THE HIGH COURT

Record Number: 2006 No. 86 Ext.

BETWEEN

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
POUL JOHN AAMOND

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 24th day of November 2006

1. This case has by way of background some very unusual features, and, therefore, before dealing with the application itself under s. 16 of the European Arrest Warrant Act 2003, as amended ("the Act") for the surrender of the respondent to Denmark I will set out that background as fully as seems necessary.

2. The domestic warrant on foot of which the present European arrest warrant was issued dates back to the 5th February 1993. At that time the respondent was charged with three offences which can be broadly classified as drug smuggling charges. An important feature of those charges is that it is alleged that the respondent committed these acts outside the territory of Denmark, namely "from the waters north of Aruba off Venezuela to the waters off the Bahamas".

3. One of the allegations is that in June 1988 a quantity of cocaine was transported in a vessel named 'Nerma', of which the respondent was First Mate, from these Venezuelan waters to the waters off the Bahamas, and then loaded onto a receiving vessel for which $25,000 was received. Another allegation is similar in nature but relating to a later date, namely November 1988. A further allegation relates to the splitting of another party's share of the proceeds of the June offence. The precise details do not matter, but the fact that the offences are alleged to have taken place outside the territory of Denmark is critical.

4. In 1993 when the domestic warrant was issued in Denmark, the respondent was already residing in this country. His extradition was sought here at that time, resulting in his arrest and an order being made for his extradition in the District Court pursuant to Part II of the Extradition Act, 1965, and in particular section 29(1) thereof. The respondent challenged his detention under that order by way of an application for Habeas Corpus on the grounds that the offence in respect of which his extradition was sought was an offence which was alleged to have been committed outside the territory of the requesting state, namely Denmark, and was one therefore which was not capable of being prosecuted here. The Supreme Court ordered his release on the ground that extradition for an extraterritorial offence was precluded in the absence of the State also exercising an extra-territorial jurisdiction. It was held, inter alia, that extradition should be prohibited since the offence for which extradition was requested had been alleged to have been committed outside the requesting country's territory, and the law of this country did not allow prosecution for such an offence when committed outside the territory of Ireland. Some subsequent changes in the law here are relevant and I will return to that in due course.

5. By the time of this release the respondent had already spent fourteen months in prison here. In an affidavit sworn by the respondent to ground his opposition to the present application, the respondent states that he understood at that time that the reason for his extradition in effect being refused was not something which could simply be corrected so that a further request for his extradition could be made. Consequently, he states, he thereupon set about rebuilding his life in this country, since it was highly unlikely in his view that the Danish authorities would renew his Danish passport which by that time had expired. He outlines in his affidavit the manner in which he settled in Waterford and the ways in which he integrated himself into society here both in terms of voluntary work in the community, as well as paid employment and re-training. He is now retired from any paid employment. The respondent is aged fifty nine. He had assumed that there would not be any further attempt made to seek his extradition following the ordering of his release by the Supreme Court in 1994. He states also that his recent arrest under a European arrest warrant has had a devastating effect on the modest life which he had rebuilt for himself in Waterford, and he fears that while he is in custody following this arrest his rented accommodation will be lost. He feels that following his release in 1994 he was entitled to expect that things were at an end as far as any threat of extradition was concerned and that he could get on with his life. He is of the view that to be surrendered now would be oppressive and invidious. He also points to the lack of any explanation for why it has taken twelve years for his surrender to be once again sought.

6. That then is a brief outline of the background to the present application for the surrender of the respondent on foot of the European arrest warrant so that he can face trial for the same offences for which extradition was refused under Part II of the 1965 Act some twelve years ago.

The present application

7. As I have stated, the European arrest warrant in this case issued in Denmark on the 26th July 2005 based on the domestic warrant issued in 1993. The respondent was arrested here on the 22nd August 2006 following the endorsement of the warrant under s. 13 of the Act on the 28th July 2006. No point of objection is raised as to the identity of the respondent or the manner of his arrest on that date. He was properly brought before the Court as required following his arrest and remanded in custody from time to time until this Court heard the application presently under consideration.

8. It will be recalled that the reason for the refusal of extradition in 1994 was that it was not possible then under Irish law to prosecute these extra-territorial offences, and that therefore by virtue of Article 7.2 of the European Convention on Extradition, applied to Denmark by S.I. 9/1989, this country was entitled to refuse extradition. The European arrest warrant has designated the offences concerned as being among the list of offences set forth in Article 2.2 of the Framework Decision, being offences in which double criminality does not have to be verified. In that way, under the Framework Decision, a corresponding offence here does not have to be identified. I will come back to that question in due course, but suffice to say for the moment that George Birmingham SC for the respondent contends that there would not be such correspondence despite certain changes which have occurred in the intervening years.

9. No undertaking is required to be given by the requesting state pursuant to s. 45 of the Act since there has been no trial or sentence in absentia for these offences. Neither is the Court required to refuse surrender for any reason arising from sections 21A, 22, 23 or 24 of the Act. What arises for determination in this application is whether in the unusual circumstances of this case the surrender of the respondent is prohibited by Part 3 of the Act or the Framework Decision.

Section 44 objection

10. Mr Birmingham submits that the surrender of the respondent would be contrary to the specific provisions of s. 44 of the Act. That

section provides as follows:

> *"44.— A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state, and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State." (my emphasis)*

11. It is important to have regard to the use of the present tense "does not" in this section, given the fact that the offences under scrutiny were committed allegedly in 1988. The reason for this importance is that there is no doubt that these offences were committed outside the state of Denmark, since they were committed in the waters north of Aruba off Venezuela. The warrant states that the applicable Danish law is s. 7 of the Danish Criminal Code which provides for a circumstance where a Danish citizen can be held criminally responsible in Denmark for acts committed outside Denmark subject to certain conditions. The respondent submits that such a power reflects a traditional reluctance on the part of certain civil law countries to surrender their own nationals to other countries, since they can deal with the offences in Denmark. This has no equivalence under Irish law.

12. The respondent refers to one of the *optional* grounds for refusal to execute a warrant under the Framework Decision, namely Article 4.7(b) which provides:

> *"7 Where the European arrest warrant relates to offences which:*
>
> *(a) ……*
>
> *(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."*

13. The Oireachtas has given effect to this optional ground for refusal by the enactment of s. 44 of the Act. Mr Birmingham submits that given the terms of s. 34 of the Criminal Justice Act, 1994, the respondent on the date on which this European arrest warrant *was issued*, could not have been prosecuted under this section for offences committed outside the State, and therefore could not at that time have been surrendered as to do so would contravene s. 44 of the Act. The relevant parts of section 34 of the Criminal Justice Act 1994 provide as follows:

> *"34. – (1) This section applies to an Irish ship, a ship registered in a Convention state and a ship not registered in any country or territory.*
>
> *(2) A person shall be guilty of an offence if, on a ship to which this section applies, wherever it may be, he –*
>
> *(a) has a controlled drug in his possession, or*
>
> *(b) is in any way knowingly concerned in the carrying or concealing of a controlled drug on a ship,*
>
> *knowing or having reasonable grounds to suspect that the drug is intended to be imported or has been exported contrary to any regulations made by the Minister for Health under section 5(1)(a)(ii) of the Misuse of Drugs Act, 1977 or the law of any state outside the state." (my emphasis)*

14. It is important to note the reference to "a ship registered in a Convention state", because in 1988 when these offences were committed the vessel Nerma was registered in Vanuatu, and that territory was not at that date a Convention state not having acceded to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances, done at Vienna on the 20th December 1988. The evidence before me, to which objection has not been taken by Mr Birmingham on the basis of hearsay, is that even on the date when the Danish authorities issued the European arrest warrant on the 26th July 2005, Vanuatu had not yet acceded to this Convention, and did not do so until the 20th January 2006.

15. It will have been seen that while the warrant was issued on that date, it was not endorsed by the High Court for execution until after the date on which Vanuatu acceded to that Convention, and that there was a delay from July 2005 until July 2006 before the application for endorsement was made to the High court. It is reasonable in my view to presume that the reason for that passage of time was to await the accession of Vanuatu to the Convention before any arrest of the respondent took place on foot of the European arrest warrant.

16. The result of that accession to the Convention is that the vessel Nerma becomes a ship "registered in a Convention state" for the purpose of s. 34 of the 1994 Act at the time the application is before this Court for an order of surrender, and in this way the significance of the use of the present tense in s. 44, adverted to already, becomes clear, since its relevant provision is:

> *A person shall not be surrendered …if the offence specified in the European arrest warrant issued …was committed … in a place other than the issuing state, and the act …does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."*

17. Since following the accession of Vanuatu to the Convention, this state could prosecute a person who committed these offences on a ship registered in Vanuatu, the offences are taken outside the exclusionary provisions of s. 44 of the 2003 Act, as of the date on which this Court is considering the application. Mr Birmingham has drawn attention to the provisions of s. 5 of the 2003 Act which deals with correspondence in the normal sense. In that section the Oireachtas has deliberately provided that correspondence in the normal way is to be considered by reference to whether, *as of the date of issue of the European arrest warrant*, the act complained of would, if committed in this State constitute an offence here. He submits therefore that if the same was to apply in the present case of this extra-territorial offence, the offence would be found not to correspond, since at the date of issue of the warrant, Vanuatu was not a Convention territory.

18. Mr Birmingham draws attention to the use in s. 44 by the Oireachtas of the words "act or omission *of which the offence consists* does not….etc". He submits that there has been a deliberate choice of words rather than the use of the word "offence". In other words, he submits, the prohibition is determined not by the offence (which can be created by some later enactment) but rather by reference to the act giving rise to the offence (which is fixed in history and cannot change over time). He suggests that it could not be the case that retrospectively these acts could become amenable to surrender, where at the date of commission or even at latest the date of issue of the warrant in July 2005 they were not so amenable. This retrospectivity in his submission should not be regarded

as permissible. He points to the fact, as I have already stated, that s. 5 has the effect of disapplying the prohibition on the creation of retrospective offences so far as correspondence is concerned, since it is to be determined by reference to the date of issue of the European arrest warrant and not the date of alleged commission of the offences.

19. Mr Birmingham submits also that since the offence contrary to s. 34 of the Criminal Justice Act, 1994 was created subsequent to the commission of the offences alleged in the European arrest warrant, the warrant offences are not offences which could be prosecuted against the respondent in this jurisdiction as being on the date of commission offences contrary to Irish law, and that the prohibition on retrospective criminal sanction renders the subsequent creation of an extra-territorial offence in 1994 meaningless as far as the respondent is concerned. It is significant that the offences have been designated by the Danish authorities as ones where correspondence or double criminality does not have to be verified.

20. Robert Barron SC for the applicant on the other hand submits that the meaning to be given to s. 44 is clear and unambiguous from the ordinary meaning to be given to the words chosen by the legislature to express its intention. He submits that the use of the words "does not …constitute an offence under the law of the State" is capable of one meaning only in the present context, namely that the date by reference to which the matter of the existence of an Irish offence is concerned is now, i.e. when the Court is considering the matter. He accepts that the legislature speaks of the offence itself by reference to the past tense i.e. the offence committed, but that it has deliberately chosen the present tense in relation to finding if there is not a law in the State under which that offence could be prosecuted. He submits that even if he is incorrect in this regard, the Court should give a purposive interpretation in accordance with the judgment of the European Court of justice in the Pupino case, as was referred to by Fennelly J. in *Minister for Justice, Equality and Law Reform v. Dundon*, unless to do so would be to decide the matter '*contra legem'*, which in his submission it is not. He submits that a literal interpretation of s. 44 is consistent with Article 4.7 of the Framework Decision which also refers to the present tense in relation to the laws of the executing Member State.

Conclusion on s. 44 point of objection
21. In considering how to conclude this point it is necessary to overlook the fact that the extradition of the respondent has already been refused back in 1994. That fact is irrelevant to an interpretation of s. 44 and Article 4.7 of the Framework Decision. The intention of the Oireachtas must, and in my view can, be gleaned from the ordinary meaning of the words used in the section and in the Article in question. The words used, taken in their ordinary meaning, are clear and unambiguous, and do not give rise to any absurdity. There is no prohibition of surrender under s. 44 of the Act by reason of the fact that as of the *date of issue* of the European arrest warrant, the Nerma was not a ship registered to a Convention country. By the time the warrant was endorsed for execution here it was so registered. I have little doubt that the delay was incurred while the Danish authorities awaited the accession by Vanuatu to that Convention, which took place eventually in January 2006. But that does not seem to me to have any relevance to the interpretation of s. 44.

22. It must be remembered that it is not the ratification of that Convention which has given rise to the offence under the laws of Denmark and for which he is sought to face trial. The ratification of the Convention has relevance only as to whether the acts committed in 1988 *now* would be an offence under Irish law. That is the basis which the Oireachtas has laid down for deciding whether or not the surrender of a respondent should be prohibited in respect of an extra-territorial offence. That is clear from the words used. According to those words, the surrender is not prohibited, and I am satisfied that this is consistent also with the terms of Article 7.4 of the Framework Decision. This is a relevant finding in view of the provisions of s. 16 (1) of the Act which require the Court when making an order for surrender under that section to be satisfied, inter alia, that the surrender is not prohibited by "Part 3 or the Framework Decision".

23. I therefore conclude that this ground of objection must fail, in spite of the fact that there has in my view quite obviously been some very deliberate alteration of the status of the territory of Vanuatu between the date of issue of the warrant and the endorsement of the warrant here for execution. Complaints of 'foul play' so to speak by the respondent do not appear to be of any relevance in my view to the interpretation and application of s. 44 as a ground of refusal to surrender under the Act.

Passage of Time/Delay
24. The second ground of objection is that of delay or, perhaps more properly in the context of the 2003 Act 'lapse of time' since the date of commission of the offences alleged. This objection comes within s. 40 of the Act which provides:

> *"40 —A person shall not be surrendered under this Act where—*
>
> *(a) the act or omission constituting the offence specified in the European arrest warrant issued in respect of him or her is an offence under the law of the State, and*
>
> *(b) the person could not, by reason of the passage of time, be proceeded against, in the State, in respect of the second-mentioned offence." (my emphasis)*

25. Again, it is noticeable that the Oireachtas has used the words "is an offence under the laws of the State". The present tense in paragraph (a) thereof clearly indicates that it is the date on which the Court is addressing this question which is relevant, and not the date on which the offence was committed or even the date on which the European arrest warrant issued. There is some debate generally as to whether paragraph (b) refers only to a prosecution being not possible due to the expiration of a statute of limitation period for the offence, and not on what is generally understood here as being a delay ground.

26. It is not uncommon to find in civil law member States that there are offences which are controlled by limitation periods, after which the offence in question may not be prosecuted. But since the Oireachtas has enacted this provision in the way it has by the use of the chosen words which are clear and unambiguous according to their plain and ordinary meaning, and since there are almost no offences here which are the subject of statutory limitation periods, it is not reasonable to apply such a restricted meaning so as to exclude the possibility of a respondent arguing that such has been the delay in prosecuting the offences that his trial would be prohibited in this country, and therefore that his surrender is prohibited under Part 3 of the Act.

27. Besides s. 40 of the Act, it is possible to argue delay on general constitutional and convention grounds by reference to an accused person's entitlement thereunder to a trial within a reasonable time or with reasonable expedition. That arises from s. 37 of the Act which provides as follows:

> *"37.—(1) A person shall not be surrendered under this Act if—*
>
> *(a) his or her surrender would be incompatible with the State's obligations under—*

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies)."

28. What has given rise to some uncertainty judicially is by what criteria the Court is under these sections to decide whether or not the delay/lapse of time, and the circumstances of the case, are to be judged sufficient to warrant the prohibition of surrender under these provisions. Prior to the repeal of Part III of the Extradition Act 1965 and in particular s. 50(2)(bbb) thereof, the matter was relatively clear in relation to requests for surrender between this State and the United Kingdom. That section was specific as to what the Court was required to do. The jurisprudence which evolved over the years since that section was inserted into section 50 helped to clarify the Court's task even further by requiring first of all that there be established a lapse of time since the date of commission of the offences which was itself exceptional. Thereafter, it was necessary that there be established some other fact or circumstances which were exceptional, and only if these two hurdles were successfully overcome was the Court to consider whether in the light of those factors and all the circumstances of the case it would be unjust, oppressive or invidious to surrender the person.

29. Neither the Framework Decision nor the Act giving effect to it gives any assistance as to how the Court now must address the issue of delay/lapse of time constituting a ground for refusing surrender. I am conscious that there has been a divergence of judicial opinion, not yet resolved by the Supreme Court, as to whether it is appropriate to still have regard to the manner in which these matters were formerly considered by reference to the now repealed s. 50(2)(bbb) to which I have referred, or whether the Court can simply, for example, have regard to the length of the passage of time and proceed immediately to consider whether it would be in all the circumstances be unjust, oppressive or invidious. Without the provisions of s. 50(2)(bbb) there is no reference to "other exceptional circumstances" being a necessary consideration prior to considering whether it is unjust, oppressive or invidious. There is nothing to guide the Court as to whether under these new provisions there is a need to examine the cause of the delay or who might be culpable. After all, there are subtle shades of distinction in meaning between 'delay', and for example 'lapse of time' or 'passage of time', these latter two perhaps having no connotations of culpability, whereas the former seems to. Delay suggests that somebody did not do something as soon as he or she could or should have done it.

30. In the knowledge that the 2003 Act was repealing s. 50 (2) (bbb) of the 1965 Act, the Oireachtas can be seen as choosing not to replace it with an equivalent section. Section 40 refers only to a prohibition on surrender where the person "could not by reason of the passage of time be proceeded against in the State". Section 37 is a general constitutional ground.

31. I have taken the view that the Court is not required to consider this type of plea by reference only to the manner of how such matters were considered under the old section now repealed. That is not to say for one moment that the task undertaken by the Court will not overlap to some, or even a large, extent with matters which would have been relevant under that repealed section. Indeed in many cases the result will be the same no matter which test is used. But I cannot help feeling that in the absence of s. 50(2)(bbb) there exists a wider discretion to the Court as to the manner in which it might consider a sufficient unfairness to exist to justify a refusal to surrender. It is also clear from the Framework Decision itself that Member States have agreed that Member States can apply its own constitutional rules in this and other matters as necessary, and so these questions are not necessarily to be overridden or trumped in all cases by any imperative derived from the objectives of the Framework Decision as set forth in the recitals thereto.

32. While there may well in many cases be no real difference in outcome between the two methods, that may not always be the case. For example, in a recent case of *Attorney General v. Heywood*, unreported, 26th October 2006, which was an application by the respondent under s. 50(2)(bbb) of the 1965 Act, I was satisfied that there was an exceptional passage of time. It was a case in which the alleged offences took place in 1995-1996. There had been an order made under s. 47 for his return to the United Kingdom, but after protracted applications of various kinds, the Supreme Court released him in February 2002. Fresh warrants were issued some ten months later and the process re-commenced, culminating eventually in another order being made under s. 47 for his return to the United Kingdom. During the entire process he had spent about three years in custody, some eleven days of which had been found to be unlawful detention.

33. I then moved on to consider, as I am required to do, whether there were any other exceptional circumstances in the case above and beyond the exceptional lapse of time. I had no doubt that there had been some dilatoriness on the part of the UK authorities, but I decided that to regard this as an exceptional circumstance would be to double count the lapse of time. Another circumstance submitted to constitute an exceptional circumstance was that the person had spent timer in custody. But the fact was that bail had been granted which the person had not been able to meet, and I concluded that this was not an exceptional circumstance since to so regard it, since it could not be the case that the setting of bail conditions, deemed appropriate, could later be regarded as militating against the very objective of setting those conditions, namely to ensure as far as possible that the person would be available for surrender should an order be made. Other matters were unsuccessfully canvassed to constitute exceptional circumstances, including that the delay had compromised the person's ability to defend himself against the charges in question, but I considered that no particular matter had been pointed to in this regard, and that it was simply asserted in a general way.

34. Not finding that there were "other exceptional circumstances", I was precluded from proceeding to consider whether the exceptional lapse of time and all the circumstances of the case would require the person's release under the section on the basis that it would be unjust, oppressive or invidious to do so. It can be thus seen how the Court was constrained by the terms of the section.

35. It is tempting to consider whether, if that case was one brought on the second occasion on foot of a European arrest warrant, the Court, unconstrained by the specific provisions of s. 50(2)(bbb) as to the manner in which it considered the passage of time since the commission of the offences, might have forced to conclude that so long a passage of time, the reasons for how it arise in that case, and the overall situation in which the person then found himself, amounted to a prohibition against surrender on the basis either that his trial here would be prohibited on delay grounds, or under s. 40 on the basis that his trial would not be within a reasonable time. It was the case that the passage of time in that case was not one for which the person himself was responsible to any great extent. One could not say with certainty that such would not be the case, and I merely speculate for the purpose of demonstrating that in my view there may be differing outcomes depending on what criteria are used.

36. In passing I note that when giving effect to the Framework Decision in its Extradition Act, 2003, the United Kingdom has, in section 14 thereof under the heading "Passage of Time" provided that:

"A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have

committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be).”

37. Clearly, the intention as expressed therein is that the Court should continue to scrutinise passage of time under the case-law already developed over the years as to oppression and injustice. No such guidance is present in the Act in this country.

38. Returning to Mr Aamond’s case however, I will first of all consider the facts of the present case by reference to each possible method and see whether the result might be different under both. If not then clearly no difficulty arises. If there is a difference, I will consider at that stage how best to deal with the dilemma.

39. In this case the lapse of time from the date of commission of these offences since 1988 cannot be other than an exceptional lapse of time given its sheer length. But it is exceptional also in the sense that it has arisen in exceptional circumstances. If the Court was to search for other exceptional circumstances, I would conclude that the fact that there has already been a determination by the Supreme Court in 1993 that as of that time there was no offence in this State for which the respondent could be prosecuted comes into that category. Were it not for the fact that new surrender arrangements have been put in place which did not exist on the occasion of the respondent’s original arrest, it would not have been possible to again seek his surrender given that the question of a corresponding offence had already been determined. It is in my view beyond doubt that this respondent would have reasonably assumed that there was no longer a possibility that he might ever be extradited for these offences. He could never reasonably have foreseen that the manner in which this State might give effect to a Framework Decision might by some chance capture within its net these old offences. The fact that he has settled down here and has not been hiding his whereabouts are not matters of any relevance to the concept of “other exceptional circumstances” but the circumstances in which the respondent now finds himself the target of an arrest under a new surrender regime, namely a European arrest warrant, which seems to be capable of circumventing the difficulty presented on the previous occasion, albeit requiring the co-operation of the territory of Vanuatu in the matter of accession to the Convention, is to my mind a truly exceptional circumstance, which if the matter was dealt with under the old s. 50(2)(bbb) regime would have constituted “other exceptional circumstances”, and would have entitled a Court to proceed to consider the remaining element of that section, namely whether the lapse of time, and the other exceptional circumstances when considered with all the circumstances of the case, would be unjust, oppressive or invidious to deliver him up.

40. In my view it would be oppressive – that word being given the meaning to be found in the Concise Oxford Dictionary, 1990 ed., i.e. oppressing, harsh or cruel, difficult to endure. I exclude the concept of cruelty but it seems to me harsh and difficult to endure. It is also invidious by reference to the definition of that word in the same dictionary, i.e. “likely to excite resentment or indignation against the person responsible, esp. by real or seeming injustice”. It seems to me that the happenstance by which these offences have been caught by the choice of words deliberately chosen by the Oireachtas to give effect to one of the optional grounds for refusal, combined with the fact that since the European arrest warrant issued Vanuatu has acceded to the Convention, easily fits with the concept of invidiousness and oppression. Whether it is unjust would perhaps require the respondent to have shown some prejudice by the delay.

41. If oppression and invidiousness are still among the criteria by which the Court here should assess whether the lapse of time is sufficient to refuse surrender, then his surrender is prohibited under Part 3 of the Act.42

42. As I have already noted, the Oireachtas has chosen to give effect to the passage of time Article of the Framework Decision differently to the United Kingdom. They have chosen not to use the reference to oppression and injustice.

43. In the context of the European arrest warrant it interesting to look at a case of *Kociukow v. District Court of Bialystok* [2006] 2 All ER. 451 where section 14 of the U.K. Extradition Act, 2003 was considered. In that case the respondent, a Polish citizen, submitted that it would be unjust to return him to Poland in circumstances where the offences alleged against him were committed six years previously and that his defence against them was prejudiced. He asserted that he knew nothing of the alleged events giving rise to the offences of robbery in August 1999, and that he could not recall what he might have been doing on that date by way of alibi. The Court concluded that he would very likely have difficulties in dealing with evidence which he hears for the first time some six years on from the events. It was also decided that if, as was the case, the person was not responsible for the delay which occurred, it would be ‘unjust’ to surrender him because of the serious risk of prejudice to him in the conduct of his defence. In that case there was no explanation given by the Polish authorities as to why there had been the delay in issuing the warrant, and the judge concluded that in those circumstances it would be unjust to surrender given the asserted prejudice and lack of any evidence that he was in any way responsible for the delay which occurred. The Court was not satisfied that there was any evidence from which it could be concluded that to order surrender would amount to oppression.

44. I would be of the view that the circumstances of that case are milder to say the least than the case presently before the Court, both in terms of the length of delay, the reasons for it, and the overall circumstances of the case.

45. If on the other hand the Court, when considering the matter under s. 40 the Court is not to have regard only to the s. 50(2)(bbb) criteria, then it is arguable first of all that the Court now has a wider discretion in how the lapse of time is to be considered, and that it may not be essential for there to be those “other exceptional circumstances” over and above the lapse of time. But it is arguable also that the Court must consider it as if it was an application to prohibit the trial – in other words to have regard to the jurisprudence which has developed in this country as to the basis on which the Courts may prohibit a trial on grounds of prosecutorial delay. Such a consideration would overlap also with a consideration of the matter under s. 37 of the Act which I will come to.

46. In the present case, the wider discretion which I have mentioned would not be relevant since I am of the view that even under the more restricted s. 50(2)(bbb) criteria there is oppression and invidiousness in ordering his surrender.

Right to trial in course of law – with reasonable expedition – s. 37

47. If the Court was to look at the matter in accordance with the prosecutorial delay jurisprudence, the matter is not so clear in view of the recent decisions of the Supreme Court in cases such as *PM v. DPP* [2006] 2 ILRM 361, *H v. DPP*, unreported, Supreme Court, 31st July 2006, and *KR and PR v. DPP*, unreported, Supreme Court, 7th November 2006, albeit that these decisions relate to sexual abuse cases. These decisions would have relevance even if the Court considers the lapse of time under the wider discretion under s. 37, but I shall consider that question by reference to s. 40 as well.

48. The fact that the respondent has not asserted on affidavit any specific prejudice in the capacity to defend himself could well leave him in a situation by reference to these decisions, where the delay may not be sufficient on its own to prohibit his surrender. Neither will the Court inquire as to the reasons for the delay. Clear prejudice would need to be established.

49. Under s. 40, however, the question is whether the respondent could not, by reason of the passage of time since 1988 (for which he is not culpable), be proceeded against in this State if the offences were offences here. Under s. 37 consideration, the question

would be somewhat different, namely whether any trial of the offences now in Denmark would or could not be a trial in due course of law and a trial with reasonable expedition. The question can be asked in different ways, but the issue is clear enough.

50. The passage of time is very lengthy since the date of the alleged offences – eighteen years. The delay in the case of *Minister for Justice, Equality and Law Reform v. Stapleton*, unreported, 21st February 2006 was twenty eight years. The offences in that case were fraud offences, and there was a specific plea of prejudice in the capacity of the respondent to defend himself against charges of that kind. On the other hand in Stapleton there was little doubt that the respondent had caused a substantial portion of that delay by taking himself and his family to Spain with which at the time there were no extradition arrangements under which his return to the United Kingdom could be sought. In the present case there exists a shorter, though still very significant passage of time, and the respondent has pleaded no prejudice to the capacity to defend himself.

51. I stated in my judgment in Stapleton:

> *"There comes a time, and twenty eight years since the date of alleged commission of a fraud is within this concept, that it must be presumed that it is simply not possible to guarantee a fair trial, no matter how assiduous the trial judge may be to ensure that the jury is appraised and properly instructed as to the potential for delay to dull the memory and prevent the marshalling of evidence."*

52. I cannot place the present case into such a scenario in circumstances where the respondent himself has pleaded no specific prejudice. I believe that a trial judge could guarantee as far as is possible that a fair trial was achieved despite the delay which has undoubtedly occurred. The recent judgments of the Supreme Court, albeit that they are decided in the context of sexual abuse offences to which special considerations have applied over the years, emphasise the importance of establishing prejudice before a trial will be prohibited, even in the case of very lengthy delay. These decisions also suggest that the reasons for the delay will not be determinative of the matter. The crucial question is the real risk of an unfair trial. In my view the respondent's trial can be a fair one if he were to be tried in Denmark.

53. It follows in my view that if this case is to be looked at under s.37 but by reference to the sort of matters which would have been previously considered under s. 50(2)(bbb) of the 1965 Act, the respondent's surrender is prohibited by Part 3 of the Act on the basis that it would be oppressive or invidious to do so. That is the result in this particular case particularly since there are in my view the "other exceptional circumstances" present which enable the Court to proceed to a consideration of the final question under the section. The Court therefore is not presented with the difficulty which was present in *Heywood*.

54. On the other hand if that is not the appropriate method of examining the matter and the Court has to approach the question on the basis of general delay and its capacity to affect adversely the prospects of a fair trial and a trial with reasonable expedition, the Court would not intervene to prevent his surrender. That would be the conclusion under s. 40 also, for the reasons stated.

55. I am of the view that in circumstances where there is uncertainty as to how the matter should be considered, the construction by which the result more in ease of the requested person is achieved should be applied, pending a clarification of the law in an appropriate appeal to the Supreme Court. Of course each case will be different and must be decided on its own facts.

56. In this particular case, since I can be satisfied that the lapse of time is exceptional, that there are other exceptional circumstances, and that these factors considered with all the circumstances of the case would render it oppressive or invidious to surrender him, it is appropriate that I adopt these criteria.

57. I therefore refuse to order the surrender of the respondent.