[Neutral Citation Number: 2005 IEHC 377]

THE HIGH COURT

2005 No: 13 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
S R

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 15th day of November 2005

1. The respondent was born in Ireland in 1939 and is now therefore aged 66 years. His surrender to the United Kingdom is sought pursuant to a European Arrest Warrant issued on the 17th February 2005, and endorsed by the High Court here on the 12th April 2005. On foot of same he was duly arrested by a member of An Garda Siochana on the 26th April 2005 and brought before the High Court on that date as required by the s. 13 (5) of the European Arrest Warrant Act, 2003, as amended. The offences alleged against him, and in respect of which it is intended that he should face trial in the United Kingdom, are of sexual assault on his granddaughter, a young girl, aged about nine years of age at the time of the alleged offences between the 30th June 2000 and the 1st September 2001. The complaint made by his grand-daughter was that on three occasions between these dates the respondent had committed acts of indecent assault upon her in England where the respondent then lived. This complaint was made to her mother (i.e. the respondent's daughter) in September 2001 after the family had returned to England following a holiday in Tralee where the respondent was then living.

2. It appears that it was some months before the matter was brought to the attention of the social services in England in January 2002. It would appear also that on that occasion, while the matter was reported to the Social Services for the area where the family live, the complainant's father informed social services that they did not want the matter to be brought to the attention of the police at that time. That appears to have been on the basis that the respondent would live in Tralee, and that he would not thereafter present a danger to the complainant. But it would appear that fears returned in or about July 2002 when it became known that the respondent was travelling back and forth to England from Ireland. Contact was made with the police, and the complainant and two of her siblings made video statements to the police, the complainant's being made in August 2002, and her siblings in October 2002.

3. In October 2002 a decision was made by the Crown prosecution service ("CPS") to seek the extradition of the respondent even though it was apparently known that he travelled to England on occasions both in relation to financial matters and for health reasons. In relation to the latter, it was known that he attended at Harefield Hospital, Middlesex where he was attending as an out-patient for what has been described in an affidavit of Ms. Riley of the CPS as " a heart condition".

4. On the 14th January 2003, a warrant was obtained from Hendon Magistrate's Court for the arrest of the respondent. A copy of this warrant has been produced to this Court arising out of the cross-examination of Ms. Riley. The contents of this warrant which I shall refer to hereafter as "the domestic warrant" has been the subject of some submissions by Aileen Donnelly SC on behalf of the respondent, but I shall refer to that aspect again in due course. For the moment, it suffices to say that in this warrant the "alleged offence" is set forth as follows:

> *"Between 1st May 2001 and 1st September 2001 at [address] did indecently assault a female, namely [complainant named and date of birth given] contrary to section 14(1) Sexual Offences Act 1956."*

5. The warrant goes on to direct the constables of the Metropolitan Police Force to arrest the respondent and bring him before the Magistrates Court immediately. Ms. Riley has sworn that thereafter his name was circulated on the police national computer. She has also stated that papers were then sent to the CPS headquarters so that papers could be prepared for the purpose of preparing a European Arrest warrant. Factually this European Arrest Warrant was not obtained from Bow Street Magistrates Court until the *17th February 2005* – a period of some thirteen months after the date of issue of the domestic warrant. I shall return to that period of delay in due course, but it suffices to say that it appears from the evidence of Ms. Riley that a decision was taken by the CPS not to submit any extradition requests to this State until such time as the difficulties which the UK authorities had with the provision of certain undertakings required under the 2003 Act were resolved. I shall return to that also. According to her evidence, this decision by the CPS not to seek extraditions from this State during this time resulted in about 20 cases being held up until the passing of the 2005 Act which created certain presumptions, thereby removing the need for such undertakings to be provided.

6. As I have already stated this warrant was endorsed by this Court for execution on the 12th April 2005, and the respondent was arrested on the 18th April 2005, and brought before the High Court, and was thereafter remanded on bail pending the hearing of this application under s. 16 of the Act.

7. When moving this application, Shane Murphy SC for the applicant submitted that the matters upon which this Court must be satisfied in applications of this kind are met in the present case. The first requirement is that this Court must be satisfied that the person before the court is the person named in the European Arrest warrant. I am so satisfied, and in fact no issue has been raised in that regard. Secondly, I am satisfied that the warrant was duly endorsed by the High Court for execution. A point of objection is raised in that regard in as much as the endorsement on the warrant is signed by the High Court Registrar and not the High Court itself,. Ms. Donnelly in making that objection relies on the same arguments put forward in Minister for Justice, Equality and Law Reform v. Hamilton, unreported, 23rd August 2005, and adopts them for the purpose of this case. For the same reasons as I did so in that case, I reject that argument in this case also. Thirdly, since this is not a case of conviction/sentence in absentia, the provisions of s. 45 of the Act are not applicable. Fourthly, he submits that there is nothing shown in this case which ought to mandate a refusal of the respondent's surrender by virtue of sections 21A, 22, 23, or 24 of the Act. I agree. Finally, he submits that the surrender of the respondent is not precluded by Part III of the Act, or by the Framework Decision. It is appropriate to consider the respondent's submissions on the points of objection which have been raised, before reaching a conclusion on this final point.

8. Apart from an additional point of objection raised subsequent to the cross-examination of Ms. Riley, in relation to the domestic warrant to which I have already referred, and to which I will return later, the objection made is really one which in other circumstances would have been made under s. 50(2)(bbb) of the Extradition Act, 1965, as amended. Ms. Donnelly submits in that regard that because of delay on the part of the prosecution parties in the bringing of this application from the time the complaint was first made by the complainant, and the serious ill-health of the respondent which was extant at that time and is still present to an even greater degree, the respondent's constitutional rights would not be respected and vindicated by his surrender to the UK authorities for the purpose of facing a trial on the charges brought against him, and that such a surrender would breach his constitutional right to bodily integrity and, potentially his right to life.

9. The delay is not a delay to which the respondent has contributed in any way. I am satisfied in that regard.

The evidence regarding delay/ lapse of time:
10. As I have stated, the complaint was first made by the complainant to the Social Services in or around August 2001, but at that time the parents of the girl decided that they did not wish to involve the police, since the respondent was by then in Ireland. In his own affidavit he states that his wife to whom he had been married for forty years died from cancer in July 2000. He says that in August 2001 he came to Ireland on a holiday, and that while he was here he decided to live here for one year in order to see if it would work out. He goes on to say that during that year his daughter and her husband (the parents of the complainant) continued to run his building business until August 2002 while he was here, and that his accountant for the business knew his address here and that he lived openly in Tralee, and that, amongst other things, he was in receipt of a widower's pension from the UK which was sent to his address in Tralee. The submission in this regard is that the respondent made no secret of his whereabouts and that he cannot be expected to bear any share of responsibility for the delay in arresting him. I have already indicated that I am satisfied that this is correct.

11. Furthermore he states that during 2002 and 2003 he made a number of trips back to the UK in connection with winding down his business affairs, and that his daughter and son in law knew at all times where he stayed on those occasions. He states that for these reasons he cannot understand why there was delay in arresting him, and also why he was not asked to return to the UK voluntarily. He says that his deteriorating health has prevented him from returning to the UK since 2003, although during 2003 itself he made a number of visits.

12. Ms. Riley of the CPS deals with delay in her affidavit and I have already dealt with that to some extent. To summarise that again, she states that in September 2001, the complainant mentioned the alleged indecent assaults to her parents. Her father reported the matter to the social services in January 2002, but at that time indicated that they did not wish police involvement. In July 2002, however, the police were contacted and in due course by the end of October 2002, statements had been taken from both the complainant and her siblings. The domestic warrant issued on the 14th January 2003. Ms. Riley stated in her affidavit that following the issue of that warrant, the CPS office decided not to submit any extradition requests to Ireland until the need for certain undertakings under the 2003 Act were removed. This is a reference to the issue raised in the Dundon case. Even though that issue was unsuccessful in the Dundon case, the UK authorities appear to have considered that the requirement to furnish certain undertakings was an onerous one, and they wished to wait until the case was heard in the Supreme Court, and she goes on in paragraph 8 of her affidavit to say that "the Irish authorities were also amending their European Arrest Warrant Act 2003 to avoid the need for written undertakings to be provided in respect of specialty and re-extradition to a third territory and thereby facilitate extradition procedures between Ireland and her European Union partners." Ms. Donnelly has placed considerable emphasis on the delay which was caused by this policy decision to postpone the seeking of any extraditions from this State pending the easing, as she submits, in the requirements of the Act, which the UK authorities appear to have regarded as unnecessarily onerous.

13. Ms. Riley submitted to cross-examination on her affidavit pursuant to a Notice to Cross Examine served by the respondent. She was asked about what happened after the issue of the domestic warrant in January 2003. She said that she did not receive the file until the 7th May 2004, although from a date stamp on the file, it may have been received in her section at the end of April 2004. She said that the domestic warrant was issued so that if the respondent arrived into the United Kingdom he could be arrested. She was adamant that it had not been issued for the purpose of seeking the extradition of the respondent. This seems to be in spite of the fact that according to her affidavit evidence a decision had been taken on the 30th October 2002 by the CPS to seek the extradition of the respondent. It is also the fact that the European Arrest Warrant arrangements contained in the Framework Decision dated 13th June 2002 had not yet come into operation. Those arrangements came into effect only on the 1st January 2004. She stated that it had always been part of the Part III procedures under the 1965 Act that a domestic warrant would be put in place before a warrant would be sought for the purpose of having same backed under the backing of warrants procedures available under Part III of the 1965 Act. Ms. Riley stated that since the file came to her only in April/ May 2004 she could not explain why there had been a delay in progressing the matter of the extradition of the respondent between the 14th January 2003 and April/May 2004, by which time the new arrangements under the European Arrest Warrant arrangements were in place.

14. In her cross examination she was asked about the decision of the CPS not to submit applications for extradition following the Dundon decision here regarding the undertakings referred to. Ms. Donnelly asked her about this decision particularly in the light of the fact that the point at issue in Dundon had failed in the High Court as of the 14th May 2004 which was the date on which O'Caoimh J. gave his judgment. She stated however that the matter was still ongoing into 2005 by way of appeal, and the decision was taken to await clarity being brought to the situation by an amendment to the legislation which it was anticipated would ease the requirements by the creation of a presumption in relation to the matters for which these undertakings were required by the 2003 Act before its amendment by the 2005 Act. It was put to her that when that decision was taken, it was taken without any regard for the individual circumstances of the respondent and his illness from which he was known to be suffering at that time. She stated at first in answer to this that she did not think that she was aware of his illness at that time, but Ms. Donnelly pointed out to her that in her affidavit she has stated at paragraph 6 in relation to the visits to the UK which the respondent made in 2003 that he was attending the Harefield Hospital for out-patient treatment for a heart condition. She stated in response that she did not see it as part of her job to look into that matter further at that time. Ms. Donnelly submits in this regard that the respondent's case was simply left on the back-burner so to speak until such times as the conditions required to be fulfilled for extradition of the respondent and the other twenty or so cases were made less onerous by amending legislation.

15. It would appear that by 17th February 2005 when the European Arrest Warrant was issued that the requirements under the unamended 2003 Act were not complied with as to obtaining of the required undertakings. Ms. Riley stated that while they had not been actually obtained because everyone was expecting the amending legislation to be soon passed, she had in fact drafted the undertakings in question but had not had them signed. She accepted that as of the 17th February 2005 she could not have sent the warrant to this country so that it could be endorsed and acted upon, as the undertakings were not signed, and that she was anticipating the change in the legislation here. The amending legislation came into effect on the 8th March 2005, and the matter progressed thereafter without the need for the undertakings.

16. It is submitted that this delay resulted first of all from the complainants' parents not wishing to get the police involved, and secondly from the decision by CPS to await a change in the legislation here, thereby making less onerous the task of having the respondent extradited. It is submitted also that this decision amounts to a breach of the respondent's constitutional rights and an abuse of process on the part of the UK authorities, since the authorities deliberately delayed proceeding with his extradition so that they could gain some procedural advantage from the expected amending legislation here.

17. The length of the culpable delay on the part of the authorities is said to be of the order of two years and three months – i.e. October 2002 when the decision to seek extradition was made, until 17th February 2005 when the European Arrest Warrant was actually issued.

Alleged prejudice due to ill-health:
18. Ms. Donnelly has submitted that it was three years after the complainant first made her complaint to her mother that the respondent was first made aware of the complaint, and for the first time was able to deal with the prospect of being prosecuted for offences which he vigorously denies, and that it was during this very period of time that he suffered a serious deterioration in his health. She submits that his ability to properly defend himself is thereby diminished and that he now would face a trial some four years after the offences are alleged to have taken place.

19. Some medical reports have been exhibited by the respondent in order to establish the extent of the ill-health from which he is suffering. The first document furnished is a Discharge Summary sent by Harefield Hospital to the respondent's General Practitioner after he had been discharged from that hospital in February 1998 after four days in hospital. At that stage he was being considered for a heart transplant, but it was felt on balance that it would be better to treat the respondent "medically" rather than by way of transplantation. But the letter is put forward to establish that the respondent was suffering from chronic heart disease problems as far back as 1998, and that he has since that time, and in particular at a time later than the complaints made against him, deteriorated. He had previously had by-pass surgery in 1988.

20. The second report is a letter dated 3rd May 2005 from Dr A.D., the respondent's General Practitioner in Tralee. Dr D. lists his medical problems as being firstly "Significant severe coronary artery disease" consisting of (a) Myocardial Infarction (heart attack) in 1994; (b) Coronary bypass grafting in 1988 (4 vessels); (c) Heart failure in 1994; (d) Pacemaker implant inserted in June 2004 – it being noted also in this regard that in June 2004 a coronary angiography showed severe generalised occluded coronary vessels with muscle wall dysfunction; (e) A "re-do" coronary artery bypass grafting in November 2004. Secondly he is suffering from "Intermittent claudication with significant peripheral vascular disease". Thirdly, he is described as suffering from hyperlypidemia for which he is taking a number of medications listed in the report.

21. Dr D. has concluded that the respondent has severe and extensive coronary artery disease with heart muscle involvement, noting that his movements are "severely restricted" as a result, and that he needs regular review and treatment for the remainder of his life. He states that the prognosis is very guarded, and that the respondent "is at major risk of a sudden onset of acute event (sic) that could lead to extremely serious consequences or death." This report concludes as follows:

> *"…He has been advised to avoid all stressful situations and not to place himself in any stressful environment under any circumstances on medical grounds. Any person or circumstance that would place this man in an 'at risk' situation will have to accept responsibility for the medical and legal consequences that may arise thereof (sic)."*

22. This final sentence is perhaps one which is couched in inappropriate terms for a report but nevertheless there is no reason to ignore the obvious dangers to which this doctor states the respondent is exposed in stressful situations.

23. The final report is one dated 6th July 2005 from Consultant Cardiologist, P.K. He states that the respondent has "very advanced coronary heart disease", and records his history of bypass surgery in 1988, and that in 2004 when examined, he was found to have "very poor heart muscle pump function and severe disease of both his native vessels and bypass grafts." Dr K. states that the respondent underwent repeat bypass grafting on the 24th November 2004 and also that he had an implantable cardioverter defibrillator inserted in June 2004. But it is noted also that despite the re-do surgery he continues to have chronic impairment of heart muscle function and is at risk of developing heart failure, in which event, it is opined, this could well prove catastrophic. Dr K. concludes:

> *"Acute severe stresses, either psychological or physical, may precipitate acute coronary disease, and if at all possible should be avoided…"*

Legal submissions relating to delay and ill-health:
24. A question to be addressed since it is arising not only in the present case, but also in a number of applications brought under the new extradition arrangements pursuant to the European Arrest warrant Act 2003, as amended, is the extent to which the consequences of delay can be argued at all on behalf of a respondent in a case where there has been some lapse of time between the date of commission of the alleged offence, or the date of conviction, and the arrest of the person on foot of a European arrest warrant. Under Part III of the Extradition Act 1965, as amended, and in particular under s. 50(2)(bbb) thereof, an application for the release of the arrested person could be brought following the making of an order for delivery under s. 47 thereof, on the ground basically that there had been an exceptional lapse of time, that there was some other exceptional circumstance, so that these factors when considered having regard to all the circumstances of the case, rendered it either unjust, invidious or oppressive to deliver up the respondent to the requesting state.

25. The provisions of that section have no application under the new Act, and neither is there any equivalent section contained in the new Act, and nowhere in the Framework Decision itself, which is annexed to the Act is there anything to suggest directly that in cases where there has been delay on the part of the authorities or on the part of a complainant coming forward with the complaint giving rise to the charge(s) for which extradition is sought, or what has until now been referred to in the legislation and case-law as lapse of time, the Court can exercise its discretion as to whether it would be unjust, invidious or oppressive, or anything of that kind, to make the order sought under s. 16 of the 2003 Act as amended.

26. Ms. D. argues that the right of an accused person to an expeditious hearing of a charge brought against him is carried into the process of extradition also, and that to order the surrender of a person to face charges in another jurisdiction in circumstances where there has been a lapse of time of significance which has resulted in the chances of that person having a fair trial being diminished would be to direct his surrender to face a trial other than in due course of law, and that a breach of constitutional right would thereby occur. She submits that even though there is no provision in the new arrangements which is equivalent to the old s. 50(2)(bbb) application, nevertheless the Court is required to ensure that constitutional rights are protected, and she has referred to Article 12 of the Preamble to the Framework Decision itself which states as follows:

> *"This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media".*

27. This statement seems to be reflected in s. 37(1) of the 2003 Act which provides:

> *"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

(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. Ms Donnelly has submitted that there is an implied constitutional right not to be surrendered under the Act so that a prosecution can be pursued against a respondent where there has been undue delay between the date on which the alleged offence was committed and the application for surrender being made, and that this is part of the constitutional right not to be deprived of one's liberty save in due course of law, as well as the right to an expeditious and fair trial.

29. Relevant also are the provisions of s. 40 of the 2003 Act which provides as follows:

"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)

30. Shane Murphy SC has submitted that the phrase "passage of time" means simply that in cases where there is in this jurisdiction some period of time specified in a Statute of Limitations, or similar legislation within which a prosecution in respect of a particular offence must be brought, and that period has been exceeded, then surrender may not be ordered. I am not satisfied that this is correct given, firstly, the words actually appearing in the section. It would have been very easy for the Oireachtas to have used words which made that meaning clear, instead of using the phrase "passage of time", which is resonant of the phrase "lapse of time" referred to in the old section 50(2)(bbb) of the 1965 Act, as amended.

31. Secondly, it is noteworthy that in s. 39(1) of the 2003 Act, there is provision to refuse surrender where person has received a pardon here under Article 13.6 of the Constitution in respect of an offence consisting of an act or omission which constitutes in whole or in part the offence specified in the European arrest warrant issued; subsection (2) has a similar provision relating to where the respondent has received a pardon or amnesty in the issuing state in respect of the offence; and subsection (3) thereof provides, and this seems particularly relevant to Mr Murphy's submission about the Statute of Limitations context:

(3) A person shall not be surrendered under this Act where he or she has, by virtue of any Act of the Oireachtas, become immune from prosecution or punishment for an offence consisting of an act or omission that constitutes in whole or in part the offence specified in the European arrest warrant issued in respect of him or her."

32. I have formed the view that s.39, subsection (3) above is couched in terms which more easily than s. 40(b) permit of a meaning that where the offence if committed in this State could not be prosecuted on account of the fact that some limitation period has expired in respect of the offence, a person cannot be surrendered. Clearly in my view where a limitation period has passed a person is thereafter is "immune from prosecution" in respect of the offence to which the period is applicable.

33. If I am correct in that view, it is inconceivable that the provisions of s. 40(b) are otiose. They must be given a meaning by reference to the ordinary meaning of the words used, and in my view, while there is nothing in the Framework Decision which states specifically that in cases where there has been a lapse of time since the date of commission of the alleged offences and the date of the application the court in the requested state may determine whether or not to refuse the application, the Oireachtas may be seen as having inserted that provision in the 2003 Act so as to give effect in this State to the Framework Decision in a way which is consistent with the protection to be given to fundamental rights, be they rights under the Convention, the Protocols to the Convention or the Constitution itself, such rights being recognised in the Framework Decision as being rights which continue to be respected.

34. It is noteworthy that s. 40 is not drafted in terms which in any way replicate or even bear a similarity to the wording of s. 50(2)(bbb) of the 1965 Act, as amended. That cannot be accidental in my view. That is relevant to the present submissions because it raises the question as to whether it is appropriate to have regard to the case-law which developed here in relation to cases brought under s. 50(2)(bbb) of that Act, when considering whether in any case under the new Act in which it is alleged that there has been such a passage of time that the person could not be proceeded against, in the State, in respect of a similar offence here. A possible view of that question would be that the terms of s. 50(2)(bbb) were very specific as to what had to be established as to a lapse of time, other exceptional circumstances, and that only if one succeeded in establishing those features in the case could the court be asked to go further and address the remaining question as to whether it would in all the circumstances be unjust, invidious or oppressive to deliver the person to the requesting state.

35. A question which arose during the course of the present case is whether, prior to the enactment of s. 50(2)(bbb) into the 1965 Act, there would have existed in any event a right under the Constitution such as the right, referred to in the present case, not to be extradited where due to a lapse of time or other reason there is a real risk of an unfair trial, or where due to the onset of serious and established illness, the right to bodily integrity or even the right to life itself would not be respected and vindicated by ordering his surrender, and if so, whether the provisions of s. 50(2)(bbb) in fact represented a restriction or an ousting of a pre-existing right in the sense of circumscribing quite tightly the circumstances in which relief under that section could be invoked. That question is not simply academic in the present case, because if there was a pre-existing constitutional right of the kind I have mentioned, and which was broader than the right to seek release pursuant to s. 50(2)(bbb), then it is questionable whether in the present case the Court's view of the submission made by the respondent should be confined to the jurisprudence which has emanated from applications brought under that section. In this regard I note that in Minister for Justice, Equality and Law Reform v. McArdle, unreported, High Court, 27th May 2005, the learned President of the High Court stated in relation to the terms of s. 40 of the 2003 Act as follows:

"I take the view that the section requires me to consider delay in the same manner in which same would have been considered under the Extradition Act 1965 section 50(2)(bbb). See Kwok Ming Wan v. Assistant Commissioner Noel Conroy [1998] 3 I.R. 527. The first matter to which I have regard is that prior to the coming into effect on the 1st January 2004 of the European Arrest Warrant Act, 2003 extradition was not possible. The European Arrest Warrant was in fact issued on the 19th August 2004. In these circumstances I am satisfied that the delay itself is not exceptional. As to other exceptional circumstances, while having regard to my decision that the delay is not exceptional, these are not

relevant, these are set out in an affidavit sworn on behalf of the respondent……In these circumstances the respondent has not satisfied me that there exists in this case any exceptional circumstance in the sense outlined in Kwok Ming Wan v. Conroy. Having considered the circumstances as a whole I am satisfied that there has not been such delay as to prevent the Court making an order for the respondent's surrender."

36. If, however, the position is that once the matter is not being dealt with under s. 50(2)(bbb) because it cannot be, but instead under s. 40 of the 2003 Act, and/or in the context of alleged breach of constitutional rights, the court is not in fact constrained to dealing with the matter only in the same manner as under s. 50(2)(bbb), then it may be necessary to look at the jurisprudence which developed prior to the enactment of s. 50(2)(bbb) which was inserted into the 1965 Act by s. 2(3)(6) of the Extradition (Amendment) Act, 1987.

37. For example, a case in point to which Ms. Donnelly referred in her submissions is the judgment of Walsh J. in *Finucane v. McMahon* [1990] 1 I.R. 165,. That case was one involving an application under s. 50(2) of the 1965 Act, but nevertheless not under subparagraph (bbb) thereof which was enacted only subsequent to that case. The point at issue was whether the offences for which the order for the surrender of the applicant had been made were political offences, or offences connected with a political offence – the 'political exception' referred to in s. 50(2). Albeit therefore in a context different to that of lapse of time, the learned judge at page 216-217 of the judgment states:

"… The Courts must remain completely impartial and detached and free form all political or diplomatic pressure in their objective determination of the issues involved. In addition, they must safeguard the constitutional rights of the fugitive and ensure that there will be no rendition which would subject the fugitive to injustice or to any treatment or procedure which would be inconsistent with the norms of our concept of fair procedures. While foreign procedures may be fair and humane without conforming in all respects with the particular guarantees in our Constitution our statutory provisions do not permit the courts to ignore the motives of the requesting state or the fairness of the procedures by refusing to consider the treatment the fugitive will receive if returned. Neither should our courts ignore the answerability of the State to the organs of the European Convention of Human Rights and Fundamental Freedoms if a fugitive offender is handed over to any other state, whether a member of the Council of Europe or not, where the courts are not satisfied that his treatment there would not be in breach of the rights protected by the Constitution."

38. There is no question of the Court in the present case having fears that the UK authorities would do anything other than look after the interests of the respondent as far as his health is concerned, in so far as that can be done in a prison environment either during any period of pre-trial incarceration, or during any period of post-trial imprisonment. That is not the point at issue for the moment. The above passage, however, is clearly supportive of the submission that the Court must act in a way which protects and vindicates constitutional rights generally, and the fact that the present case throws up for consideration the protection of a different constitutional right to that in Finucane v. McMahon is neither here nor there. The point being made is that even before s. 50(2)(bbb) was introduced into the 1965 Act, the Courts were vigilant to ensure that in any case in which rendition was being considered, of paramount importance was a consideration of whether by such rendition the constitutional rights, whatever those may be in any particular case, would be put to the hazard, and whether in order to properly protect and vindicate those rights the Court ought to refuse to surrender the person sought.

39. It is also interesting to note the use of language by Henchy J. in McMahon v. Leahy [1984] I.R. 525 at p. 542, where he uses terminology which bears a striking resemblance to the use of "unjust, invidious or oppressive" as appearing in what became s. 50(2)(bbb) of the 1965 Act. At p. 542 that learned judge stated, albeit in a totally different context to the present case, but nonetheless involving the question of constitutional rights:

"…the Court would be giving countenance to an unfair, unconscionable and oppressive discrimination. In short, it would be acting in disregard of the plaintiff's rights under Article 40, s.1 of the Constitution."

40. This would appear to lend support to the submission that even before the enactment of s. 50(2)(bbb) rendition might be refused where to do so would be regarded as being unjust, unconscionable or oppressive, since to do otherwise would amount to a breach of a constitutional right – in that case that right being one under Article 40.s. 1 of the Constitution. It seems to me to follow from this conclusion that while s. 50(2)(bbb) dealt specifically with lapse of time cases, it did not actually create the entitlement for an applicant to seek to restrain his extradition on grounds that as a result of a lapse of time his constitutional right to a fair trial or a trial in due course of law would be infringed. It did, however, prescribe how, following that enactment, such applications based on lapse of time, were to be dealt with.

41. Even though I am not aware of a particular case in which such an application was made prior to the amendment to the 1965 Act by the insertion of s. 50(2)(bbb), there would appear to have been no obstacle to such an application being made on broad constitutional grounds, and importantly, on grounds unconstrained by the criteria to be satisfied under s. 50(2)(bbb). That conclusion brings me straight back to the proposition that it may not now be appropriate to look at the passage of time argument in the present case only by reference to the manner in which lapse of time was considered previously under s. 50(2)(bbb).

42. I propose therefore to consider the present case and the arguments led in support of the respondent's submissions on a basis broader than the basis upon which applications under s. 50(2)(bbb) have been considered in the past. In other words, it is not necessary that I be satisfied that the lapse of time itself is exceptional in the present case since the date of the first complaint, and it is also not necessary to go further and be satisfied that there are other exceptional circumstances in the case, before embarking upon a consideration of whether in all the circumstances an order for the surrender of the respondent would involve an infringement of the constitutional right or rights of the respondent to bodily integrity and/or his right to life, and/or his right to a trial on the charges being brought against him which is in due course of law.

43. One of the rights which the respondent seeks to have protected is his right to bodily integrity/right to life

The illness of the respondent:

44. I have already set forth the nature of the respondent's illness and the extent of the medical evidence relating thereto which has been presented. There is an onus on any respondent to satisfy the Court by cogent evidence, including where available the evidence of his present medical advisers, that he is in reality suffering from a medical condition which has the capacity to impair or put at risk his chances of a fair trial if surrendered, or which would put at risk his future health or even his life, were he to be surrendered to the requesting state to stand trial.

45. It would not be sufficient for the purpose of discharging the onus of proof for the respondent to merely assert the nature of an illness he is alleging he is suffering from, and its effect on him. There must be expert medical evidence from some doctor or other

medical expert, preferably a treating doctor, which is sufficient to discharge the onus on the respondent. The Court of course cannot ignore also the evidence in the present case that were the respondent to be imprisoned, he could expect to receive all necessary and appropriate medical treatment for any illness he may be suffering from. An affidavit has been sworn in this case by an English barrister, Adina Ezekiel, and she avers, inter alia, that the level of health care available to prisoners is similar to that available to persons outside the prison system, including where necessary by removal to an outside hospital where he would remain in custody.

46. While I have already stated why I am of the view that the length of the "passage of time" is not now of such importance as heretofore, I should say that the period cannot be regarded as great, since the matters first came to light only in September 2001. In January 2002, the social services in England were contacted about the complaint, but the parents made a decision not to involve the police for the reasons described. I do not think that such a decision was an unreasonable one at the time in all the circumstances. There was however a delay caused by the CPS. Firstly they delayed from October 2002 until January 2003 in obtaining the domestic warrant. That in itself is not a long passage of time, but nevertheless it was followed by a further passage of time until the 17th February 2005 while the CPS waited for amending legislation to be introduced in this country making it easier, as the CPS considered it, to have persons surrendered from this State to the UK. For some reason the CPS seem to have been aware of an intention on the part of the government here to bring in this amending legislation and they decided to bide their time rather than proceed under the then existing arrangements, which involved them in furnishing certain undertakings. These undertakings had in fact been drafted according to Ms. Riley, but they were kept on file while the CPS awaited the change in the law here. I believe that I am entitled to be critical of such a decision which was taken in the UK. The evidence has been that this decision was taken at a policy level and not with any particular case in mind. There were apparently about twenty such cases which were deliberately held up for the same reason.

47. First of all, that decision took no account of any circumstances which might have affected any one of the persons among the twenty referred to. As it happens, in the present case the person was at the time of delay a very sick man according to his doctors, and no consideration was given to his individual circumstances. Secondly, the decision ignored the requirement under the Framework Decision that extradition matters be dealt with on an urgent basis. Such a basis appears to preclude the sort of decision which was made, namely to do nothing for the moment until they waited to see what the result of the Dundon case might be, and until amending legislation was introduced. Thirdly, there is something fundamentally unattractive, and in my view unacceptable about a requesting authority depriving a person of the opportunity of having matters proceed under existing arrangements, and so that it might in due course become more difficult for that person to successfully challenge the application for his surrender, or easier to have the person extradited – whichever way one wishes to look at it.

48. In my view the respondent in that regard was treated unfairly, and that he has been the victim of unfair procedures which should be regarded as behaviour which is both unjust, invidious and oppressive – to borrow the terminology of s. 50(2)(bbb) again. Once the domestic warrant issued, the authorities in the UK, while obviously being permitted a measure of tolerance as far as the time it might take to process the paperwork in the ordinary way, were not entitled to be dilatory, even if that dilatoriness was to gain some tactical advantage over the respondent in the matter of the application to this Court for an order under s. 16 of the 2003 Act.

49. It is the nature of and reason for the delay which is particularly relevant in my view to the question now as to whether the respondent has suffered a breach of his constitutional rights such that an order ought not to be made. As stated already, s. 37(1) of the 2003 Act provides:

> *"A person shall not be surrendered under this Act if –*
>
> *(b) his or her surrender would be incompatible with the State's obligations under –*
> *(iii) the Convention*
>
> *(iv) 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)."*

50. In my view there has been a breach of the respondent's right to fair procedures by the manner in which the UK authorities conducted themselves in the hope of gaining this tactical advantage over the respondent, even if they themselves did not see their decision in exactly those terms. It was invidious and oppressive behaviour particular in the circumstances where the respondent was ill, and known to be ill. I referred to the meaning of those terms recently in my judgment in Bolger v. O'Toole, unreported, 28th October 2005.

51. The word 'invidious' was defined as "likely to excite resentment or indignation against the person responsible, esp. by real or seeming injustice", by reference to the Concise Oxford Dictionary, and the same work defined the word 'oppressive' as "harsh or cruel" or "difficult to endure". In my view what was done in this case meets these definitions without any straining whatsoever.

52. That factor may on its own be sufficient to entitle this Court to refuse to order the surrender of the respondent. But it is appropriate that I deal also with the illness of the respondent and its impact on his constitutional rights. In the Bolger case I expressed some criticism about the paucity of medical evidence to support the applicant's submission that on account of his illness he ought not to be surrendered in order to serve out a sentence imposed upon him in absentia. No such criticism would be justified in the present case. The certificates exhibited from the respondent's medical attendants could not in my view present the picture more clearly. They speak for themselves and there appears to be no challenge by the applicant to the contents thereof. They provide evidence of chronic and acute severe, extensive and life threatening coronary artery disease. This man has now had by-pass surgery in 1988, as well as what is called "re-do" surgery in November 2004. That cannot be repeated a third time. He has been advised to avoid all stressful situations, and it has been opined by Dr K., Consultant Cardiologist, that any further acute coronary event "might well prove catastrophic". I take this to mean that the respondent could die as a result of such an event.

53. I have concluded that this man is at real risk of dying if placed in any situation of severe stress, and I am of the view that it is reasonable to assume not only that any trial would constitute such a severely stressful situation, but also the whole pre-trail period, including his surrender to the UK, where he would be involved in instructing solicitor and Counsel in preparation for his trial.

54. I am also satisfied that the evidence shows that the respondent's health has in fact worsened during the period constituting the 'passage of time' in this case. I am not, however, to be taken as deciding that this is something which would have to be shown in every case. Each case would have to be considered on its own particular facts.

55. I recognise that there is another interest concerned in these matters, and that is the right of the Crown Prosecution Service on

behalf of the citizens of the England and Wales to have these charges prosecuted and brought to trial. But in the circumstances of the lapse of time which I have described, that right must yield without difficulty to the respondent's constitutional rights to fair procedures, due process, bodily integrity and life itself.

56. I should refer to the fact that Mr Murphy has submitted that ill health as such is not sufficient to demonstrate that a person's constitutional rights will be infringed by surrender, unless it can be shown that a person is too ill to stand trial. He referred to the judgment of Geoghegan J. in *Carne v. O'Toole*, unreported, Supreme Court, 21st April 2005 and submitted that in that case the Court found that ill health of a similar nature to the respondent's condition was found not to constitute "exceptional circumstances" within the meaning of s. 50(2)(bbb) of the 1965 Act. In his judgment in that case, the learned judge accepted an argument by Counsel that such an illness or medical condition would not be sufficient to prevent a person in this jurisdiction from being put on trial, and that in those circumstances the illness did not constitute an exceptional circumstance. The learned judge, however, went on to state:

> *"There would have to be much more traumatic and devastating evidence of ill-health before the courts would regard a medical condition as providing 'exceptional circumstances'.*

57. I am of the view having read the learned judge's account of the medical evidence in that case, that the applicant in that case was not shown to be as dangerously ill as the respondent herein. But having said that, it is also relevant to state again that the application in Carne was under s. 50(2)(bbb) where, for the reasons already stated, it can be said that different criteria apply.

58. I am not satisfied that the objection raised during the hearing before me that the domestic warrant suffers for a flaw in that it seems to refer to only one offence, whereas there are three offences referred to in the European arrest warrant, is a valid objection. Under the 2003 Act, and as appearing in the prescribed text for a European arrest warrant in the Framework Decision, what is required to be in existence is a domestic arrest warrant or judicial decision having the same effect. As a matter of pure fact, there is in this case an arrest warrant, being that which issued on the 14th January 2003, and it is in respect of one offence of indecent assault "between 1st May 2001 and 1st September 2001". The European arrest warrant specifies three offences of indecent assault between 30th June 2000 and 1st September 2001. In my view, the fact that the domestic warrant refers to only a single offence cannot invalidate the latter warrant. What is important is that there exists a domestic warrant for the arrest of the respondent for an offence referred to in the European arrest warrant, so that the procedures under the Framework Decision can be invoked to assist in his arrest and surrender to the requesting state.

59. In relation to the submission by Ms. Donnelly that the time-limits provided for in the Framework Decision for the making of a final order under s. 16 of the Act have been exceeded, I am satisfied for the same reasons set forth by O'Sullivan J. in Dundon v. Governor of Cloverhill Prison, unreported, 3rd May 2005, that this feature does not preclude this Court from making an order, should it have concluded that such an order should be made.

60. I therefore refuse the application for the surrender of the respondent for the reasons stated herein.