process in which he enjoys the right to challenge his extradition. He will be afforded fair procedures in that process and, as pointed out earlier in this judgement, will be able to raise the full range of potential objections provided for under relevant legislation and treaties, and, if necessary, also invoke and call in aid rights guaranteed to him under the Constitution of Ireland and the European Convention on Human Rights.

Accordingly, in circumstances where the applicant has not persuaded the Court that exceptional circumstances exist such as would render the decision not to prosecute him judicially reviewable, he cannot make an arguable case that the first named respondent should state her reasons for that decision. The long standing position that the Director of Public Prosecutions cannot generally be required to furnish reasons for her prosecutorial decisions is based upon sound policy considerations, many of which were rehearsed by O'Flaherty J. in the Supreme Court case of *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589. That is not to say that the first named respondent can never be required to state her reasons. It may be that in a case where an applicant can demonstrate exceptional circumstances and, in particular, direct prejudice to an identifiable right, a different approach would be called for. This is not such a case.

Conclusion

The Court must refuse leave to apply for judicial review in respect of both putative challenges, and dismiss the applicant's proceedings.