High Court of Ireland Decisions

Judgment

Title:	Attorney General -v- Davis
Neutral Citation:	[2016] IEHC 497
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THE HIGH COURT

[2014 No. 3 EXT.]

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND

GARY DAVIS

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of August, 2016

1. On 13th January, 2014 Sergeant Martin O'Neill arrested Gary Davis pursuant to a warrant issued by the High Court under s. 26(1)(b) of the Extradition Act, 1965 dated 9th January, 2014. Sergeant O'Neill having arrested Mr. Davis showed him the original arrest warrant, the original extradition request, the original diplomatic note and the original ministerial certificate in respect of same and explained the purpose of the arrest warrant. He was served with a copy of the original warrant and the other documents. He was conveyed to Bray Garda Station where he was processed. The sergeant explained to

him the offences contained in the arrest warrant. Mr. Davis accepted that the passport photograph attached to the warrant identified him. Mr. Davis was then brought before the High Court sitting at Court 21 in the Criminal Courts of Justice, Dublin. The warrant was endorsed as executed and it, together with the original extradition request, the original diplomatic note and the original ministerial certificate are part of the proofs submitted in this case. No issue arises in these proceedings concerning the arrest and detention of Mr. Davis pursuant to the terms of the warrant or his identity.

The Warrant

2. A warrant for the arrest of Mr. Davis was issued by United States Magistrate, Judge James C. Francis IV of the United States District Court for the Southern District of New York on 5th December 2013 alleging that Mr. Davis committed the following offences:

> i. Count 1: Conspiracy to distribute narcotics in violation of 21 U.S.C. §841(h), 812, 841(a)(1), 841(b)(1)(A) and 846, which carries a maximum penalty of life imprisonment;
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> ii. Count 2: Conspiracy to commit computer hacking in violation of 18 U.S.C. §1030(a)(2) and 1030(b), which carries a maximum penalty of five years imprisonment; and
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> iii. Count 3: Conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h), which carries a maximum penalty of twenty years imprisonment.

3. An indictment in case number 13 CRIM 950 had been filed in the United States District Court for the Southern District of New York on 5th December 2013 charging the respondent with these offences. The warrant for Mr. Davis's arrest issued based on that indictment and remains valid and executable. It is the basis of this request for extradition which was made pursuant to a diplomatic note dated 3rd January, 2014.

4. The background circumstances said to provide probable cause to believe that Mr. Davis committed the crimes with which he is charged are set out in the request as follows:

> "The Silk Road website provided an online anonymous marketplace for illegal drugs and other illegal goods and services, including computer hacking services. The investigation by U.S. authorities has revealed that the website began operating in or about January 2011 and that the website provided a forum through which many types of illegal drugs, including heroin, cocaine, methamphetamine, ecstasy, and LSD, were sold. The website provided an infrastructure similar to well known online marketplaces such as Amazon Marketplace or e-Bay, allowing sellers and buyers to conduct transactions online. However, unlike such legitimate websites, Silk Road was designed to facilitate illegal commerce by ensuring absolute anonymity on the part of both buyers and sellers.
>
> Through their investigations, U.S. authorities were able to identify the owner and operator of Silk Road as a U.S. citizen named Ross William Ulbricht ("Ulbricht"). U.S. authorities have learnt through their investigation that Davis was a member of Ulbricht's support staff and specifically operated as one of two Silk Road site administrators.
>
> From in or about January 2011 up to and including in or about October 2013 Davis and other members of the conspiracy both known and unknown intentionally and knowingly conspired to violate the narcotics

> laws of the United States, to wit distribute and possess with intent to distribute controlled substances. In addition to providing a platform for the purchase and sale of illegal narcotics, the Silk Road website also provided a platform for the purchase and sale of malicious software designed for computer hacking such as password stealers, key loggers, and remote access tools.
>
> Additional confirmation of Davis's role as a member of the Silk Road was uncovered from the computer seized in connection with Ulbricht's arrest. Ulbricht's computer was found to contain a folder named "Ids" where he stored copies of identification documents he required his employees to provide to him in order to get paid. Included within the folder was an image file titled "libertas.jpg". The file is an image of an Irish passport held in the name of Gary Davis with a date of birth of February 27, 1988".

5. Further details of the alleged involvement of Mr. Davis in these offences are set out in the affidavit of Serrin Turner, Assistant United States Attorney for the Southern District of New York in support of the extradition request.

6. The investigators in the United States are said to have discovered that transactions carried out on the Silk Road website were concluded using "Bitcoin" accounts. On making a purchase on "Silk Road" the purchaser made a Bitcoin payment to a Silk Road Bitcoin account which was held in escrow in a "wallet" maintained by Silk Road pending the completion of the transaction. The Bitcoins were then transferred to the Silk Road Bitcoin address of the vendor and could be withdrawn by sending them to the vendor's Bitcoin address outside Silk Road. They could then be encashed for real currency. Silk Road charged a commission of 10-15% for each transaction. Silk Road also advertised and used a process known as a "tumbler" which sought to obscure the link between the parties involved and effectively assist in the laundering of criminal proceeds. The total revenue earned by Silk Road between 6th February, 2011 and 23rd July, 2013 was said to be $79.8million by way of commission.

7. Mr. Davis is said to be an administrator of the Silk Road site known as "Libertas". His involvement is said to be evidenced by messages found on the site. He is alleged to have commenced working for the site on 6th June, 2013 having provided services at a lesser level for one month before that date. The messages are said to provide evidence of his knowledge of the transactions which he was alleged to have facilitated and advised upon and their illegality. His weekly salary is said to have been $1500. It is claimed that private messages from Libertas concern efforts he made as site administrator to organise the listing of drugs and other items on Silk Road under specific categories to render its operation more efficient and establish that he was well aware of the illegal nature of the commerce conducted on the site. This included work on listings concerning cocaine, crack cocaine, crystal, and other drugs. Other references concern the categorisation of various items as "weaponry".

The Offences

8. Count 1 charges Mr. Davis with conspiracy to distribute narcotics. Mr. Turner's affidavit outlines that the Government's evidence will establish that from in or about June to October 2013 Mr. Davis served as a site administrator on Silk Road and as such knowingly worked with others to facilitate the illegal distribution of narcotics through the Silk Road website. It is said that the evidence will show that narcotics were distributed through the site. This evidence was obtained from servers used to operate the Silk Road website, evidence obtained from computer devices controlled by Ulbricht and other co-conspirators and evidence obtained from undercover purchases made on the Silk Road website and also material posted by Mr. Davis on the internet.

9. Mr. Turner avers that under the laws of the United States:

> "A conspiracy is an agreement to commit one or more criminal offences. The agreement on which the conspiracy is based need not be expressed in writing or in words, but may be simply a tacit understanding by two or more persons to do something illegal. Conspirators enter into a partnership for a criminal purpose in which a member or participant becomes a partner or agent of every other member. A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the identities of all the other members of the conspiracy. If a person has an understanding of the unlawful nature of a plan and knowingly and wilfully agrees to it, joining in the plan, he is guilty of conspiracy even though he did not participate before and may play only a minor part. A conspirator can be held criminally responsible for all reasonably foreseeable actions undertaken by other conspirators in furtherance of the criminal partnership. Moreover, because of this partnership, statements made by a conspirator in the due course of and while he is a member of the criminal conspiracy are admissible in evidence not only against that conspirator, but also against all other members of the conspiracy. … Therefore statements of conspirators made in furtherance of the conspiracy may be deemed to be the statements of all conspirators."

10. The crime of conspiracy is distinct from the commission of any specific "substantive crime", a person may be convicted of conspiracy even where the substantive crime which was its purpose is not committed. The essence of the offence is that the Government must at trial establish beyond a reasonable doubt that:

> (1) Two or more persons entered an agreement to commit the underlying offence to distribute narcotics; and,
>
> (2) Mr. Davis knowingly became a member of the conspiracy to commit the underlying offence.

11. Count 2 charges Mr. Davis with conspiracy to commit computer hacking. In respect of this offence the Government must establish beyond reasonable doubt that two or more persons entered an agreement to commit the underlying offence and Mr. Davis knowingly became a member of this conspiracy to commit computer hacking. The evidence proposed in this case is that from June to October 2013 Mr. Davis served as a site administrator on Silk Road and as such knowingly worked with others to facilitate the distribution of malicious software through the Silk Road website knowing that Silk Road users of such software intended to use it to commit computer hacking.

12. Count 3 alleges conspiracy to commit money laundering. Under United States law money laundering consists of conducting or attempting to conduct financial transactions involving property constituting the proceeds of specified unlawful activity including narcotic trafficking and computer hacking. The offence includes knowing that the property involved in the transaction constituted the proceeds of some form of unlawful activity and that the accused intended to promote the carrying on of the specified unlawful activity. It also includes embarking upon such transactions knowing that they are designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds.

13. It is alleged that Mr. Davis in serving as a site administrator on Silk Road knowingly worked with others to launder the proceeds of narcotic trafficking and/or computer hacking through the website's bitcoin based payment system. A system was designed to protect the anonymity of the site users and frustrate the tracing of any funds flowing through the website. It thereby promoted the illegal activity conducted on the site and

disguised the nature, location, source, ownership and control of the proceeds of that activity.

The Extradition Request and Correspondence of Offences

14. The requirements of a valid extradition request are set out in Part II of the Extradition Act 1965 as amended. Ireland made a Treaty on Extradition with the United States of America at Washington on 13th July, 1983 which was later amended by the Agreement on Extradition between the United States of America and the European Union made on 25th June, 2003. Under s. 8(1) of the 1965 Act, the Government, by order made under the Extradition Act 1965 (Application of Part II) Order 2000 (S.I. No. 474 of 2000) applied Part II to the United States of America. This was subsequently amended by the Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 (S.I. No. 45 of 2010) which gave effect to the later European Union/United States agreement. Notices of each order were published in Iris Oifigiúil. Section 9 of the Act provides that if a request for the surrender of a person who is being proceeded against for an offence is duly made by the Government of the United States that person "shall … be surrendered to that country" subject to and in accordance with the provisions of the Act.

15. I am satisfied that in accordance with the above provisions and the application of Part II of the 1965 Act as amended, the formalities of Part II have been complied with by the Government of the United States. Under s. 23 a request for extradition has been communicated in accordance with the statutory provisions. Under s. 25 the necessary documents have been supplied and received and the Minister has certified the request received in accordance with section 26. Following certification a warrant was issued by the High Court for the respondent's arrest under s. 27 and was duly executed as set out above.

16. Section 10 of the 1965 Act as amended concerns extraditable offences and prescribes the requirements for correspondence and minimum gravity. The section insofar as it is relevant provides:

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

and cognate words should be construed accordingly."

17. It is clear from Article 4(1) of the Extradition Agreement between the European Union and the United States that an offence shall be extraditable if punishable under the laws of the requesting State and the requested State by deprivation of liberty for a maximum period of more than one year or by more severe penalty. An extraditable offence also consists of an attempt or conspiracy to commit or participation in the commission of an extraditable offence. This is reflected in Article II (3) of the Annex to S.I. No. 45 of 2010.

Correspondence

18. The test as to whether an offence specified in the warrant issued by a requesting State corresponds to an offence contrary to Irish law requires an examination of whether the acts constituting the offence alleged in the warrant constitute an offence under Irish law as set out in s.42 of the Extradition Act 1965 as amended by s.26 of the Extradition (European Union Conventions) Act 2001.

19. The issue was considered by the Supreme Court in *Attorney General v. Dyer* [2004] 1 IR 40. In that case an application was made for an order extraditing the respondent in respect of offences of obtaining money by false pretences as set out in a number of warrants. The offences relied upon by the applicant as corresponding offences under Irish law had to be committed "with intent to defraud". In the absence of these words from the warrants the applicant relied on the evidence of an advocate from the requesting State (Jersey) as to the meaning of "criminal fraud" under Jersey law although the term did not appear on the face of the warrants. The High Court made an order for the respondent's surrender. This was appealed on the basis *inter alia* that the High Court was not entitled to have regard to expert evidence for the purpose of determining the issue of correspondence and that "intent to defraud" was not an element of the offences charged. It was held by the Supreme Court, allowing the appeal, that the enquiry as to correspondence of an offence in the requesting State with an offence in the law of this State was concerned with the factual components of the offence specified in the warrant. In the absence of any suggestion that the words used in the warrants had a different meaning in the law of the requesting State, the issue of correspondence was to be examined by attributing to any such words the meaning they would have in Irish law. Having reviewed the various authorities Fennelly J. (delivering the judgment of the Court) stated:

> "20. The result seems to me to be the following. Normally, words used in an extradition warrant will be given their ordinary meaning. This enables the courts to give effect, without resort to extrinsic evidence, to extradition requests where words such as "steal," "rob" and "murder" are used. It is possible that such words have different meanings in the law of the requesting state, but, in the absence of anything suggesting that, the courts will examine correspondence by attributing to such words when used in a warrant, the meaning that they would have in Irish law. In some cases, however, the word used in the requesting jurisdiction may be unfamiliar to Irish law. ... In my view, that simple proposition is a sufficient answer to the objection that the evidence of (an Expert in Jersey law) should not have been admitted to explain the term "contrary to common law". The evidence was receivable to explain that "the common law" of Jersey, when used in a warrant for criminal fraud, encompasses the notion of "intent to defraud"."

20. The learned judge applied what he described as the "now very consistent line" as maintained by Henchy J. in *Hanlon v. Fleming* [1981] I.R. 489 at p. 495 (O'Higgins CJ. and Griffin J. concurring):

> "The third point raises the question whether the specified offence has the

> required correspondence with an offence under the law of this State. The relevant decisions of this Court, such as *The State (Furlong) v. Kelly* [1971] I.R. 132, *Wyatt v. McLoughlin* [1974] I.R. 378 and *Wilson v. Sheehan* [1979] I.R. 423 show that it is a question of looking at the factual components of the offence specified in the warrant, regardless of the name given to it, and seeing if those factual components, in their entirety or in their near-entirety, would constitute an offence which, if committed in this State, could be said to be a corresponding offence of the required gravity."

21. This was in contrast to the approach adopted by Ó Dálaigh CJ. in *The State (Furlong) v. Kelly* [1971] 1 I.R. 132 in which the learned Chief Justice defined correspondence in terms of the specific and technical legal elements of the offences in issue. In that regard, Fennelly J. stated:

> "16. Ó Dálaigh CJ. then contrasted the parallel provisions of Part II of the Act, particularly the following provision in s. 10(3):- "an offence punishable under the laws of the State shall be construed as including references to an act which, if it had been committed in the State, would constitute such an offence". It is apparent therefore, that Ó Dálaigh CJ. conceived the inquiry into correspondence in terms of the legal elements of the offences created under the laws of the respective jurisdictions. Whatever force the reference to s. 10(3) of the Act of 1965 had at the time of the judgment in *The State (Furlong) v. Kelly* … it must be greatly diminished by the fact that since 2001 there is a statutory definition of correspondence by reference to "the act constituting the offence" specified in the warrant."

Therefore, the consideration in this case as to whether correspondence exists requires an examination of the acts alleged rather than the narrow definitions of the offence of the laws of the respective States.

22. Fennelly J. also quoted with approval from the judgment of Henchy J. in *Wilson v. Sheehan* [1979] I.R. 423 at p. 428 as follows:

> "What was being stressed in that passage was that the required correspondence of offences is not shown by the mere proof that the offence specified in the warrant has the same name as that of an offence in this State. It is the essential factual ingredients that determine whether two offences have the necessary correspondence. If an offence is specified in the warrant merely by the name by which it is known in the requesting State, it does not follow that because there is an offence in this State which goes by the same name, the two offences correspond with each other. They may be crucially different in essence. To show the necessary correspondence … it is necessary for the specification of the offence in the warrant (or in the warrant and its attendent documentation) to go further and identify the offence by reference to the factual components relied on; it is only by looking at those components that a Court in this State can decide whether the offence so specified (regardless of what name is attached to it) would constitute, if committed in this State, a corresponding criminal offence of the required gravity."

23. It is submitted in this case that the charges contained in the warrant and the factual information concerning these offences in the supporting documentation are not clear and unambiguous and do not disclose essential factual ingredients that would identify them by reference to those components as offences which if committed in this State correspond to criminal offences.

24. The arrest warrant issued by the United States District Court on 12th May, 2013 commands the arrest of Gary Davis who is described as a person "accused of an offence

or violation based on the indictment filed with the court briefly described as:

> "Narcotics trafficking conspiracy (21 U.S.C. 846)
>
> Computer hacking conspiracy (18 U.S.C. 1030)
>
> Money laundering conspiracy (18 U.S.C. 1956)"

25. The indictment underpinning the three charges of conspiracy sets out the material, facts and background to the charges at paras. 1 to 6. Many of these facts are referenced in the earlier part of this judgment. It describes the conspiracy which extended from January 2011 to October 1st, 2013 centred on the operation of the underground website Silk Road which is said to have hosted "a sprawling black market bazaar on the internet, where illegal drugs and other listed goods and services were regularly bought and sold by the site users". The site was used by several thousand drug dealers and other unlawful vendors to distribute hundreds of kilograms of illegal drugs and other illicit goods and services to well over a hundred thousand buyers and to launder hundreds of millions of dollars deriving from these unlawful transactions. The respondent is described as a site administrator responsible for activities such as monitoring user activity on Silk Road for problems, responding to customer service enquiries and resolving disputes between buyers and vendors. Mr. Davis's involvement is alleged to have commenced on or about 6th June, 2013 and continued until October 2nd, 2013 as a site administrator known as "Libertas".

26. The indictment sets out in detail the "statutory allegations" in respect of Count 1:

> "7. From in or about January 2011 up to and including in or about October 2013 in the Southern district of New York and elsewhere … Gary Davis aka "Libertas" … the defendant and others known and unknown, intentionally and knowingly did combine, conspire, confederate and agree together and with each other to violate the narcotic laws of the United States.
>
> 8. It was a part and object of the conspiracy that … Gary Davis aka "Libertas" … the defendant and others known and unknown would and did distribute and possess with the intent to distribute controlled substances …
>
> 9. It was further a part and object of the conspiracy that … Gary Davis aka "Libertas" ... the defendant and others known and unknown would and did deliver, distribute and dispense controlled substances by means of the internet, in a manner not authorised by law and did aid and abet such activity …
>
> 10. The control substances involved in the offences included amongst others 1kg and more of mixtures and substances containing detectable amounts of heroin, 5kgs and more of mixtures and substances containing a detectable amount of cocaine, 10gs and more of mixtures and substances containing a detectable amount of lysergic acid diethylamide (LSD) and 500gs and more of mixtures and substances containing a detectable amount of meta-amphetamine, its salts, isomers, and salts of its isomers …"

27. The indictment also recites that amongst the overt acts committed by Gary Davis in

the course of this conspiracy was that on or about July 11th, 2013 he sent a message through the Silk Road website to Mr. Ulbricht with the subject "daily notes" summarising actions he had taken during the previous day in his capacity as a Silk Road site administrator. Extensive details are also provided in the affidavit of Mr. Turner at paras. 49 to 55 of the evidence which is proposed to adduce, the nature of which has already been described earlier in the judgment.

28. I am satisfied that the acts constituting the offence set out at Count No. 1 are clearly embraced by the terms of s. 15 of the Misuse of Drugs Act 1977 (as amended) which provides that any person who has in his possession whether lawfully or not, a controlled drug for the purpose of selling or otherwise supplying it to another in contravention of regulations under s. 5 of the Act shall be guilty of an offence. The drugs the subject matter of the extradition request are all controlled drugs pursuant to the schedule of the 1977 Act and LSD is scheduled as a controlled drug pursuant to Statutory Instrument No. 78 of 2004 (Misuse of Drugs Act, 1977 (Controlled Drugs) (Declaration No.4) Order, 2004).

29. I am also satisfied that no evidence has been advanced to support the proposition that there is a substantial difference between the law relating to conspiracy in Ireland and in the United States. In particular, I reject the submission that Mr. Turner's affidavit indicates that a person may be guilty of conspiracy even though he did not participate before the date alleged or that if a person joined a conspiracy without full knowledge of the details of the unlawful agreement they would nevertheless be liable for and punishable for the activities of alleged co-conspirators committed at a time before they entered the conspiracy. The court has not been furnished with any affidavit of laws from an appropriate expert in American law in support of that proposition. There is no doubt that in this State evidence which is proven against one co-conspirator may be looked at as against all of them in the course of a trial to demonstrate the nature and purpose of the conspiracy. If a person joins a conspiracy after its initial formation he may be found equally guilty with the original conspirators: this is well established (*R. v. Murphy* [1837] 8 C&P. 297; *Criminal Law* (Charleton, Mc Dermott and Bolger paras 4.83-4.131). I am satisfied that the applicant has established the necessary correspondence between the conspiracy set out in Count 1 and that the warrant and the accompanying documentation adequately "identified the offence by reference to the factual components relied on".

30. The respondent also submits that there is no correspondence between the offence specified in Count 2 on the indictment the subject of the warrant alleging conspiracy to commit computer hacking which carries a maximum penalty of five years imprisonment. The indictment sets out the acts alleged against the respondent in respect of Count 2 under the heading "Statutory Allegations" :-

> "14. From in or about January 2011, up to and including in or about October 2013 in the Southern district of New York and elsewhere … Gary Davis aka "Libertas" the defendants and others known and unknown, intentionally and knowingly did combine, conspire, confederate and agree together and with each other to commit computer hacking in violation of Title 18, United States Code, section 1030(a)(2).
>
> 15. It was a part and objective of the conspiracy that … Gary Davis aka "Libertas" and … the defendants and others known and unknown would and did intentionally access computers without authorisation and thereby would and did obtain information from protected computers, for the purposes of commercial advantage and private financial gain, and in furtherance of criminal and tortious acts in violation of the Constitution and the laws of the

United States, in violation of Title 18, United States Code, section 1030(a)(2).

31. It is alleged that Mr. Davis was also part of a conspiracy to provide a platform for the purchase and sale of malicious software designed for computer hacking such as password stealers, key loggers and remote access tools. It is alleged that while in operation the Silk Road website regularly offered hundreds of listings for such products.

32. In the affidavit of Serrin Turner further details *inter alia* are provided as follows:

> "11. In addition to illegal narcotics, other illicit goods and services were openly sold on Silk Road as well. For example, as of September 23rd, 2013:
>
> > i. There were hundred and fifty-nine listings on the site under the category "services." Most concerned computer hacking services: for example, one listing was by a vendor offering to hack into Facebook, Twitter, and other social networking accounts of the customer's choosing, so that "you can Read, Write, Upload, Delete, View all Personal Info"; another listing offered tutorials on "twenty-two different methods" for hacking ATM machines. Other listings offered services that were likewise criminal in nature. For example, one listing was for a "Huge Black market Contact List", described as a list of "connects" for "services" such as Anonymous Bank Accounts", "Counterfeit Bills …", "Firearms and Ammunition", "Stolen Info (cc. Credit Card, PayPal)" and "Hit Men (ten plus countries)."
> >
> > ii. There were eight hundred and one listings under the category "digital goods" including offerings for pirate media content, hacked accounts at various online services such as Amazon and Netflix and more malicious software. For example, one listing entitled Huge Hacking Pack 150 plus hacking tools and programs" described the item being sold as a "hacking pack loaded with key loggers, RATs, Banking Trojans and other various malware".

33. In this regard a "key logger" is described as a type of malicious software designed to monitor the key strokes input into an infected computer and transmit this data back to the hacker. A "RAT" or Remote Access Tool is a type of malicious software designed to allow a hacker to remotely access and control an infected computer. A "Banking Trojan" is a type of malicious software designed to steal an infected user's bank account log-in credentials .This behaviour is clearly calculated to cause or facilitate loss and/or damage to others unlawfully and dishonestly and/or to enable the perpetrators to gain or profit from it.

34. As previously noted the Government prosecutors intend to adduce evidence that from in or about June to October 2013 the respondent served as a site administrator on Silk Road and as such knowingly worked with others to facilitate the distribution of this malicious software through the Silk Road website knowing that users of the website would use such software to commit computer hacking.

35. Section 9 of the Criminal Justice (Theft and Fraud) Offences Act 2001 provides:

> "9(1) A person who dishonestly, whether within or outside the State, operates or causes to be operated a computer within the State with the intention of making a gain for himself or herself or another, or of causing

loss to another, is guilty of an offence."

Under section 5 of the Criminal Damage Act, 1991 it is an offence to operate a computer within the State to access data kept within or outside the State, or from outside the State to access data within the State, whether or not any data is actually accessed by that person. The offence may be committed whether or not the accused intended to access any particular data or category of data kept by any particular person.

36. The court is satisfied that a conspiracy to commit either or both of these offences provides sufficient correspondence with that alleged in Count 2. There is little doubt that the facts alleged against the respondent in respect of Count No. 2 set out above in the warrant, the indictment and the affidavit of Mr. Turner rely upon substantially the same factual ingredients which, if established beyond reasonable doubt in this jurisdiction, would constitute either of the proposed corresponding criminal offences.

37. Count 3 alleges a conspiracy to commit money laundering and carries a maximum penalty on conviction of twenty years imprisonment. The indictment grounding the charge sets out in detail the factual allegations made against the respondent:-

> "18. From in or about January 2011 up to and including in or about October 2013 in the Southern District of New York and elsewhere … Gary Davis aka "Libertas" … the defendants and others known and unknown intentionally and knowingly did combine, conspire, confederate and agree together and with each other to commit money laundering …
>
> 19. It was a part and an object of the conspiracy that … Gary Davis aka "Libertas" … the defendants, and others known and unknown, in offences involving and affecting inter State and foreign commerce, knowing that the property involved in certain financial transactions represented the proceeds of some form of unlawful activity, would and did conduct and attempt to conduct such financial transactions, which in fact involved the proceeds of specified unlawful activity, to wit, narcotics trafficking and computer hacking, in violation of Title 21 United States Code, section 841 and Title 18 United States Code, section 1030 respectively with the intent to promote the carrying on of such specified unlawful activity, in violation of Title 18 United States Code, section 1956(a)(1)(A)(i).
>
> 20. It was further a part and an object of the conspiracy that … Gary Davis aka "Libertas" and … the defendants and others known and unknown, in offences involving and affecting inter State and foreign commerce, knowing that the property involved in certain financial transactions represented proceeds of some form of unlawful activity would and did conduct and attempt to conduct such financial transactions, which in fact involved the proceeds of specified unlawful activity, to wit, narcotics trafficking and computer hacking in violation of Title 21 United States Code, section 841 and Title 18 United States Code, section 1030, respectively, knowing that the transactions were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership and the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, section 1956(a)(1)(B)(i).

38. These activities clearly correspond with the offence of money laundering as provided by s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

which provides:

> "7(1) A person commits an offence if —
>
> (a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:
>
> (i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;
>
> (ii) converting, transferring, handling, acquiring, possessing or using the property; …
>
> and
>
> (b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct."

39. I am satisfied having regard to the ingredients and substance of the offences alleged and described in the materials submitted in and with the warrant and the definition of the common law offence of conspiracy in Ireland that correspondence has been established in respect of Count 3. The court, in reaching this conclusion has had particular regard to the facts set out extensively and in detail in the indictment on foot of which the warrant was issued and the accompanying documentation including the affidavit of Mr. Turner.

40. The court is therefore satisfied that correspondence has been established in respect of all three counts.

Duplicity

41. It is submitted that the charges on foot of which extradition are sought are bad for duplicity. The respondent submits that each charge alleges more than one offence.

42. It is submitted that Count No. 1 contains a number of offences: in the course of submissions this was reduced to two. Since Count No. 1 charges only "conspiracy to distribute narcotics" on the face of the warrant and makes no mention of any other alleged fact, it is said that one must turn for clarification to the supporting documentation. This includes the affidavit of Mr. Turner and the indictment. It is submitted that on the basis of Mr. Turner's affidavit the narcotics conspiracy set out in Count 1 had two objects. Firstly, its object was to distribute or possess with the intent to distribute controlled substances in violation of 21 USC Sections 841(a)(1) and 846. Secondly, it is said that the object of the conspiracy was to deliver, distribute or dispense controlled substances by means of the internet in a manner not authorised by law or to aid and abet such activity in violation of 21 USC Sections 841(h) and 846. It is submitted that it does not simply describe the commission of one offence by a number of different means but in fact alleges different activities namely, on the one hand to distribute or on the other to possess with intent to distribute controlled substances and to distribute or dispense by means of the internet. The court is not satisfied that the count embodies an allegation that the accused committed two offences. It clearly charges a conspiracy to distribute narcotics in which the respondent is alleged to have participated in a number of particularised ways over a specific period.

43. In respect of Count 2 it is alleged that the conspiracy between the respondent and others would and did intentionally access computers without authorisation, and thereby obtain information from protected computers for the purpose of commercial advantage and private financial gain in furtherance of criminal and tortious acts in violation of the Constitution and the laws of the United States. The Silk Road website allegedly provided a platform for the purchase and sale of malicious software designed for computer

hacking such as password stealers, key loggers and remote access tools. It offered hundreds of listings for such products. I am not satisfied that the allegations of conspiracy in Count 2 which are directed towards computer hacking could be regarded in any way as bad for duplicity having regard to the extensive detail set out in the affidavit of Mr. Turner, and the indictment handed down by the Grand Jury.

44. It is also submitted that Count 3 is bad for duplicity. Reliance is placed upon *The People (DPP) v. Meehan* [2002] 3 I.R. 139 in which the Court of Criminal Appeal quashed a conviction for money laundering charged under s. 31(3) of the Criminal Justice Act 1994 which provided:

> "A person shall be guilty of an offence if he handles any property knowing or believing that such property is, or in whole or in part directly or indirectly represents, another person's proceeds of drug trafficking or other criminal activity."

45. The Court of Criminal Appeal held that the section contained two alternative and distinct offences relating to drug trafficking or other criminal activity and that a conviction based on a count containing the two alternatives was uncertain and unworkable. It noted that the question as to where the line should be drawn between a single offence committed in two different ways as against the creation of two different offences often falls to be considered on a case to case basis. The court found that two different offences had been created. They were not merely a description of the commission of one offence in two different ways. In this case it is also alleged that the American charge is bad for duplicity in that it alleges not the commission of the same offence in a number of different ways but the commission of different offences.

46. In *Regina v. The Government of the United States* (*ex parte* McKee) (unreported Queen's Bench Division 28th April, 1999) the applicant was alleged to have been involved in the distribution of LSD in California and his extradition was sought on a number of charges alleging conspiracy to supply LSD during different periods in the United States. In respect of the four conspiracy charges it was submitted that one charge of conspiracy would have been sufficient and the others should be regarded as bad for duplicity since they covered essentially the same facts. Kennedy LJ. delivering the judgment of the court stated:

> "The simple answer to that is that it is plainly open to the prosecution, in a case such as this, to allege one overriding conspiracy covering the whole of the period under consideration and as an alternative to allege smaller conspiracies relating to the dates when drugs were supplied as though each transaction was self contained. That, on the face of it was precisely what was done in this case. There is nothing, in my judgment wrong about that" (at page 5).

47. In *Mateusz Koziel v. District Court in Kielce, Poland* [2011] EWHC 3781 (Admin) the English Court of Appeal considered the proposed rendition of a Polish national on foot of a warrant for the offence of robbery. A point was taken that because the warrant referred to two provisions of the Polish Penal Code, the European Arrest Warrant was invalid because it did not specify the sentence in respect of each of those two provisions of the Penal Code. Sir John Thomas P. in delivering the judgment of the court noted that a reading of the warrant indicated that it concerned one offence for which there was a maximum custodial sentence. The warrant then set out two sections of the Polish Penal Code. The court considered that the warrant was entirely clear. It concerned one offence the maximum sentence for which was twelve years but that under Polish law the offence derived from two sections of the Penal Code. The learned president noted that "it would be contrary to principle to look at the matters through the eyes of a common lawyer by bringing into play questions of duplicity." He continued:

> "It might well be the case that in this jurisdiction it would not be

> permissible to charge one offence arising out of two different provisions of a code, but I do not see how it is possible for a court in the UK to conclude that Polish law is the same. The warrant is clear. There is one offence, one maximum sentence. It would seem on the face of the warrant that this offence derives from two sections of the code. Thus looking at the warrant on its own I am not going outside it, there is no breach of the provisions of section 2 of the Act."

48. This is an approach which is consistent with the jurisprudence of the Irish courts which does not accept that extradition may be successfully opposed based on a lack of correspondence between Irish criminal procedure and the rights available thereunder and the rules or criminal procedure and rights accruing thereunder in the requesting state.

49. In *The Minister for Justice v. Stapleton* [2006] 3 IR 26 Fennelly J., delivering the judgment of the Supreme Court rejected the contention that in a proposed rendition under a European Arrest Warrant the court should require or seek parity of criminal procedure in the requesting member state:

> "73. The trial judge was mistaken in seeking parity of criminal procedure in the issuing member state. It is apparent that, even under the long established extradition jurisprudence, as it applied between some member states prior to 2004 and, as it still applies between this country and third countries, such a comparison was not required. Extradition does not demand that there be parity of criminal procedures between contracting states. It is notorious that criminal procedures vary enormously between states. Indeed it is obvious that they approximate much more closely between this country and the United Kingdom than between either of those states and the great majority of member states practising the civil law system, where, for example, there is no tradition of cross-examination of the sort practiced in our courts, and which is here regarded as totally fundamental to the rights of the defence."

50. A similar submission that the High Court should consider whether evidential rules to which the respondent might be subject in the course of trial if extradited would be unconstitutional was rejected by Edwards J. in *The Minister for Justice v. Shannon* [2012] IEHC 91.

51. In *The Minister for Justice v. Brennan* [2007] 3 IR 732 an attempt to impose standards of domestic procedures on foreign criminal law and sentencing procedures was rejected by the Supreme Court. The respondent absconded to Ireland having escaped from prison in the United Kingdom while serving sentences for various offences. A European Arrest Warrant was issued seeking his surrender to serve the balance of the sentence and to prosecute him for the offence of escaping from lawful custody. Since escape from lawful custody was a common law offence the maximum term of imprisonment that could be imposed was life imprisonment. The respondent claimed that if surrendered in respect of that offence he faced the imposition of a mandatory minimum sentence which constituted denial of his rights under the Constitution. It would not take into account the particular circumstances of his case, including his personal circumstances, in order to ensure that a sentence was proportionate. It was held by the Supreme Court that a judge who is satisfied that the minimum gravity requirement under the 2003 Act was fulfilled, was bound to make the order for surrender unless some other specific ground upon which an order for surrender ought to be refused was established. The trial judge in the United Kingdom was not obliged to impose a minimum mandatory sentence for the offence of escaping from lawful custody without exercising his discretion and this had been made clear in the European Arrest Warrant. In delivering the judgment of the court Murray CJ. stated:

> "35. There is no doubt that the operation of the process for

surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings.

36. However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing state, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our courts for a criminal offence.

37. The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country.

38. Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution.

39. The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

40. That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the

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

52. The court is not satisfied that it should or may infer that the counts as framed are bad for duplicity under Irish law. Even if the court were satisfied that it would be impermissible to try the respondent on the counts on the indictment as drafted and handed down by the grand jury, it is not open to this Court to deny an extradition request because the rules of criminal practice, procedure and due process in the Federal Courts of the United States allow for the charges as framed to proceed. The evidence in this case does not establish the type of fundamental defect in a system of justice that might justify a refusal of an application for surrender. The court is not satisfied to refuse the application for extradition on the ground of duplicity.

Specialty

53. It is claimed that if extradited, tried and convicted, the trial judge in the United States would be allowed under Federal Sentencing Guidelines to take into account alleged conduct which was not the subject of the conviction and in respect of which he was not charged. It is claimed that he might also be subject to an "enhanced" sentence in respect of such facts. This could lead to an increase in his sentence and punishment for conduct which is outside the scope of the charges set out in the request and a breach of the rule of specialty.

54. The rule concerning specialty is set out in s. 20 of the Extradition Act of 1965 (as amended) which states:

> "Subject to subs. (1A) (inserted by section 15 (b) of the *Extradition (European Union Conventions) Act, 2001*), extradition shall not be granted unless provision is made by the law of the requesting country or by the extradition agreement -
>
> (a) that the person claimed shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, or otherwise restricted in his personal freedom, for any offence committed prior to his surrender other than that for which his extradition is requested, except in the following cases…" (which do not arise in this case).

The rule of specialty is specifically provided for in Article XI of the 1983 Treaty on Extradition between Ireland and the U.S.

55. The respondent relies upon the decision of the Supreme Court in *Attorney General v. Burns* [2004] IESC 99 which arose from a case stated to the High Court in which the Federal Sentencing Guidelines were considered. It is an important feature of this case that the District Court heard and accepted unchallenged expert evidence on behalf of

the respondent that he could be sentenced under the guidelines on the basis of conduct or offences other than those for which extradition had been sought and granted. In that case extradition was not sought in relation to a number of charges originally included in the request. The respondent submitted that the guidelines permitted a sentencing court to take the conduct underlying them and other conduct into account. The District Court, in the case stated to the High Court stated that it was satisfied that the rule of specialty applied and was enshrined in the laws of the United States and that he could therefore apply to courts in the United States to remedy any breach of his rights in this regard. The learned district judge sought the opinion of the High Court as to whether he was right in law in his determination in that regard.

56. O'Caoimh J. was satisfied that provision had been made under Article XI of the Treaty for the application of the rule of specialty and that s. 20 did not preclude the appellant's extradition. He was also satisfied that the appellant had failed to show any basis for contending that the United States would disregard the rule in the course of the respondent's trial. He added that

> "any sentence to be imposed upon the appellant should he be convicted for any offence for which his extradition has been sought must be in respect of such offence, but the same must not preclude the court from having regard to the antecedents of the appellant in its ascertainment of the appropriate punishment in any given case."

57. The Supreme Court allowed the appeal on this issue based on the facts as stated in the case stated. Denham J. stated:

> "I am not satisfied on the facts adduced in the District Court that the rule of specialty will apply to the appellant. It is a contravention of the rule for him to be subject to a penalty for an offence other than that for which he is extradited. While this Court is bound by the findings of fact of the District Court on the law of the United States of America and may not itself, nor indeed is it competent to determine, the law of the United States of America, these findings may not be determinative of another case.
>
> The treaty on extradition between Ireland and the United States of America specifically excludes extradition for a person to be "sentenced, punished, detained or otherwise restricted in his or her personal freedom" in the United States of America for an offence other than that for which extradition has been granted. Thus the decision in this case is specific to and based on the facts of this case as found in the District Court and may not be of precedential value in other cases."

58. The applicant in these proceedings claims that the *Burns* case is of very limited application and relies upon the decision in *Attorney General v. Russell* [2006] IEHC 164 in which Peart J. reviewed its effect. In particular, the learned judge noted the emphasis placed by Denham J. on the fact that the decision is confined to its facts as found by the District Court and that the case may not be of precedent value in other cases.

59. In *Russell* the respondent raised the objection that if extradited on three charges of vehicular homicide and other charges he would also be tried in respect of an offence of bail jumping and interstate flight in respect of which his extradition was not sought or if not prosecuted, was likely to be punished for these offences. It was submitted that these were factors which could, under the law of Washington State, be taken into account by the trial judge when imposing the appropriate sentence for the extradition offences and that any enhancement of sentence on that basis amounted to punishment for an offence other than that for which his extradition was sought; this would breach the rule of specialty. The sentencing guidelines allowed for the imposition of an

enhanced sentence or "an exceptional sentence" in circumstances where the judge formed the view that the sentence otherwise to be imposed would be too lenient in all the circumstances. In *Russell* the Chief Deputy Prosecuting Attorney in Whitman County, Washington stated that the respondent would only be prosecuted in respect of offences for which he was extradited. Peart J. distinguished the facts and circumstances of the *Burns* decision as follows(at p. 12):-

> "On reading the judgment of Denham J. it is clear that the decision in *Burns* is confined to the facts as found in that particular case by the District Court. The matter came before the Superior Courts by way of a Case Stated and as such both the High Court and the Supreme Court were constrained by the finding of fact deemed to have been made by the district judge as to the law in the United States in relation to sentencing. The learned Supreme Court judge refers to the fact that the evidence of foreign law which was adduced in the District Court was that of a lawyer on behalf of the respondent only, and that there was no other evidence called by the applicant to contradict that evidence. It was on those deemed findings of fact as to US law that the learned judge considered that the district judge had erred in not releasing the respondent, but it is made clear that the case may not have any precedential value. I would readily and respectively concur with that view."

60. Peart J. considers the scope and effect of the *Burns* decision. He noted that the district judge made a finding of fact to which the High and Supreme Courts were confined to the effect that under the United States law a person could be punished for an offence other than that for which his extradition was ordered. It was on that basis that relief was granted on appeal. However, he stated:

> "The question which arises for determination in the present case is whether a person is in fact being punished for "*an offence other than that for which his extradition has been granted*" if in respect of the offence for which his extradition was granted he receives a sentence which reflects all the circumstances of that offence including the fact that he did not answer to his bail. If that be the position, does it follow also that extradition would have to be refused, if a person whose extradition is sought for an offence, has previous convictions in the requesting state either for the same type of offence or different offences, since such a person in all probability would receive a heavier sentence or punishment than a person who is being sentenced or punished for a first offence? I do not believe so. Mr. O'Connell argues that this is not the position since it is only in respect of unindicted conduct that is taken into account that there would be a breach of the rules. But in my view that is not what is stated in Article XI, which refers specifically to any other offence, and makes no reference to conduct as such.
>
> I am satisfied that the words used in the Treaty mean simply what they say, which is, for the purposes of this particular issue, that a person must not be punished in respect of any offence other than the offence for which extradition was granted.
>
> But I am satisfied that under the Sentencing Guidelines, a trial judge may enhance a base level sentence for the extradition offence, or indeed impose an exceptional sentence in circumstances where in all the circumstances he/she considers the sentence under the Guidelines to be too lenient, and that such upward movement in the level of sentence can take account of other conduct of the respondent, including conduct which may have its factual background in the non-extradition offences, whether offences for which extradition was actually refused or not, or even

> uncharged and unproven conduct. In the present case I am satisfied that such matters have the capacity to enhance the respondent's sentence should he be convicted. The extent by which any sentence may be enhanced does not really matter as far as my decision is concerned.
>
> But I am also satisfied that the taking into account of such other conduct for the purpose of calculating or arriving at the appropriate sentence or punishment for the extradition offence, even if it could give rise to another offence if charged, does not amount to punishment for another offence, but is simply a process by which the appropriate sentence for the extradition offences is arrived at. It is not therefore a breach of the rule of specialty."

61. The learned judge was also satisfied that though the Sentencing Guidelines permitted upward movement from a base level sentence, they did not thereby effect a breach of specialty since whatever penalty was imposed as the appropriate sentence in respect of the extradition offence would take into account all matters relevant to the level of sentence. It was not punishment imposed in respect of a non-extradition offence. Peart J. relied on two persuasive English decisions on this point *R (Bermingham and others) v. Director of the Serious Fraud Office* [2006] All ER 268 and *Welsh and Thrasher v. Secretary of State for the Home Department* [2006] All ER 289 which dealt with the same issues in a manner of which he approved and applied.

62. The Supreme Court upheld and approved the judgment of Peart J (*Attorney General v Russell* unreported Supreme Court; *ex tempore*, 13th October 2006). A similar argument was rejected by Donnelly J. in *Attorney General v. Damache* [2015] IEHC 339 at paragraph 7.5.7. applying the principles in *Russell*.

63. The respondent has chosen to address this matter by way of legal submission rather than expert evidence. Reliance is placed upon the Federal Sentencing Guidelines (U.S.S.G 1B 1.3) which provide (*inter alia*):

> "In the case of a jointly undertaken criminal activity … all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity that occurred during the commission of the offence of conviction, in preparation for that offence or in the course of attempting to avoid detection or responsibility for that offence; all harm that resulted from the acts or omissions specified … above and all harm that was the object of such acts and omissions may be taken into account at the sentencing stage."

64. Thus the respondent fears not only that he may be punished for matters in respect of which he is not extradited but that matters which occur outside the period of his alleged involvement in the conspiracy may be used to enhance any sentence ultimately to be imposed upon him, if convicted. I do not consider that there is any evidence beyond the assertion made in the submissions that this is so. The only evidence in relation to sentencing guidelines indicates that they are advisory and not binding upon the judge imposing sentence who retains a full judicial discretion in that regard. Indeed a claim made in the submission that this may result in some form of disproportionate sentence is not borne out by the sentence which was actually imposed on one of Mr. Davis's co-defendants, a Mr. Nash who was also alleged to have served as a member of the Silk Road customer support staff and received a sentence of seventeen months imprisonment and was not involved for the full duration of the alleged conspiracy. In the circumstances I am not satisfied that the respondent's extradition would breach the rule of specialty.

65. I also reject the submission that the applicant will be exposed to a potential

mandatory sentence in respect of Count 1 which would be unfair, disproportionate or unconstitutional if applied in this jurisdiction on the basis of the principles set out in the Stapleton case.

Failure to Prosecute

65. The respondent submits (notwithstanding some inconsistency with the grounds advanced concerning correspondence) that extradition should not be granted because the offences with which the respondent is charged were allegedly committed in Ireland. Previously, s. 15 of the Extradition Act 1965, precluded the extradition from Ireland of a person charged with an offence which was committed in the State. I am satisfied that s. 15 has no application in this case. In order to have any application, the offence for which extradition is sought must be an offence "wholly" or "entirely" committed in Ireland (see *Attorney General v. Pocevicius* [2015] IESC 59). Clearly, the affidavits submitted contain evidence of commission of the offence in the United States, including evidence of undercover operations in the course of which contraband materials were supplied to agents in the United States. Section 15 of the 1965 Act no longer applies having regard to its substitution by section 27 of the Extradition (Amendment) Act 2012. This precludes extradition if a prosecution is under consideration or pending in Ireland. Furthermore, there is no evidence of any refusal by the Director of Public Prosecutions to prosecute offences in Ireland and no challenge by way of judicial review to any such decision (see *Damache v. DPP* [2014] IEHC 114). In addition, though the respondent claims that the former s. 15 applies because the alleged conspiracy dates back to 2011, the indictment restricts the alleged involvement of the respondent as site administrator to between 6th June, 2013 and 2nd October, 2013. I am satisfied that there is no substance in this ground.

Health Issues

66. In paras. 17 to 20 of the points of opposition the respondent claims that he has Asperger's Syndrome and a "depressive" and/or "generalised anxiety" disorder. He claimed that since childhood and throughout his adolescence he has exhibited symptoms of Asperger's Syndrome. It is submitted that his extradition, as a person living with this syndrome and suffering from mental ill health, would place his health and life at grave risk. The applicant is fearful of the effect of prison conditions upon his health if subjected to pre-trial detention or post conviction imprisonment. He does not anticipate that he will be released on bail if extradited because he has no right to reside or work in the United States, no means to support himself while there and no address at which to stay. He believes that he will be imprisoned in a maximum security facility pending trial, and following his conviction, and that conditions in such a facility will have a highly damaging effect on his mental health. It is also submitted that he would be subjected to an unlawful and unconstitutional sentencing process and a penal regime, which, if applied in Ireland would constitute a violation of his fundamental rights and in particular Articles 38, 40.3 and 40.4 of the Constitution. It is also claimed that his imprisonment in such facilities would be contrary to the rights guaranteed under Articles 3 and 8 of the European Convention on Human Rights and/or the provisions of the European Convention on Human Rights Act 2003.

67. The respondent's challenge to the proposed extradition is not a generalised challenge to the prison conditions that exist in federal prisons in the United States or in a particular prison, but is focused upon his mental vulnerabilities, health and the effect of incarceration upon him as a person who lives with Asperger's Syndrome.

68. Section 11 of the 1965 Act prohibits extradition for an offence which is a political offence, or one connected with a political offence, if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that person's position may be prejudiced for any of

these reasons. The section also provides that extradition should be refused if there are substantial grounds for believing that, if granted, the person may be subjected to torture. In addition, extradition must be refused if the evidence establishes that there is a substantial or real risk that the respondent's fundamental constitutional rights will be breached or not adequately protected or that it would give rise to a real risk of a breach of his Convention rights.

69. In *Finucane v. McMahon* [1990] 1 I.R. 165 the Supreme Court was satisfied that the applicant had demonstrated that there was a probable risk of ill treatment if he were returned to the Maze Prison in Northern Ireland and ordered his release in order to ensure that his constitutional rights and in particular his right to bodily integrity under Article 40.3 of the Constitution were protected.

70. In this jurisdiction the duty of the prison authorities to protect a prisoner's constitutional personal rights of health and bodily integrity was considered in *The State (C) v. Frawley* [1976] I.R. 365. The applicant, who suffered from a severe sociopathic disorder which caused him to commit acts of self injury and resulted in the prison authorities subjecting him to a rigorous regime for his own safety, applied for release under Article 40 on the basis that he was not accorded the medical attention which he desired and which expert evidence established was highly specialised and appropriate to his rare condition. Finlay P. held that the right to bodily integrity as a specified right operated to prevent an act or omission by the executive which without justification or necessity, would expose the health of a person to risk or danger. The executive had a duty "to protect the health of persons held in custody as well as reasonably possible in all the circumstances of the case …"

71. In *Minister for Justice and Law Reform v. S.R.* [2007] IESC 54 the Supreme Court considered whether there was a risk to the health and life of the respondent which precluded his surrender on foot of an application for extradition to the United Kingdom. It was established that the respondent had chronic impairment of heart muscle function and was at risk of developing heart failure. There was a possibility that stress could exacerbate his acute coronary disease and the medical recommendation was that it should, if possible, be avoided. The respondent underwent a number of operations which were successful but an acute coronary event "might well prove catastrophic in limiting heart function". The court interpreted that evidence to mean that an acute coronary event was likely to result in future limitation of the heart muscle function rather than a likelihood of fatality. The court concluded on the evidence that whether on bail or in custody the respondent would receive appropriate health care. Finnegan J. (delivering the judgment of the court) stated that he was satisfied that "something much more definite by way of threat to life would be required in this jurisdiction before the courts would involve Article 40.3.2 of the Constitution and prohibit a trial" or refuse extradition. The possibility of the precipitation of acute coronary disease caused by the severe stress of surrender was insufficient to justify a conclusion that the respondent was at any real risk of dying if placed in a situation of severe stress. In an earlier case, *Carne v. Assistant Commissioner Patrick O'Toole* (unreported Supreme Court 21st April, 2005) the applicant, a sixty-four year old man, suffered two strokes while in prison awaiting extradition. It was submitted that the stress to which he would be subjected in facing trial would endanger his health and that his medical condition would be aggravated and his health seriously endangered if he were to be incarcerated. A considerable body of medical evidence was adduced on his behalf. It suggested that he had difficulty in recollecting events. He had a previous stroke some years earlier and a history of heart disease. The court held that his medical condition did not constitute "an exceptional circumstances" for the purposes of the then applicable s. 50(2)(bbb) of the Extradition Act 1965.

72. In *Minister for Justice, Equality and Law Reform v. Johnston* [2008] IESC 11 the

Supreme Court rejected submissions that an application for surrender should be refused because of the respondent's medical or psychiatric condition. It was accepted by the court that his medical condition was serious. It was clear that he understood the nature of the charges against him and was competent to instruct solicitor and counsel to follow proceedings. It was also recommended in medical reports submitted that he should be treated as a vulnerable prisoner given his reported history of significant self-harm and a recommendation was made that in the event of his surrender his psychiatric condition as well as the risks of suicide should be communicated to the appropriate authorities in Scotland. The court was satisfied that the respondent was receiving appropriate medical care in this jurisdiction which would continue until his surrender. The court noted that the authorities in the United Kingdom at all levels were obliged to protect the respondent having regard to his medical and psychiatric condition. In that case there was no evidence to suggest that he would not be fully assessed and treated for his particular medical and psychiatric difficulties upon surrender or that his mere surrender in itself would have serious medical effects.

73. In both *S.R.* and *Johnston* the Supreme Court considered the issues in the context of s. 37(1)(b) of the European Arrest Warrant Act 2003 including whether the respondents' surrender would be in breach of their constitutional rights to life and/or bodily integrity and whether surrender would constitute a serious risk to their health. The conclusion reached by the Supreme Court in both cases was that the right to life and bodily integrity of the respondents must be considered and balanced with the State's obligation under the Framework Decision.

74. In this case it is claimed that following the applicant's transfer to the United States he is likely to be imprisoned in conditions which will cause serious damage to his mental health and probably his life. The onus is on the applicant to establish this threat as a matter of fact on the basis of cogent evidence. The cases of *SMR* and *Johnston* indicate the high threshold which the respondent must reach in order to satisfy the court that extradition should be refused on health grounds. The *C* case defines the scope of a prisoner's constitutional right in this jurisdiction, the obligations imposed on the executive and the level of protection that Irish courts require for the protection of the rights to health and bodily integrity under Article 40.3.

75. The respondent also invokes Article 3 and Article 8 of the European Convention on Human Rights. The respondent claims that his extradition to the United States will expose him to a real risk of inhuman and degrading treatment under Article 3 and a risk to his right to private and family life under Article 8 because of the consequences of imprisonment before trial and if convicted, post-trial. It is submitted that he is perceived medically as at a heightened risk of suicide if extradited and imprisoned.

76. Article 3 of the European Convention on Human Rights provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The entitlement to protection under Article 3 is absolute and is not subject to a consideration of the proportionality of the respondent's surrender.

77. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety

> or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

78. In *Minister for Justice v. Altaravicius* [2006] 3 IR 148 and *Minister for Justice v. Stapleton*, the Supreme Court recognised that extradition arrangements whether with Member States of the European Union or States outside the Union, implies a level of mutual political trust and confidence in the legal systems of the cooperating States. The existence of an extradition arrangement entitles the court to presuppose that the Government and the Oireachtas are satisfied that an Irish citizen extradited to the United States will not have his constitutional rights impaired (per McCarthy J. in *Ellis v. O'Dea (No. 2)* [1991] I.R. 251 at 262).

79. In *Attorney General v. O'Gara* [2012] IEHC 179 Edwards J. considered the approach to be taken to objections to surrender based on fundamental rights whether they arise under the Constitution or rights assured under the European Convention on Human Rights in respect of an extradition to the United States. Though the learned judge acknowledged the presumption created in European Arrest Warrant cases that the fundamental rights of a respondent will be respected if extradited, he did not consider that as strong a presumption applied in "conventional" extradition cases, to countries outside the European Arrest Warrant system. He stated:

> "This is because the whole European Arrest Warrant system is built and predicated upon the notions of mutual trust and confidence between member states, and mutual recognition of judicial decisions, and there is a continuing and ongoing commitment to abide by these principles as expressed in the recitals to the Framework Decision, including Recital 12 thereto which expressly states that the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. … Such is the level of mutual trust and confidence in other member states … that the Oireachtas has given statutory effect to the presumption that arises … Neither the Extradition Act 1965, nor the Washington Treaty contains a comparable provision. That is not to say that no presumption at all arises, but as the Court has stated it is very much weaker and more easily rebutted than is the case under the European Arrest Warrant system. Furthermore, it needs to be emphasised that rebuttal of the presumption does not of itself establish the existence of a real risk. It merely means that the court is put on enquiry as to whether there is a real risk."

80. Nevertheless, it is clear that there is such a presumption and the learned judge also emphasised that the principles adumbrated by the Supreme Court in *Minister for Justice v. Rettinger* [2010] 3 IR 783 applied, with some modifications, as set out at pages 54 to 56 of the judgment. These principles insofar as they are relevant to this case are as follows:

> (a) The objectives of the [Washington Treaty] cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3.
>
> (b) The court must inquire as to the level of danger to which the person is exposed.
>
> (c) The respondent must establish that there is a real risk that he will suffer inhuman or degrading treatment. It is not necessary to establish that he will probably suffer inhuman or degrading

treatment but a mere possibility of ill treatment is insufficient.

(d) The respondent bears an evidential burden of adducing cogent evidence capable of proving that there are substantial grounds for believing that if he were returned to the requesting country he would be exposed to a real risk of being subjected to treatment contrary to Article 3.

(e) If there is evidence from the applicant as to the conditions in prisons of the requesting State and no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if returned to the requesting State he would be exposed to a real risk of treatment contrary to Article 3. It is open to the requesting State to dispel any doubts by evidence but that does not mean that the burden has shifted in respect of such conditions.

(f) The court should examine the foreseeable consequences of sending a person to the requesting State.

(g) The court may attach importance to reports of independent international human rights organisations in reaching it's conclusion in much the same way as country of origin information is used in immigration and asylum cases.

(h) A court should examine the existence of a real risk by way of rigorous examination of the material before it and if necessary material obtained of its own motion.

81. In *Minister for Justice and Equality v. I.S*. [2015] IEHC 36 Edwards J. set out a number of principles relevant to the approach which a court should adopt when it is alleged that the surrender of a person suffering from mental health difficulties would breach that person's Article 8 rights, as follows (at pages 51-57):-

"1. The test imposed by Article 8(2) is not whether extradition is on balance desirable but whether it is necessary in a democratic society;

2. There is no presumption against the application of Article 8 ECHR in extradition cases and no requirement that exceptional circumstances must be demonstrated before Article 8 grounds can succeed;

3. The test is one of proportionality, not exceptionality;

4. Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;

5. In conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;

6. Rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;

7. In the required balancing exercise, the public interest must be properly recognized and duly rated;

8. The public interest is a constant factor in the horizontal sense, i.e. it is a factor of which due account must be taken in every case;

9. However, the public interest is a variable factor in the vertical sense, i.e. the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;

10. No fixed or specific attribution should be assigned to the importance of the public interest in extradition, and it is unwise to approach any evaluation of the degree of weight to be attached to the public interest on the basis of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. That said the public interest in extradition will in most cases be afforded significant weight;

11. The gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. …;

12. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the court is required to adopt a different approach to Article 8 ECHR rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case;

13. …

14. In so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure, both in terms of the legitimate aim or objective being pursued, and the pressing social need which it is suggested renders such interference necessary;

15. It is self-evident that a proposed surrender on foot of an extradition … will … result in the requested person being arrested,

possibly being detained in custody in this State for a period of time pending transfer to the requesting State, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial), and/or may have to serve a sentence in the requesting state. Such factors, in and of themselves will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will be of little avail to the affected person;

16. Article 8 does not guarantee the right to a private or family life. Rather, it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both the legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and in breach of the affected individual's rights under Article 8;

17. It will be necessary for any court concerned with the proportionality of a proposed extradition measure to examine with great care, in a fact specific enquiry, how the requested person, and relevant members of that person's family, would be affected by it. In particular, it will be necessary for the Court to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person;

18. Such an exercise ought not to be governed by any predetermined approach or by preset formula; it is for the court seized of the issue to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise;

19. The demonstration of exceptional circumstances is not required to sustain an Article 8 ECHR type objection because, in some cases, the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected persons or persons, rather than on the circumstances giving rise to those consequences."

These principles must be applied to the facts of any particular case which, of course, may vary.

Medical Evidence

82. The evidence adduced by the respondent concerning the state of his mental health consists of affidavits from his solicitor, Mr. McErlean, Prof. Michael Fitzgerald, Prof. Simon Baron-Cohen, from Dr. Ciara Kelly, concerning medical records, and from Ms

Claire Grealey and Ms Mary O' Doherty concerning school reports. There is also a report from an addiction counsellor exhibited in his solicitor's affidavit. There was no affidavit by the respondent or any member of his family attesting to any of the matters set out in the reports submitted in respect of his mental state or the symptoms of Asperger's Syndrome of which he complains.

83. The applicant was born on 27th February, 1988 and has one brother who is four years older and three sisters. He attended national school between 1992 and 2000. His record of attendance indicates an average absence of approximately twenty days out of 183 school days per annum. He then attended secondary school completing his Junior Certificate with good grades in a number of higher level papers. Thereafter, he completed his Leaving Certificate in 2006, and sought to improve his results by attending the Institute of Education in 2006/2007. He was absent for a considerable number of days and his attendance there was not a success. Thereafter, he states that he worked with his father in his engineering company in Bray for two and a half years operating machines. He was let go in 2008 or 2009. He took a computer programming language course which he completed and obtained a certificate.

84. The medical records obtained from Dr. Ciara Kelly indicated no mental health issues until 14th January, 2014. The note states:-

> "Loss of motivation, low mood, difficulty sleeping, especially initial insomnia. Poor school performance from mid-teens. H/O low mood from 14y, school refusal in teens. Friend suicide when Gary was 18y, brother in law suicide when Gary was 22y. Strong FHx depressive illness. Not worked past 12+12, previously worked with father. Reports 'lack of empathy', 'excessive computer use'."

85. The general practitioner consulted raised the question whether Mr. Davis had an unspecified organic or symptomatic mental disorder or depressive illness and the issue of Asperger's Syndrome. He was referred to Prof. Michael Fitzgerald, Consultant in Child and Adolescent Psychiatry. Prof. Fitzgerald's report was received in the practice on 27th January, 2014, and he prescribed Fluoxetine to Mr. Davis for depression.

86. It is clear that the report prepared by Prof. Fitzgerald was in the context of a court case then pending in which Mr. Davis was charged with and pleaded guilty to a charge of possession of cannabis of a value "just under" €10,000 with intent to sell or supply. Mr. Davis later explained to Prof. Kennedy that Prof. Fitzgerald prepared and furnished a report for use in the Circuit Criminal Court at his sentencing hearing. He said that he was a user of cannabis who had developed large debt as a result of which he was selling cannabis to his friends. He said he owed €5,000. He received a three year suspended sentence in June 2015. His solicitor arranged for him to give voluntary tests over a period of time to the Community Addiction Response Programme (CARP) in Tallaght. He was arrested outside his residence with approximately €3,500 cash in his possession and in the course of a search, he directed the Gardaí to a suitcase in his wardrobe which contained the cannabis.

87. Prof. Michael Fitzgerald in a short report dated 21st January, 2014 based on an interview with the respondent and his sister wrote:-

> "This is to say that I saw Gary with his sister Natalie who is fifteen years older than he is. What emerged from the interview is that he meets the criteria for Asperger's Syndrome ICD10. He also has Depressive Disorder and Generalised Anxiety Disorder. The depression is of very long standing and has never been treated with medications like Fluoxetine 20mgs daily. He does worry every day, finds it hard to control the worry, the worry puts him on edge, affects his sleep, makes him lethargic, affects his sleep

and concentration and this would be Generalised Anxiety Disorder. In terms of depression he has low energy, poor concentration, poor appetite. In terms of Asperger's Syndrome ICD10, this has been evident since childhood and based on the history from himself and his sister there were problems in the past reading non-verbal behaviour, his own non-verbal behaviour was reduced and indeed described by his sister as blank. He is described as a loner, problems with social know how, naive and immature. He has narrow interests, obsessed with computers, so much that growing up he would soil himself rather than go to the toilet because he was so fixated on the computer.

Problems sharing, controlling and dominating, speaks with a monotonous tone of voice, preservation of sameness, sensory issues. This gives you Asperger's Syndrome ICD10 which could be helped by pragmatic language therapy, social skills therapy, mind reading skills therapy, help in social know how, help in seeing things from other people's perspective.

His depression could be treated with Fluoxetine 20mgs daily.

> In terms of his current difficulties with the law, it emerged that when he was eighteen, he had to cut a man down who had completed suicide. More recently, his brother in law also completed suicide and this brought back all the traumas of the first suicide. This led to his developing post traumatic type symptoms with poor sleep, excessive drinking and cannabis use. This was the precipitating factor which led him to be apprehended by the Gardaí and which he is currently in court. Since then he has gone to counselling and has not used cannabis since.
>
> I would be extremely grateful that these various factors could be taken into account during the court case.
>
> He is a person who is naive and immature and his Asperger's disability leads to doing things that are inappropriate and not fully realising it.
>
> In addition, the two suicides had a severe effect on his personality and it was really the second suicide which reactivated the memories of the first suicide that sent him down on this path of trying to deal with his psychological problems using cannabis and alcohol…"

88. The professor gave him the names of people who engage in Asperger type therapy. There is no evidence to suggest that this was availed of at any stage. There is no suggestion in the report of any particular risk to Mr. Davis if the Circuit Court were to impose a sentence of imprisonment upon him following his guilty plea in respect of this very serious offence or any particular difficulty that imprisonment might present to his mental health. The court imposed a suspended term of imprisonment.

89. At an earlier stage, between 26th January and early June 2012, Mr. Davis attended the All Trust Centre, Bray with Mr. Donal Kiernan, an Addiction Counsellor and Psychotherapist. This is the period of counselling referenced in Prof. Fitzgerald's report. He presented seeking help for cannabis abuse and episodic alcohol misuse. He was suffering from depression and was isolated from people. He was spending a lot of time on his computer. He had, at that stage, a criminal charge pending for possession of cannabis. He said that he ceased attending school due to bullying and harassment when he was about fourteen or fifteen years old and found comfort in computers and playing games. He outlined a traumatic incident in which he had been asked at age seventeen to assist in the taking down of a body of a young boy who had committed suicide. He was depressed about the later suicide of his brother in law. Mr. Kiernan believed that he was genuine in his attempts to get help for his cannabis use and episodic drinking. He

concluded that this use was an attempt to self medicate the experiences of school and the self inflicted deaths of the young boy and his brother in law. Since he consistently missed the nuances of conversational relationships, it came as no surprise to Mr. Kiernan that he was diagnosed with Asperger's Syndrome. His report is dated 20th November, 2015. Mr. Kiernan had ten to twelve sessions with Mr. Davis.

90. Mr. Davis' medical records indicate that he attended his general practitioner on a number of occasions in 2015, complaining of low mood and anxiety arising out of the extradition proceedings. He was given medication to address anxiety disorder. His Circuit Court case was also pending at the time. There was no attendance between 10th March, 2015 and 1st September, 2015. On 7th September, 2015, Mr. Davis attended his doctor seeking a print-out of his case practice notes. I note that these were unavailable to the court or indeed, Prof. Kennedy until the court specifically requested that they be obtained during the course of this hearing.

91. On 28th October, 2015, his mood was noted to be very low and his subjective symptoms were that he was "down, low, expressing ideas of suicide, no current intent". This was a reference to his increased fears regarding extradition to the United States. There are no other entries recording his attendance.

92. Prof. Simon Baron-Cohen, is Professor of Development Psychopathology at Trinity College, Cambridge. He submitted a number of affidavits on behalf of the respondent. In his first affidavit, having conducted his own assessment, he agreed with the diagnosis carried out by Prof. Michael Fitzgerald, whom he acknowledged to be a well known expert in Asperger's Syndrome, that Mr. Davis had Asperger's Syndrome. The professor conducted his assessment with Mr. Davis on 6th November, 2014 and it was, like Prof. Fitzgerald's report, based on information received from Mr. Davis and his sister and a test completed by his mother.

93. Prof. Cohen noted the account give by Mr. Davis' sister, Natalie, who has a sixteen year old son who also suffers from Asperger's Syndrome. He considered her to be a good source of information because of her experience with the syndrome. She gave her view that her brother showed signs of AS throughout his life. She was fifteen years older than him. She reported that Mr. Davis was bed wetting until his teenage years and that he would soil himself when on his computer because he became so obsessed with it that he could not stop to go to the bathroom. He developed scabs on his legs through soiling himself. She said that he was the fifth child and did not respond to reward or punishment. He had inflexible behaviour and always wanted things his own way. He would become very angry if he had to change or compromise. He would have frequent temper tantrums when he was younger. He resisted change and liked things the way they were. He showed highly repetitive behaviour. She reported that he had no friends as a child and was verbally bullied in fourth class. He used to spend sixteen hours per day on the computer and not sleep more than four hours from about 2-3am. Prof. Cohen indicated that these were classic signs of AS.

94. Mr. Davis furnished a history to Prof. Cohen. He stated that he did not make eye contact and does not interact with people in the normal way. He avoids noisy social situations and did not have friends at school. He said he dropped out of school at the age of sixteen years. He explained his obsession with computers and the fact that he spent all his time playing games. He described some obsessive behaviours such as wiping his feet before bed every night. He had difficulty tolerating background noise. Prof. Cohen noted that these symptoms, social difficulties, obsessions and sensory issues were classic signs of AS.

95. Mr. Davis reported to Prof. Cohen that he had attempted suicide at age sixteen by taking an overdose of pills which he vomited up. He said that he had been traumatised

by his brother in law's suicide in January 2011. He said when he was eighteen years old, he had to assist in the removal of a man who had hanged himself who was his neighbour's friend. He said that he was depressed and took Fluoxetine which was reduced from 20mg to 10mg per day. After his brother in law's death, he abused cannabis but because it made him more depressed, he went to an addiction counsellor. Prof. Cohen noted that depression is not a sign of Asperger's Syndrome but is a common consequence of it and indicated that Mr. Davis was "at risk". He also noted the family history as reported by Mr. Davis, that his father (an engineer) had signs of AS and that his grandmother had depression as did his mother, her two sisters and five brothers and his sisters. He believed that this increased his risk level for "mental illness and risk of suicidality".

96. Mr. Davis reported that if he were extradited he would not be able to cope and his depression would worsen because he would lose his family support. He said he is terrified of extradition because he would be placed in solitary confinement. Prof. Cohen comments as follows:-

> "Given his fear of extradition and fear of solitary confinement, I am very concerned of the risk to Gary's mental health of being placed in a US prison. Given he has had depression since at least aged sixteen, and remains depressed, there is a significant risk that he will deteriorate further if extradited. He has highlighted that he would lose his family support upon which he is highly dependent. As a man with AS, he would also experience high levels of stress in a US prison, because of the sensory overload (prisons are very noisy environments), the unfamiliarity (people with AS often experience a breakdown when their environments change unexpectedly), and because he may be vulnerable as a potential victim of bullying by other prisoners because of his odd social behaviour. He would also likely be less able to defend himself against such victimisation because people with AS, … lack the 'street smarts' or social skills to evade or resist aggression."

97. Prof. Baron-Cohen concluded his report with the following opinion:-

> "There is no doubt in my mind that Asperger's Syndrome is the correct diagnosis for Gary. He remains at suicidal risk. He claims he is innocent and that it is a case of mistaken identity. In my opinion, requiring him to be extradited to stand trial in the US would pose a serious risk to his mental health and would be totally inappropriate for such a vulnerable young man with this disability."

98. The court sought further information on Mr. Davis' condition from Prof. Baron-Cohen who helpfully supplied an additional affidavit in response. The professor was asked to indicate the level of severity of Mr. Davis' Asperger's Syndrome. He stated that in his original report he noted that Mr. Davis' score on the Autism Spectrum Quotient was extremely high, on the Empathy Quotient, it was extremely low and on the Childhood Autism Spectrum Test (completed by his mother), it was extremely high. The scores achieved were not marginal but were "the most extreme scores I had seen". He stated:-

> "In my opinion, his Asperger's Syndrome is very severe in that he struggles to live independently, depends to a great extent on his family, (in) particular his sister, and his Asperger's Syndrome affects his social judgment so that he ends up in situations that could be misinterpreted by others to his detriment. Most worrying are his levels of depression that as mentioned earlier are not uncommon secondary consequences of his Asperger's Syndrome. This is not just at ordinary levels of sadness, but are signs of serious mental ill health. As for how this might affect his ability to be extradited, it is clear that he feels extradition would be impossible and that extradition could precipitate a suicide attempt."

99. He remained very concerned about Mr. Davis' mental health and assumes that the length of time the legal case was taking would exacerbate his depression and add

extreme stress and unpredictability, "the latter being toxic for someone with Asperger's Syndrome". He was asked to comment on how a US prison might affect Mr. Davis and stated that he was aware that US prisons can offer patients with mental health issues relevant psychiatric support but considered this to be irrelevant:-

> "…because the very idea of leaving his family and leaving Ireland is causing Gary such stress, as well as his fears of how he would be treated in a US prison, that in my opinion there are grave risks in trying to extradite him."

He read a report entitled "GAO-12-743 Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates" and was concerned that since Mr. Davis could not cope with social crowds, the experience of prison would be extremely stressful and "could trigger a suicide attempt".

100. Prof. Baron-Cohen helpfully exhibited a copy of an article which he co-authored on "Suicidal Ideation and Suicide Plans or Attempts in Adults with Asperger's Syndrome attending a Specialist Diagnostic Clinic: a Clinical Cohort" (Lancet Psychiatry, 2014). This was a survey of data from adults newly diagnosed with Asperger's Syndrome at a clinic between January 2004 and July 2013 in England. The rate of suicidal ideation in the sample was compared with published rates of suicidal ideation in the general population. Associations between depression, autistic traits, empathy and the likelihood of suicidal ideation and suicide plans or attempts were also assessed. The study found that adults with Asperger's Syndrome were significantly more likely to report life time experience of suicidal ideation than were individuals from a general UK population sample, people with one, two or more medical illnesses or people with psychotic illnesses. Compared with people diagnosed with Asperger's Syndrome without depression, people with Asperger's Syndrome and depression were more likely to report suicidal ideation and suicide plans or attempts. It was concluded that the study lent support to anecdotal reports of increased rates of suicidal ideation in adults with Asperger's Syndrome and depression as an important potential risk factor for suicidality in adults with this condition. The article concluded that on the basis of these findings, services should be alerted to the high lifetime risk of suicidal ideation and suicide plans or attempts, especially in individuals receiving a late diagnosis of Asperger's Syndrome, in view of the substantial risk in this group.

101. Mr. McErlean stated in his affidavit, that Mr. Davis instructs him that he finds the prospect of being taken away from his family and girlfriend, as "absolutely terrifying" as this is the only place where he feels comfortable. He instructs his solicitor that he is not mentally strong enough to cope with the pressures of the judicial or penal system as it operates in the United States nor its likely oppressive effects on him as a person with Asperger's Syndrome.

102. Mr. Davis was also examined by Prof. Harry Kennedy, Consultant Forensic Psychiatrist and Executive Clinical Director of the Central Mental Hospital and Professor of Forensic Psychiatry at Trinity College Dublin. He also interviewed Mr. Davis and his sister, Natalie Davis. He took a family history. Mr. Davis informed him that his eldest sister, Natalie, was fifteen years older. She lived nearby with her four children. She had trained as a psychiatric nurse and subsequently ran a Montessori school. She now works as a teacher/tutor in a special scheme for early school leavers. Her eldest son has Asperger's Syndrome and her youngest son had Attention Deficient Hyperactivity Disorder. Mr. Davis indicated that she had been a great help to him because of her own experience of Asperger's Syndrome. He gave a similar history of depression within the family to that described by Prof. Baron-Cohen.

103. Prof. Kennedy in his opinion expresses serious reservations about various aspects of the history and diagnosis made by Prof. Baron-Cohen. He concludes that although a diagnosis of Autism Spectrum Disorder/Asperger's Syndrome may be correct it is so mild as to be of no practical significance. He criticises the complete absence of sources

of contemporary, independent and validated observations concerning childhood and adolescent development which, if available, might lend considerable support to the diagnosis made. School records had not been supplied. There were no childhood tests or public health nurse records of developmental checks disclosed.

104. Prof. Kennedy stated that the diagnostic criteria relevant to Asperger's Syndrome include abnormal or impaired development evident at or after the age of three in language used in social communication, the development of selective social attachments and functional or symbolic play. However, there was no evidence of any of these traits. There was no evidence of any qualitative abnormality in reciprocal social interaction or communication or restricted repetitive or stereotypical patterns of behaviour, interests and activities. Prof. Kennedy did not regard Mr. Davis' preoccupation with technology and computers as extreme enough to merit the diagnosis. No specific examples had been given of clearly abnormal behaviour concerning failure adequately to use eye to eye gaze, failure to develop peer relationships, lack of socio-emotional reciprocity or lack of spontaneity in seeking to share enjoyment, interests or achievement with other people. He noted on the contrary, that Mr. Davis described normal social development of relationships with girlfriends and appeared on his own account to have been able to support an expensive use of cannabis over a period of time by dealing cannabis to friends. There were no specific examples of abnormally delayed spoken language. There were no examples of relevant failure to initiate or sustain conversational interchange and the professor considered that he conversed normally during a long interview.

105. At para. 3 of his report, Prof. Kennedy expresses considerable doubts concerning Mr. Davis' presentation:-

> "It is essential to bear in mind that Mr. Davis appears to have presented to clinicians for the first time ever only in the context of legal proceedings concerning cannabis. In this respect criteria have been put forward in the standard diagnostic systems for differential diagnoses that should reasonably be considered in relation to abnormal illness behaviour.
>
> • In spite of the absence of objective evidence, a diagnosis of autism spectrum disorder ASD/Asperger's may be correct, though only if it is so mild as to be of no practical significance. This is because it is of the nature of the retrospective diagnoses of Asperger's syndrome that it is almost impossible to rule out completely. Any educational and work related withdrawal or other apparent functional impairment however is more likely explained by cannabis use and family issues.
>
> • Factitious disorder (ICD-10 68.1) is the intentional production or feigning of symptoms or disabilities either physical or psychological. These occur when the individual exhibits a persistent pattern of intentional production or feigning of symptoms when no evidence can be found for an external motivation such as financial compensation, escape from danger or more medical care.
>
> • Malingering (ICD-10 Z76.5) should be considered when feigning of symptoms or disabilities is suspected in the context of an obvious external motivation. The American diagnostic and statistical manual (V65.2) says that malingering should be strongly suspected if any combination of the following is noted:

> (a) Medical legal context of presentation for example the person is referred by an attorney to the clinician for examination (this may be the case in relation to Mr. Davis's first presentation to Prof. Fitzgerald).
>
> (b) Marked discrepancy between the person's claimed stress or disability and the objective findings. I note Mr. Davis's minimal if any impairments in function and his apparently extreme scores on Prof. Baron Cohen's test.
>
> (c) Lack of cooperation during the diagnostic evaluation. I am at a loss to understand why general practice, school and other relevant conterminous records have not been disclosed.
>
> (d) The presence of antisocial personality disorder. I note that based on the limited information available to me, Mr. Davis appears not to meet the strict diagnostic criteria for antisocial personality disorder."

106. Prof. Kennedy notes that all imprisonment is stressful and involves separation to a greater or lesser degree from friends and family. The Irish prison service has no special services provided for people with Asperger's Syndrome. Although there has been a series of surveys of suicides amongst prisoners he was not aware that Asperger's Syndrome had ever been linked to a suicide in the Irish prison service although there are many associated with substance misuse and some associated with mental illness. He noted that the suicide rate in US prisons (for sentenced prisoners as distinct from remanded prisoners) was reported to be as low, or lower than suicide rates in the community. He also noted that threats of suicide are inherently instrumental (goal directed), the products of reasoned intention. While there is a duty of care on prison authorities to prevent expressive, impulsive suicide arising from mental illness when compared with mental capacities, it is not possible for either prison services or mental health services to prevent all deliberate intentional and planned acts of suicide arising from clear consciousness and intact mental capacities. This significant difference in opinion lead to a further affidavit from Prof. Baron-Cohen.

107. In an affidavit of the 13th July, 2015 Prof. Baron-Cohen recites a number of statements made by Prof. Kennedy and simply follows them with the comment "this does not follow", without elaboration. In commenting on Prof. Kennedy's opinion section he states as follows:-

> "In his opinion section, under point 2, the report uses criteria that are applicable to classic autism (which Gary does not have) but not Asperger's Syndrome (which I diagnosed him to have). The signs of Asperger's Syndrome are much more subtle than the extreme symptoms of classic autism. One does not expect to see the symptoms Dr. Kennedy lists (such as total lack of development of spoken language) in Asperger's Syndrome, and simply by listing such symptoms in 2.4.3 and the subsequent sections, Dr. Kennedy is revealing his lack of expertise in this field. Saying that no examples of abnormally intense preoccupations have been shown to be present in Gary's behaviour (2.4.7) makes no sense given that earlier Dr. Kennedy noted that as a child, Gary would become so preoccupied on the computer that he would soil himself, because he did not want to stop playing on the computer to go to the bathroom. Surely such examples are abnormal in their intensity."

108. Prof. Baron-Cohen also states that the specialist clinic in Cambridge was one of the first to diagnose Asperger's Syndrome in adults in the United Kingdom and perhaps internationally and had diagnosed over a thousand patients since its inception. He stated that Mr. Davis was extremely typical of the cases of Asperger's Syndrome seen in the clinic.

109. Prof. Kennedy in a further report of the 13th October, 2015 made a number of critical comments on Prof. Baron-Cohen's diagnosis and criticises aspects of his methodology. Prof. Kennedy notes that Prof. Baron-Cohen has diagnosed Mr. Davis's Asperger's Syndrome as very severe in that he struggles to live independently and depends to a great extent on his family and that his Asperger's Syndrome affects his social judgment. Prof. Kennedy notes that Prof. Baron-Cohen gave no concrete examples in support of these points and that there was no objective corroboration for any of them based on any independent sources such as school reports. He adds that the conclusion does not appear to have taken into account Mr. Davis's relationship with his girlfriend, his other friends and his apparent success as a dealer in cannabis and other relevant matters. He also notes that there is no independent source of information to support Mr. Davis's assertions concerning sleep, appetite, anxiety and mood.

110. In a particular reference to Prof. Baron-Cohen's rejection of his conclusions in his affidavit of the 13th July, 2015, Prof. Kennedy states his respectful disagreement with the Professor and adds:-

> "Prof. Baron-Cohen may wish to consider the necessity in normal clinical practice as well as forensic practice of obtaining independent objective evidence. It is normal clinical practice not to rely on subjective self report evidence. It is also normal clinical practice to make assessments based on information specific to the individual in hand (including observation, signs and symptoms) and not a generalisation."

111. Prof. Kennedy also comments on Prof. Baron-Cohen's reference to the prevalence of suicidal feelings and thoughts amongst adults said to have Asperger's Syndrome as follows:-

> "He makes no comparison with normal populations. Once again, suicidal feelings and thoughts are not evidence of or related to functional mental incapacities of any sort. He comments "a person with autism who has limited language and significant learning difficulties may in contrast be more content and less socially aware that they are experiencing social exclusion …". This is speculative, inferential and generalisation. Prof. Baron-Cohen makes no direct connection between this line of reasoning and Gary Davis."

112. In a further affidavit Prof. Baron-Cohen states that he found the suggestion that Mr. Davis might be malingering "surprising". He questioned whether Prof. Kennedy could be regarded as an expert at all in respect of Asperger's Syndrome and rejected his opinion that Mr. Davis might be "malingering" as "unwarranted". There is clearly a professional disagreement between Prof. Baron-Cohen and Prof. Kennedy as to the appropriate diagnosis for Gary Davis. No effort was made to cross-examine Prof. Fitzgerald, Prof. Baron-Cohen or Prof. Kennedy in respect of any of these differences, a fact upon which the Court commented during the course of the hearing. The Court had no affidavit evidence from Mr. Davis, any person who knew him or was in contact with him during his childhood, adolescence or short working life, or from his family concerning his behaviour and disposition over those years.

113. There is no evidence of any ongoing active treatment or counselling offered to, or availed of, by Mr. Davis in respect of his depression or anxiety which is said to involve suicidal ideation. Basic records concerning Mr. Davis's education, school attendance, and attendance with his doctor had to be requested by the Court and were only procured

and furnished after a considerable lapse of time.

114. I am satisfied having considered the evidence and the reasons set out in their respective reports to accept the evidence of Prof. Fitzgerald and Prof. Baron-Cohen, notwithstanding the misgivings of Prof. Kennedy, that a diagnosis of Asperger's Syndrome is appropriate. I accept this evidence in the knowledge that most of the material is self-reported and a number of unexplained inconsistencies have been identified by Prof. Kennedy.

115. The court is concerned that there is a complete absence of any evidence that Mr. Davis is in receipt of any on-going medical provision or treatment for depression involving suicidal ideation. Though he reports an attempt at suicide as a teenager, there is no objective evidence of this and it does not feature in Mr. Kiernan's or Prof. Fitzgerald's reports. The professor advised that Mr. Davis came back to see him for follow-up unless his general practitioner could arrange follow-up locally. He was given the names of people with whom he might engage in Asperger's type therapy. There is no evidence that he took advantage of this. He attended his general practitioner for a prescription on the 23rd April, 2014, and three further attendances are recorded on the 12th November, 2014 and 10th March and 1st September, 2015. Though he described himself as anxious and in a low mood and was prescribed medication, he disavowed suicidal thoughts. Even though there is an expression of suicidal thoughts in the last consultation on the 28th October 2015, no further steps were advised at that time though the possibility of admission for treatment was discussed. There is no evidence that Mr. Davis is under the active treatment of a psychiatrist or a psychologist. Prof. Baron-Cohen's and Prof. Fitzgerald's reports, helpful though they are, were prepared for the purpose of court proceedings and neither are actively engaged in the ongoing treatment of Mr. Davis.

116. I am not satisfied that the medical evidence establishes as a matter of probability that Mr. Davis presently suffers from depression accompanied by suicidal ideation of such a level and intensity that his trial on offences similar to the alleged offences could be stayed or prevented in this jurisdiction. He is not "unfit to plead". He pleaded guilty to a very serious offence in 2015 and faced the prospect of a lengthy custodial sentence in the Circuit Court without any dramatic deterioration in his mental health. It is not claimed that he does not comprehend the charges or is unable to give instructions in these proceedings or in respect of the charges laid in the United States. The respondent's case essentially is that if the Court makes an order extraditing him to the United States he will not be able to cope by reason of Asperger's Syndrome and because of depression and severe anxiety with pre-trial and post conviction incarceration and has expressed the view that he will chose to commit suicide in those circumstances. Apart from acknowledging and accepting Mr. Davis' assertion to that effect and the possible risk of such an occurrence, no attempt has been made to assist Mr. Davis nor has he sought any help from Prof. Fitzgerald or any other professional with this anticipated deterioration in his health. It is a deterioration that was not apparent during the 2015 case and will only arise because of the imprisonment which he may face if removed to the United States. Prof. Baron-Cohen regarded the respondent's removal from Ireland and imprisonment in the United States as giving rise to a real possibility of a dramatic deterioration in his mental health involving a risk of suicide. It is therefore appropriate to consider the considerable amount of evidence adduced as to how he would be treated if extradited.

Imprisonment

117. It is a normal part of the administration of criminal justice that persons who are lawfully convicted of criminal offences are liable to the imposition of whatever penalty is permitted by law including a sentence of imprisonment. In Ireland, as in the United States, a conviction is usually followed by a sentencing hearing. The antecedents of the

convicted person may be advanced to the sentencing judge as mitigation. The state of their health, mental and /or physical, will be taken into account when imposing sentence. That is what happened before the Circuit Court in 2015 when a suspended sentence was imposed on the respondent.

118. Under domestic law a person suffering from depression or Asperger's Syndrome may be tried, convicted and sentenced for a criminal offence notwithstanding the risks that he/she may face of removal from their family or home following arrest and detention in the course of an investigation, pre-trial detention as a result of the refusal of bail, or post-trial imprisonment following the imposition of a custodial sentence. A person may only be imprisoned following a judicial decision and the balancing of the respective rights and interests involved. A sentence is imposed after the proper exercise of a judicial discretion. In the case of murder a life sentence is mandatory following conviction. The minimum mandatory sentence of imprisonment must be considered in drugs cases of a certain value or possession of firearms in defined circumstances. The sentencing court is faced with a difficult decision in a case such as the respondent's. It is undoubtedly the case that deprivation of liberty is traumatic for a convict and his/her family. The courts have imposed prison sentences on elderly persons, young people with serious psychological problems or serious addiction issues (including some with life-threatening illness associated with drug-abuse) and people who are incapacitated or otherwise very ill. This includes those who suffer from mental ill-health, including acute depression. These circumstances are frequently advanced on behalf of the convicted person as part of a plea in mitigation and if successful, may result in a reduction of the term of imprisonment from that which might otherwise have been imposed. It is then the duty of the executive to ensure that the sentence is carried out. It must do so with due regard for the right to health and bodily integrity of those in custody as defined in the *C* case already referenced. This entire process is regulated by the Constitution, legislation and the common law.

119. I set out these obvious facts because it is the court that ultimately determines the appropriate sentence in a proportionate way, independently and with due regard to the evidence. The assertion by the accused that if sentenced to a term of imprisonment he will seek to take his life , if taken at face value and genuinely asserted, must be properly regarded as a manifestation of his illness which may be taken into account at the sentencing stage. It is not something that of itself could be regarded as sufficient to justify the staying of a trial or dictate or determine the sentence to be imposed. It is an unfortunate fact of life that persons who may be at risk of, or develop a risk of suicide are imprisoned from time to time. If there is such a risk it falls to be managed by the prison authorities by providing appropriate medical intervention if necessary by removal for psychiatric care. The administration of criminal justice within these principles is authorised and mandated under Articles 34, 38 and 40.3 of the Constitution. This is the constitutional framework within which the respondent's claim must be measured when he asserts his right to a fair trial, bodily integrity and health in opposing his extradition.

Sentencing

120. Mr. Herbert J. Hoelter is the Chief Executive Officer and co-founder of the National Centre on Institutions and Alternatives (NCIA) in the United States and directs its sentencing and prison consulting services. He has wide experience of the Federal Prison Service and federal sentencing procedures. He holds a Master of Social Work degree from Marywood College, Pennsylvania and served as an adult faculty member at the American University and on the faculty of the National Judicial College. He was asked to give his professional opinion concerning the respondent's extradition on a number of issues including the potential sentence to which he is exposed if convicted. He provided an analysis of federal sentencing guidelines in respect of the charges laid in the indictment. He is not a qualified lawyer or an expert in United States law. He accepted that these guidelines were advisory only but were a reliable guide to the sentence that

might be imposed on the respondent if convicted. Mr. Hoelter noted that Mr. Davis was exposed to the following guideline calculations for each offence. The guidelines allowed for the allocation of points which suggested the range of sentence applicable. He stated that on count 1, narcotics conspiracy, a sentencing guideline range of 121-151 months was appropriate: it also carried a statutory minimum prison sentence of 120 months. Count No. 2, computer hacking carried a guideline range between 27-33 months or 121-151 months depending upon the amount of revenue for which Mr. Davis might be held responsible. Count No. 3 the money laundering conspiracy, yielded a sentencing guideline of 41-51 months or 188-235 months based upon the offence level for the underlying offence from which laundered funds were derived. He also stated that the guidelines provide for a calculation for multiple counts as well as a potential reduction for acceptance of responsibility. He estimated "based upon the multiple account calculation" that Mr. Davis might receive a sentence with an estimated guideline range of 151-188 months or 235-293 months based upon various factors within the guidelines. He might also be eligible for an acceptance of responsibility adjustment if he accepted a guilty plea to the charges. If he were granted this adjustment, Mr. Davis would have an estimated total offence guideline range of 108-135 months or 168-201 months. He states that the severity and length of the sentence that Mr. Davis is likely to receive if convicted is completely disproportionate to a sentence he would likely receive in Ireland and contradicted any human rights obligations owed to him especially in the light of the diagnosis of Asperger's Syndrome. He noted that the United States sentencing guidelines were "ill-equipped to provide any rehabilitative function to a person with Asperger's".

121. It is clear that the respondent does not claim that he is suffering from mental ill-health or AS such that it renders him "unfit to plead" to the charges against him. He is fully capable of understanding the charges, the evidence against him, these proceedings and trial procedures. He has furnished full instructions to his solicitors and is clearly able to participate in this case. No issue arises about his competence as a witness. It is not claimed that there is any basis upon which to raise or maintain the "insanity" defence as understood in Irish law under the provisions of the Criminal Justice Act 2006. His AS and depression are said to be relevant in the context of pre-trial and post trial imprisonment in a US prison.

122. Mr. Turner accepts that if convicted Mr. Davis will be subject to the sentencing guidelines but notes that as a matter of law they are purely advisory (*United States v. Booker* 543 US 220 (2005)). A sentencing judge retains discretion to sentence a defendant at any point within the minimum and maximum allowable by statute. For example, Philip Nash, a co-defendant with Mr. Davis in the indictment pleaded guilty to counts 1 and 3. He served as a member of the Silk Road customer supply staff and was extradited from Australia. He pleaded guilty in March 2015 in respect of the narcotics and money laundering conspiracy counts. A probation officer's report determined that the guideline of 121-151 months was applicable. However, he was sentenced to time served, 17 months imprisonment. Mr. Nash was described as a "primary moderator" on Silk Road. He was alleged to have been responsible for monitoring user activity or discussion forums associated with the site, provided guidance to forum users as to how to conduct business and reported any significant problems on this forum to the site administrators. Mr. Davis is indicted as a site administrator and is said to have been responsible for, among other things, monitoring user activity for problems, responding to customer service enquiries and resolving disputes between buyers and vendors.

123. Mr. Turner states that the guideline range applicable cannot be ascertained with certainty until a sentencing judge makes a specific finding on the matter. This will be based on a pre-sentence investigation prepared by the Probation Office of the United States District Court in respect of Mr. Davis's offence, conduct and criminal history. Mr. Turner notes that while count 1 carries a mandatory minimum sentence of ten years

imprisonment, United States federal law provides for relief from such mandatory minimum terms under certain circumstances. In the case of Mr. Nash, relief was granted because of his lack of criminal history, his low level role in the offence, the fact that he truthfully provided all information he knew about his offence to the government following extradition and certain other statutory factors. Mr. Nash became eligible for a so-called "safety valve" relief pursuant to Title 18 United States Code section 3553(f) which rendered the ten year mandatory minimum sentence inapplicable to him. It was also possible for a defendant facing a mandatory minimum sentence to negotiate a plea to a lesser offence that does not carry that sentence.

124. The concept of statutory minimum mandatory sentences from which relief may be given in certain circumstances is well established in Irish law in respect of controlled drugs and firearms offences. There is clear jurisprudence governing the factors that may be relied upon in such cases by way of mitigation to reduce the sentence below the minimum mandatory term.

125. I am not satisfied that the extensive criticism of the sentencing regime or the limited evidence adduced of the effect thereof establishes that, if extradited, there is a real risk of violation of the respondent's rights to fair procedures by reason of the sentencing guidelines or otherwise under Article 38 or 40.3 of the Constitution or his rights under the European Convention. It is inappropriate for this Court to engage in a detailed review of the application of sentencing guidelines, policies or penalties to be imposed under the laws of the United States or to require parity between the laws applicable in both jurisdictions before granting an extradition request. The court has already indicated that it is satisfied that the rule of specialty will not be breached if the respondent is extradited. The court is obliged in an individual case to examine a claim that fundamental trial rights will be violated if a person is extradited. However, the court is not satisfied that the sentencing law, principles and guidelines applicable in the Federal Court in this case could in any realistic way be regarded as giving rise to a real risk of violation of those rights. There is no evidence that they do not conform to the "exigencies of our Constitution" or that extradition would lead to a denial of the respondent's fundamental or human rights if tried, convicted and sentenced under the law of the United States.

Conditions of Confinement

126. Fears have been expressed by Mr. Hoelter and Prof. Baron-Cohen of the likely effects of incarceration in the United States on Mr. Davis. Mr. Hoelter states that Mr. Davis if extradited would be placed immediately in custody and transferred to the Metropolitan Correction Centre (MCC) a maximum security prison in Lower Manhattan, New York :-

> (a) It is claimed that because of (i) the offences charged, (ii) his Asperger's Syndrome disorder, (iii) as a foreign inmate from the Republic of Ireland in a high profile case, he would be placed in a Special Housing Unit (SHU) in the MCC. As a result he would be subjected to "extreme" prison conditions. He would be placed in an isolated cell for twenty-two to twenty-three hours per day, would be entitled to receive a one hour social visit per week and a maximum of two fifteen minute telephone calls per week (a maximum of three hundred minutes per month). He would be denied access to an e-mail connection because the charges laid against him involve the use of computers. There may also be an issue concerning the provision of medication currently prescribed.
>
> (b) Mr. Hoelter believes that Mr. Davis would remain for between six to eighteen months at MCC before legal proceedings reach the

stage of a plea agreement or trial.

(c) It is submitted that conditions at MCC would render Mr. Davis susceptible to bullying and violence from gangs in MCC, a lack of proper medical treatment, overcrowding, and invasive body searches and the use of restraints when being moved around the complex and to court.

127. Adam Johnson, Supervisory Attorney with the Federal Bureau of Prisons assigned to the MCC describes it as a pre-trial detention facility which houses inmates of all security levels and levels of functioning. He is responsible for the evaluation and resolution of various legal issues relating to MCC. He rejects the proposition that Mr. Davis would be housed in a special housing unit (SHU) as a matter of course. These are units where inmates are securely separated from the general inmate population either alone or with other inmates due to administrative detention status or disciplinary segregation status. He describes administrative detention status as a non-punitive administrative status in which an inmate is removed from the general population when necessary to ensure the safety, security and orderly operation of correctional facilities or to protect the public. An inmate may be placed in a SHU as a new arrival at MCC and pending a determination as to where he or she should be housed, pending transfer to another institution or location. Otherwise a prisoner may he paced in SHU if under investigation for violating a prison regulation or the criminal law within the prison or the inmate has requested or staff has recommended administrative detention status for his own protection. Mr. Johnson states that none of the factors cited by Mr. Hoelter namely an inmate's offence conduct, the fact that he has a psychological condition, that he is being extradited from a foreign country or the high-profile nature of the case operated as a basis upon which to house him in the SHU without some connection to the factors referred to above.

128. Mr. Johnson also states that inmates are housed in the general population at MCC and generally have access to recreational facilities within their housing units during daytime hours as well as periodic access to additional outdoor recreational facilities on the rooftop. There is no basis to suggest that he will be placed in an isolation cell and allowed out for no more than one to two hours per day for exercise. Furthermore, the mere fact that an inmate's offence involved the alleged use of a computer does not "necessarily imply that he will be denied e-mail access". These restrictions are determined on a case by case basis.

129. Associate Warden Eldridge of MCC also rejects Mr. Hoelter's assertion that Mr. Davis would be housed in a SHU upon arrival. Though he acknowledges that Mr. Davis' co-defendants were previously held in SHU upon arrival for about fifteen days in one case, and less than a day in another, he was satisfied that based on the information available to him, Mr. Davis would likely be housed in the general population.

130. The Chief Psychologist at MCC, Elisa Miller PsyD reviewed the earlier affidavit submitted by Prof. Baron-Cohen and Mr. McErlean concerning the applicant's Asperger's Syndrome and depression. She states that new inmates are screened by psychology staff within twenty-four hours of arrival. Any psychological medications which the inmate may be taking are noted and continued upon admission where appropriate. In addition the inmate's mental health status is evaluated to determine whether there is any imminent risk of self harm and whether the inmate is stable and appropriate for placement in the designated setting. She states that regardless of the initial evaluation all newly designated inmates are seen within fourteen days for evaluation by a doctoral level psychologist. This evaluation focuses on "collecting the inmate's mental health history, as well as identifying any current symptoms and treatment needs". There is also a full-time psychologist on the staff. She sets out in detail the responsibilities of the

psychology department staff at the MCC ranging from assisting inmates in making a satisfactory adjustment to conducting individual treatment and crisis intervention sessions as needed or on an emergency basis. She was satisfied on the basis of her familiarity with the psychology services available to MCC inmates that there was no reason to believe that Mr. Davis's reported mental health conditions could not be successfully managed at MCC or within the Federal Bureau of Prisons facilities generally.

131. Anthony Bussanich M.D. is the Clinical Director of the MCC since 2009. He noted from the affidavits submitted by Mr. McErlean and Prof. Baron-Cohen that Mr. Davis was at that time prescribed 10mg of Citalopram daily. He also noted that he had been previously prescribed Fluoxetine at 20mg daily (subsequently reduced to 10mg daily). These were medications which are used and available to prisoners at MCC or within the federal prison system and could be prescribed for Mr. Davis if deemed medically appropriate by MCC personnel.

132. In a later affidavit Prof. Juan Mendez, a UN Special Rapporteur on Torture and Professor of Human Rights at Washington College, Washington D.C. stated that he has made repeated requests to visit the MCC and several other US prisons but had not been granted the opportunity to do so. He concluded that the United States Government violated the rights of a named inmate who was allegedly held in solitary confinement at MCC and later at a maximum security federal prison in Florence, Colorado and concluded that he had been subjected to "cruel and/or inhuman treatment or punishment". He believes that given the nature of the charges against Mr. Davis, he was likely to be held in the highly restrictive south wing of the MCC or in a SHU where detainees are held in solitary confinement. He stated that as Mr. Davis had been diagnosed with Asperger's Syndrome any period spent in solitary confinement could have serious consequences for his mental health. He believed that someone with Asperger's Syndrome would struggle to cope even if housed within the general population at MCC.

133. The difficulties for somebody with Asperger's Syndrome who is prosecuted, convicted and imprisoned were summarised in an article exhibited by Mr. Hoelter "Asperger's Syndrome in the Criminal Justice System"(Judge Kimberly Taylor (retired), Dr. Gary Mesibove and Dennis Debbaudt, 2009 - AANE):

> "If an individual with AS is taken into custody, alert jail authorities. This person may be at risk in the general jail population. For short term custody, consider segregation, monitoring, and a professional medical and development evaluation. Incarceration would be fraught with risk for the person and anyone in contact with him or her. The direct manner, off-beat behaviours, and other characteristics of the person with AS may be read by other inmates as an invitation to exploit and control. Correction professionals may see a rude, incorrigible person. Good behaviour privileges will be hard to earn. Correction professionals who work with the incarcerated AS population will benefit greatly from a comprehensive training - or at least a good briefing - and access to ongoing assistance from a professional who is familiar with AS."

This article also recognises the reality that people with AS may have to engage with the criminal justice system whether as victims of crime, witnesses or accused persons. The article is an encouragement to recognise and deal with the differences presented by those who have AS and address the challenges presented by and for them by the criminal justice system in a reasonable, fair and proportionate manner. It recognises the fact that those with AS may be detained in the course of an investigation or imprisoned pre-trial or post-trial following conviction.

134. In assessing the evidence advanced in respect of pre-trial detention at MCC I have

considered all affidavits submitted and the reports exhibited. There has been no cross-examination of any of the deponents by either side. There has been considerable criticism expressed about the treatment of pre-trial detainees at MCC and the fact that they have been subjected to prolonged periods of solitary confinement. The more prominent cases identified in the reports relate to those suspected of terrorist offences. The court is concerned with the facts of this particular case and whether Mr. Davis will suffer a real risk of the extreme conditions of confinement described by Mr. Hoelter. Mr. Hoelter criticises the affidavits from prison officials and professionals as containing mere restatements of policy which is well-documented but not implemented. I am not satisfied that this is so. Their evidence is relevant to the respondent's case. There is undoubtedly a great deal to criticise in the penal system in the United States as there is in the Irish penal system but I am satisfied that though pre-trial detention in the United States involves a number of challenges for the respondent and for the prison administration, reasonable and adequate provision has been made within MCC to receive and accommodate those who have Asperger's Syndrome and/or suffer from depression.

135. It is not the law that a person suffering from Asperger's Syndrome and/or depression cannot be imprisoned in this jurisdiction or extradited to a third country or within the European Union simply because imprisonment would give rise to changes in environment or disturbance in routine or removal from family. These factors may cause enormous upset to the family of the proposed extraditee and will likely be regarded (as in this case) as undesirable by his diagnosing psychiatrist or psychologist. This may inform the type of regime to which he should be subjected or the length of a sentence to be imposed. However, I accept the evidence from the MCC personnel concerning the likely procedure, assessment, and conditions of confinement to which Mr. Davis will be subjected if extradited. I do not consider that the evidence establishes that the high threshold of ill-health and risk to life required to justify a refusal to extradite on those grounds and the potential violation of the rights to health, bodily integrity or life has been reached.

136. The court is mindful of the threat of self-harm which has been repeated on behalf of Mr. Davis in the course of these proceedings. The possibility of self-harm arising from depression and prompted by any number of factors (including potential conviction and sentence for a criminal offence) is a matter which judges and prison authorities must regrettably address from time to time. As already noted the issue of mental ill health, Asperger's Syndrome or depression can be addressed and assessed by a sentencing court when considering the appropriate sentence. There is also a heavy burden on prison officials before and after conviction to assess and monitor prisoners committed to their care and custody who are at risk. However, I am satisfied on the evidence that procedures are in place for the evaluation and assessment of persons arriving at MCC and during the course of their detention there in respect of their mental health and any treatment that may be required in respect of medication or otherwise including threats of self harm or suicide.

Post-Conviction Imprisonment

137. Mr. Hoelter describes how a person sentenced to a term of imprisonment by the Federal Courts is subjected to a security designation process to determine the security level of the institution to which he may be committed as well as his proposed custody classification. He applied the Federal Bureau of Prisons Inmate Load and Security Designation Form Criteria in respect of security designation and custody classification and concluded that it was likely that Mr. Davis would be assigned to a medium security federal prison. This designation would take place at a centre in Oklahoma City to which he would be conveyed under restraint and from which he would be conveyed to the designated prison.

138. Mr. Hoelter then describes the conditions of imprisonment in medium security

prisons. The respondent's fellow inmates would likely have prison records or have committed major felony offences. He would be housed in a cell, subject to controlled movement and spend most of his time in that cell or on the cell block. There is nothing in this description of prison conditions that of itself gives rise to a potential breach of the respondent's rights. However, it is claimed that he would suffer more severe difficulties than others because of his Asperger's Syndrome and depression in coping with the prison environment or engaging with fellow inmates or staff. There would be considerable potential for misunderstandings because of inappropriate responses and engagement by Mr. Davis with people whom he encounters whilst in prison.

139. In response, Mr. Ralf Miller, a Senior Designator at the Federal Bureau of Prisons Designation and Sentence Computation Centre (DSCC) in Grand Prairie, Texas states that the Bureau of Prisons programme on inmate security designation and custody classification requires staff to classify inmates based on the level of security and supervision required. This is based on their individual programme needs such as education, vocational training, individual counselling, or mental/medical health treatment. Other factors which may be considered include the length of sentence imposed, the severity of the current offence, criminal history, history of violence, and escape history, if any. Information is received from the prisoner's sentencing court, the US Marshall's Service, the US Attorney's Office and the United States Probation Office. Points are then calculated for a particular prisoner which are used to match him with a commensurate security level institution. If an inmate's security score does not accurately reflect his security needs staff may use professional judgment to place him in a facility inconsistent with the scored security level. The pre-sentence investigation report and other documents reflecting his medical and mental health history are reviewed. The known circumstances of the prisoner are part of the assessment of his medical and mental health.

140. There are four levels of security categorisation. Level 1 designates those with least need of medical or mental health care and level 4 includes those requiring the greatest level of such care. If a prisoner comes within level 3 or 4 or when staff believe further medical screening is required to determine the most appropriate facility for him, the Office of Medical Designation and Transportation reviews the inmate's documents to assess and assign the appropriate medical and mental health screen levels. If it is determined that the criteria for screen levels 3 or 4 have been reached staff will designate an inmate to an institution capable of providing appropriate medical and mental health care. Otherwise he will be returned to the DSCC designators to assign his initial institution placement. In addition once a prisoner arrives at the designated institution to serve his sentence, health care professionals conduct intake screenings before he may be cleared for assignment to the general population. If medical staff determine that the inmate's medical or mental health care level requires adjustment, a request for transfer to a facility that can better address his medical and mental health needs can be submitted. However, as noted by Mr. Turner it is not possible to predict in advance the type of facility to which Mr. Davis would be assigned. Mr. Turner believes that it was most unlikely based on his familiarity with Mr. Davis's offence, conduct and personal history, that he would be designated to serve a sentence at a maximum security facility. Mr. Hoelter suggests a medium security facility. This is not denied but it is clear that such a determination could only be made by the Bureau of Prisons following sentencing based upon all information available at that time.

141. Once again, Mr. Hoelter, based on the reports exhibited in his affidavit suggests serious deficiencies in the adequate provision of medical and mental health care in MCC and within the Federal Bureau of Prisons emphasising in particular, documented inadequacies in prison mental health services and an insufficient number of properly trained personnel within the Federal Prison Service.

142. Mr. Hoelter reiterates that the information contained in the replying affidavits filed on behalf of the applicant concerning imprisonment post-conviction is aspirational and does not accord with his experience of the failure to properly assess, treat and monitor vulnerable prisoners post conviction.

143. The practice and procedures which will be applied to the respondent on arrival at MCC and before designation to a particular prison if sentenced following conviction were fully described to the court. They are calculated to identify, address and take reasonable account of the difficulties he may experience because of depression, anxiety and AS during any period of imprisonment. The clear purpose is to provide reasonable care and, when appropriate, treatment (including medication) while he is in custody. The court is satisfied to accept the evidence given by officials of the United States Federal Bureau of Prisons and Mr Turner as an Assistant United States Attorney on these matters. The court also regards this evidence as a solemn assurance to the court by the Government of the United States that all reasonable and necessary care and treatment will be given to the respondent during all periods of imprisonment while in the United States.

144. The court also notes that there has been very little engagement by the respondent with the psychiatric services in this jurisdiction. Apart from a few visits to his general practitioner and a continuing prescription for anti-depressant medication, the respondent has not found it necessary to seek any professional help or therapy from Prof. Fitzgerald. The first engagement with Prof. Fitzgerald was in advance of his sentencing hearing in January 2014. Prof. Baron Cohen believes that the respondent's removal from home and Ireland and imprisonment in the United States is a very serious matter and may precipitate a suicide attempt. However, apart from the medication no other treatment has been availed of or required. I have taken this into account in assessing the evidence of risk to which extradition may expose the respondent but I am not persuaded that it gives rise to a real risk of a violation of the respondent's Article 40.3 rights.

Article 3

145. I am not satisfied that the respondent has established that there are substantial grounds for believing that if extradited to the United States he will be exposed to a real risk of being subjected to treatment of an inhuman or degrading nature by reason of the conditions of confinement to which he will be subject and/or the fact that he has AS and suffers from depression and generalised anxiety with thoughts of self-harm and suicide prompted and exacerbated by a fear of isolation and separation if imprisoned in the United States. The court is satisfied that whether detained in the MCC or in any other federal prison if convicted and sentenced, he will have access to mental health services wherever he may be imprisoned.

146. In *Aswat v The United Kingdom* (Application no. 17299/12, 16th April, 2013) the European Court of Human Rights held that the applicant's extradition from the United Kingdom to the United States on terrorist related charges would constitute a violation of Article 3. The applicant suffered from paranoid schizophrenia which required his continued detention in a hospital for his own health and safety. Though it was accepted by the Court that regardless of where he was detained in the United States federal prison system he would have access to medical treatment, nevertheless, the severity of his mental disorder indicated that it was appropriate for him to remain in hospital in the United Kingdom. There was no guarantee that if extradited, he would not be detained in ADX Florence, a maximum security prison which operated a highly restrictive regime with long periods of social isolation. The court does not consider the respondent's case on the basis of comparative medical case-histories: each case must be considered on its own facts. The *Aswat* case is an indication, however, of the threshold of evidence applicable in Article 3 cases. I am not satisfied that the evidence in this case establishes a history, or present state, or treatment of mental disorder of a similarly serious level or

intensity as that exhibited in *Aswat* nor is there any real risk that the respondent would be considered for imprisonment in a similar maximum security facility. The court is satisfied that the United States authorities will act to protect his mental and physical health and take appropriate steps to address any symptoms of depression or continuing anxiety by appropriate treatment (including medication) and take such steps as are appropriate and necessary to accommodate him safely as a person with AS within the prison system.

Article 8

147. The respondent submits that his extradition is contrary to his right to respect for his private life and family under Article 8 because of the serious threat that imprisonment in a United States prison and removal from his home and family poses for his health in that there is a real possibility that due to his AS and mental ill-health he will self harm or commit suicide.

148. The removal of a person from his home and country are a normal incident of extradition and cannot be sustained as a ground of objection. It is clear that removal involves an interference with family rights which has been recognised as proportionate and in the interests of a democratic society and in particular, the pursuit and the bringing of fugitives to justice. The court must attach significant weight to this public interest having regard to the very serious nature of the conspiracy charges contained in the warrant and the fact that they encompass an international series of alleged criminal trade transactions involving the use of computers and large quantities of drugs, money and other illicit goods.

149. It is submitted that the consequences of the respondent's proposed extradition would be very severe and will give rise to "exceptionally injurious and harmful consequences" for the respondent which are disproportionate to the legitimate aim pursued of bringing him to justice. Even if the court were satisfied to accept the level of risk to his life or health suggested on behalf of the respondent, I am satisfied that it is of a nature that will be adequately addressed in the United States. Though it is clear that family support outside prison, in the community and at home is the best way to deal with his vulnerabilities and that his separation from family will be difficult for him and his family, nevertheless, the evidence is that appropriate assessment, care and if necessary, treatment is available within the prison system. All information concerning the respondent will be made available to the authorities concerning his AS, depression and anxiety and any expressions of suicidal intent. The court is satisfied that the American prison officials will take all necessary measures to protect him. The court is not satisfied that the respondent's surrender is, in the circumstances, a disproportionate measure or will breach his rights to respect for his health or family life under Article 8.

Conclusion

150. For all of the above reasons the court is satisfied that the respondent should be surrendered and extradited to the United States.

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