THE HIGH COURT

Record Number: 2004 No. 888 JR

BETWEEN

PETER BOLGER

APPLICANT

AND
JUDGE GERARD HAUGHTON, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

THE HIGH COURT

Record Number: 2004 No. 232 Sp

BETWEEN

PETER BOLGER

PLAINTIFF

AND
PATRICK O'TOOLE

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 28th day of October 2005

1. The judicial review proceedings herein seek to quash an order of the first named respondent dated 15th June 2004 by which he ordered the delivery of the applicant into the custody of a member of the London Metropolitan Police pursuant to s. 47 of the Extradition Act, 1965, as amended, so that the respondent could serve a three year prison imposed on him in his absence at Southwark Crown Court on the 2nd June 1995.

2. Also before the Court are proceedings commenced by way of Special Summons in which an order is sought under s.50 (2)(bbb) of the Extradition Act, 1965 as amended ("the Act"), for the release of the plaintiff principally on the grounds of lapse of time, but a point has also been addressed regarding correspondence in relation to one of the offences, namely forgery.

3. Given that the offences in respect of which the plaintiff was convicted in April 1995 were committed in December 1991, there is no doubt that there has been a significant lapse of time as a matter of simple fact. There is a substantial background history to the present applications, the detail of which is spread over seven lever arch files of documents, with legal submissions and accompanying authorities running to another lever arch file, as well as a bundle of other loose documents referred in submissions to the Court.

4. I will set out a chronology of different events in the history of the proceedings against the applicant/plaintiff, leading eventually to the granting in the District Court of the order impugned in the judicial review proceedings. Then I will address the submissions in the judicial review proceedings and thereafter deal with the application under s. 50 (2)(bbb) of the Act.

Offences committed – stealing cheques and money, carrying on business with intent to defraud, and forgery	the earliest of such offences being said to have been committed between 1st January 1991 and 16th July 1991.
Arrest of the plaintiff	15th July 1992
Plaintiff charged with offences	20th April 1994
Commencement of Trial	13th March 1995
Applicant, on medical grounds, fails to return to his trial, after coming to Ireland for a weekend	3rd April 1995
Conviction (in absentia) by a jury	6th and 7th April 1995, the applicant having failed to appear at his trial after the 3rd April 1995 due to alleged medical reasons
Sentence passed (again in absentia)	2nd June 1995
Extradition warrants obtained	27th December 1995
Warrants endorsed for execution	15th February 1996
Arrest of plaintiff	April/May (????) 1996
Before District Judge Windle	23rd May 1996 and 23rd July 1996
Extradition refused by Judge Windle	10th October 1996
New extradition warrants issued	25th June 1998
Warrants endorsed for execution	19th October 1998
Plaintiff arrested	20th October 1998
Habeas Corpus application refused	21st October 1998
Appeal to Supreme Court dismissed	2nd November 1998
1st Judicial Review application	limited leave granted – 2nd November 1998
Notice of Appeal filed against granting of limited leave	26th March 1999
Appeal to Supreme Court dismissed	8th July 1999
Judicial Review application heard by O'Neill J.	15th December 1999
Judgment delivered by O'Neill J.	8th June 2000
Order perfected	30th November 2000
Notice of Appeal filed in Supreme Court	11th December 2000
Books of Appeal lodged	"early to mid 2002"
Dismissal of Appeal by Supreme Court	2nd December 2002.
Re-listing of application for extradition in District Court	9th April 2003
Dates of hearing in District Court	26th and 27th November 2003

District Judge rules that case for order is made out and adjourns	3rd December 2003
Decision and Order of the District Judge under s. 47 of the Act	15th June 2004.

Submissions in the Judicial Review Proceedings
5. The reliefs sought in the judicial review proceedings herein arise out of the hearing and decision in the District Court application which on the 26th November 2003. The learned District Judge delivered a written judgment on the 15th June 2004. The applicant seeks an order of certiorari quashing the order of the learned District Judge by which, pursuant to s.47 of the Act, he ordered the rendition of the applicant to the UK authorities so that he could there serve out the sentence of three years imposed in absentia on 2nd June 1998.

6. It is important to state the obvious at the outset, namely that the judicial review proceedings cannot be seen as or treated as being an appeal against the decision of the learned District Judge. It is in no sense a re-hearing of that application, even though the Court has been referred to extensive passages from the transcript of the hearings in the District Court. This Court is concerned only with the process by which the learned District Judge conducted the hearing and reached his conclusions on the evidence placed before him.

7. A number of grounds are put forward by the applicant as to why the said order should be quashed. I will summarise these grounds as follows:

> 1. The rendition of the applicant would be a breach of his constitutional rights and/or his rights under the European Convention on Human Rights 2003, by reason of the fact that the applicant was medically unfit to attend at his trial on or after the 3rd April 2003 and the sentence hearing;

8. This ground depends on the facts which I will be setting out in some detail in relation to the application under s. 50 (2) (bbb) of the 1965 Act as amended. I will not rehearse those facts at this point, since I prefer to deal with the medical ground, so to speak, under the latter application, rather than in these judicial review proceedings. But it has been raised as a ground for quashing the order of the learned District Judge and I will deal with that ground now. The District Judge heard evidence as to the nature of the applicant's illness and the fact that the applicant while in Ireland during the weekend preceding the 3rd April 1995 became so ill that he saw a medical doctor, a Dr Collis and attended hospital thereafter. He also heard evidence that the English Court was appraised of the situation and was shown a copy of a note from Dr Collis. The applicant was still represented by solicitor and Counsel at this point. The learned District Judge heard evidence also that by this point in the trial all evidence had been led by the prosecution as well as the Defence, and both the prosecution and Defence cases had closed. The judge came to a decision that the remainder of the trial could continue in the absence of the applicant, and the jury was informed that the reason for the non-appearance of the applicant was that he was ill. On the 6th April 1995 the jury returned a verdict of guilty. Sentencing was adjourned on a number of occasions so that the medical condition of the applicant could be clarified. Eventually the applicant was sentenced in his absence on the 2nd June 1995. The applicant continued to be represented by solicitor and Counsel up to the point of sentence being passed.

9. The applicant submits that since his non attendance was necessitated by his illness the trial ought to have been halted on the 3rd April 1995 until he was well enough again to attend court. The respondent submits that since the Defence had closed its case, and since the applicant continued to be represented by solicitor and counsel, there was no unfairness in the trial continuing in his absence, in the sense that the jury was permitted to consider and reach its verdict in his absence. It is also submitted by the applicant that even if it is found to be fair that the trial was concluded so that the jury could reach its verdict in the absence of the applicant, the trial judge ought not to have passed sentence until such time as the applicant was present in court for his sentence hearing.

10. In my view, there is no doubt but that if the applicant had become ill necessitating his absence from court during the trial itself, and by that I mean before evidence had been concluded, the applicant might well have a case to submit that his constitutional right to a fair hearing had been breached by any refusal on the part of the trial judge to adjourn the trial pending his recovery, provided of course the trial judge was satisfied that the illness was such as to genuinely require that he do not attend court, or such that he could not attend court. Evidence about this was before the District Judge. He had evidence that the trial judge was appraised of the nature of the illness. Efforts were made by the prosecution to clarify the precise nature of the illness and its effect on the applicant's ability to attend court. The applicant is critical of the extent of the efforts made by the prosecution to pursue those enquiries, but be that as it may, the trial judge concluded that the trial could proceed to conclusion and he allowed the jury to retire and reach its verdict in the absence of the applicant, but while his solicitor and counsel were still instructed and present. I cannot see that this amounted to an unconstitutional unfairness.

11. In relation to the sentencing of the applicant in his absence, the District Judge heard evidence that following the jury's verdict the trial judge adjourned sentence so that some further enquiries could be conducted into the applicant's medical condition. Without going into it in any great detail, it seems clear that the applicant was not fully co-operative with regard to the further investigation of his medical condition by the prosecution. He appears to have not been agreeable, by the beginning of June 1995, to be examined by a doctor here who was nominated by the prosecution, having an an earlier point in time agreed to this.

12. The point was also made that the applicant himself had, by the 2nd June 1995, not furnished up to date information to the court as to his condition, even though he attended his doctors a short time prior to that date. He appears in my view to have disengaged from the court process at that time, even though his lawyers were still representing him. A number of adjournments were granted by the judge to enable enquiries to be made. In any event sentence was passed in his absence. The point made is that the applicant has a right to be present when being sentenced, and that if he had been present, he may have been in a position to give evidence which would have been relevant to the question of what sentence would be appropriate. However, it is submitted on behalf of the respondent that the applicant himself failed to make any serious effort to appraise the English court of the state of his health and his prognosis, so that the Court might be in a position to consider fully how long it might be necessary to adjourn sentencing so that the applicant could attend for the sentence hearing.

13. In my view the applicant has failed to show a breach of his constitutional rights in this regard. The onus is upon him in that regard. I am not left with the impression of a man who was anxious at all times to keep the court fully informed of his medical condition and to remain fully engaged with the court process. There may remain some unresolved factual matters between the applicant and the prosecution as to what efforts were or were not made to ascertain his current medical condition, but I do not believe that the applicant himself reasonably assisted in that task, and it was in my view permissible for the trial judge to proceed to

sentence him in his absence, especially since at that hearing the applicant continued to be represented by solicitor and counsel, and no application was made on that date to have sentencing put back yet again. The applicant's solicitors had informed the applicant by letter just prior to the sentencing date that on that date he would be sentenced in his absence. He was therefore not taken unawares in that regard. This is not a case in my view where the interests of the applicant were disregarded in an unconstitutional manner. This ground for relief by way of judicial review must fail.

14. In my view, the applicant has failed to demonstrate in any way whatsoever how he has suffered unfairly or been prejudiced in any way by the fact that the end of the trial, and the sentencing took place in his absence, albeit in the presence of his lawyers with whom he was in contact between the 3rd April 1995 and his sentencing on the 2nd June 1995. There can clearly be circumstances where a trial and/or sentencing in absentia could be a breach of the constitutionally protected right to a fair trial, particularly where the accused man may have been absent for his arraignment, or an entire trial proceeded in the absence of the accused or legal representatives, but the facts of this case as emerged from the evidence fall short of establishing such a breach. There is some evidence that the applicant decided not to pursue the question of an appeal against his conviction and sentence. He undoubtedly had such a right.

15. There is also certainly no evidence before me that the sentence imposed was more harsh against the applicant than it would have been if he had been present. He appears, for example, to have received the same sentence as his co-accused who was present – indeed a co-accused who the applicant himself in a letter to the trial judge appears to have attempted to have exculpated in the alleged offences. I would not be prepared to hold that the mere fact that the jury deliberated in his absence, or that he was sentenced in his absence, albeit an absence dictated only by medical reasons, amounts to a breach of his constitutional rights.

16. This Court was referred to the judgment of Murphy J. in *Lawlor v. Hogan* [1993] ILRM 606 regarding the discretion of a judge in relation to proceeding with a trial in absentia. During the course of his judgment the learned judge at page 610 identified the following propositions:

> *"1. That in so far as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable those functions to be performed.*
>
> *2. The right of an accused person to be present and to follow the proceedings against him is a fundamental constitutional right of the accused which every court would be bound to protect and vindicate.*
>
> *3. If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial notwithstanding the absence of the accused."*

17. These propositions do not refer specifically to a situation where the absence is due to medical unfitness. But it does not seem to me that the particular reason for the absence should be crucial to the existence or non-existence of the absolute right to be present at all times. In my view, in the present case, the applicant was there at all times where his presence was necessary, and on all other occasions he was legally represented, and if such a situation were to occur in this jurisdiction, it could not be said that to proceed in the absence of the accused would be an improper exercise of the discretion vested in the trial judge, even though any particular judge may choose to exercise a discretion in favour of adjourning the case.

18. In so far as it is also submitted that what occurred in the English Court was a breach of the applicant's rights under the European Convention on Human Rights (and in that regard I am conscious of the fact that this Court is required to have regard to the case-law of the European Court of Human Rights) I am not satisfied that the protection is any greater under Article 6 of that Convention than it is under the Constitution, and neither am I satisfied that the jurisprudence of the European Court of Human Rights goes so far as to recognise a breach of Article *6 in all situations* where there is a conviction and/or sentence in absentia.

19. A case to which the Court was referred and one which is helpful in relation to the question of whether a person's right to fair procedure, constitutional or Convention, is infringed where a trial, conviction and sentence takes place in absentia, is *R. v. Jones* [2002] UKHL 5. In that case the accused was present for his arraignment, and was duly bailed to appear at the Crown Court for trial. He failed to appear, although it was clear that he both knew of the date of his trial and of the consequences that might flow from his non-appearance. His solicitor and counsel withdrew from the case, and the trial judge, having considered the question of his discretion to proceed or adjourn, decided that the trial should proceed in the absence of the accused, but that in so far as he could do so, the judge would safeguard the interests of the absent accused. He was duly convicted and sentenced in his absence, and some considerable time later was re-arrested and brought before the Court, whereupon he received a further twelve month sentence concurrent to the sentence imposed on the original charges. An appeal against his conviction was unsuccessful, but the Court of Appeal (Criminal Division) certified a question to the House of Lords as follows:

> *"Can the Crown Court conduct a trial in the absence, from its commencement, of the defendant?"*

20. It will be seen immediately that this was a case where the defendant was not present or legally represented at any point of his trial or sentencing. That is an important distinction to the case of the present applicant. But nonetheless the House of Lords decided that the trial judge had a discretion and that on the facts of that case there was no infringement of the accused's rights. The law lords had to decide whether the Strasbourg jurisprudence should lead to an overruling of decisions such as that in R. v. Jones, Planter and Pengelly [1991] CrimLR 856, and R. v. Donnelly and Donnelly [Court of Appeal(Criminal Division)] unreported, 12 June 1997, where the Court had rejected the contention that where an accused person absented himself deliberately, or even involuntarily, from his trial, it must not be proceeded with in his absence. Having considered a number of the decisions of the European Court of Human Rights as appears in his speech, Lord Bingham answered the question certified in the affirmative, saying also:

> *"…In doing so I would stress, as the Court of Appeal did in paragraph 22 of its judgment, at pp 135-136, that the discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution. If the absence of the defendant is attributable to involuntary illness or incapacity it would rarely if ever be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin. The Court of Appeal's check-list of matters relevant to the exercise of this discretion …… is not of course intended to be comprehensive or exhaustive but provides an invaluable guide……The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome……. It is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory, and there is no possible ground for criticising the legal representatives who withdrew from representing the appellant at trial in this case. But the presence throughout the trial of legal*

representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility and oversight."

21. As I have stated already, this was clearly a case where an accused deliberately absconded, and there is absent therefore the mitigating factor in the present case where the applicant's absence from the final part of the trial only, namely the jury verdict and sentencing, was due to illness so certified by his own doctors. It is notable that Lord Bingham refers to the undesirability of commencing a trial against an accused whose absence is as a result of "involuntary illness or incapacity". I should say perhaps that I am accepting the bona fides of the applicant's illness for the purpose of this judgment. But in the present case, it was not a question of commencing the trial in the absence of the applicant. He was there throughout his trial, and even if his absence at the very final stages thereof he remained represented by solicitor and counsel, who were in touch with him at all times.

22. Lord Hoffmann in a short speech in the same case, and in which he agreed with Lord Bingham, added that in his view the question at issue was whether in all the circumstances the accused received a fair trial, and not whether he had by his deliberate act of absconding waived his right to a fair trial.

23. I am satisfied that taking all the circumstances of the case into account, and particularly the fact that at all times during the trial itself up to the point at which the jury commenced its deliberations the applicant was present, and that thereafter, though not present he was in touch with his legal team and was represented by solicitor and counsel for the remainder of the trial, including his sentencing, the rights of the applicant under Article 6 of the Convention were safeguarded.

24. I should just refer to one other point made by the applicant, and that is in relation to the fact that under the new extradition procedures introduced by the European Arrest Warrant Act, 2003, and the Framework Decision to which effect is given by that Act, extradition of a person will not be ordered, where either a conviction has been reached or sentence passed in absentia, without the requested state being assured by the requesting state that upon surrender the person convicted or sentenced in absentia will be given either a retrial or a new sentencing hearing. It is submitted on behalf of the applicant in these proceedings that this is tantamount to a recognition that a person's Article 6 rights are infringed where a conviction is reached or a sentence is passed in the absence of the accused person. In my view this does not follow. It is a fact that prior to the Framework Decision being agreed upon, the member states of the European Union had in place extradition arrangements with other member states, but that in some respects these arrangements were not by some considered to be ideal from the point of view of efficacy.

25. The Framework Decision was in my view drafted in a manner which attempted to meet the basic requirements of fairness of all member states, some of whom had, as part of their extradition arrangements, a requirement that in the event that a person had been tried and/or sentenced in absentia, such a person would have to be entitled to have a re-hearing upon his/her extradition. Not all member states, for example the United Kingdom and Ireland, had this requirement in their legislation and/or their jurisprudence. Nevertheless in the Framework Decision it is contained as part of the agreed arrangements among the signatories to that document. But that is not to say that it must be regarded as an infringement in all cases of trial/sentencing in absentia that a breach of Article 6 rights has occurred. Each case, as Lord Hoffmann stated in Jones, must be viewed in the light of the particular facts and circumstances of each case, in order to see whether the trial process taken as a whole has been fair, or if a real risk of unfairness exists.

> *4. There has been a breach of the applicant's constitutional and Convention right to a hearing of the application for his extradition within a reasonable time, and that if the Act permits his rendition notwithstanding these circumstances, then same is incompatible with the Constitution and/or the Convention.*

26. The learned District Judge considered the question as to whether to order the extradition of the applicant would be to breach the applicant's constitutional right to an expeditious hearing of his extradition proceedings. He considered this question very fully, and concluded that the delay, which he put at three and a half years was not of such a magnitude as to amount to a breach of a constitutional right. He of course quite correctly also pointed out that different considerations would apply in relation to any application for release which might be made to the High Court under s. 50(2)(bbb) of the Act, and that those considerations were not ones to which he could have regard, since the District Court has no jurisdiction in relation to such an application.

27. In my view, once again, the applicant has failed to demonstrate that the delay has been such as to amount to a real unfairness. There has undoubtedly been some delay, and I will be looking at that again in the context of the application for release under s. 50, but as far as it amounting to a breach of a constitutional right to an expeditious hearing of the application for his extradition is concerned, I am not satisfied that, absent any demonstrated prejudice resulting from any delay in relation to meeting such an application, any breach of the right has been made out. Furthermore, the lapse of time itself, while of some duration, is not of such an extraordinary length as to, of itself, amount to a breach of the right. This ground for seeking relief by way of judicial review must also fail.

> *5. That, having found that there were errors in each of the warrants – these errors being in relation to them stating on their face that the applicant "failed to surrender as required to the custody of the Crown Court at Southwark", whereas the District Judge found that the applicant was not in fact on bail - the District Judge erred in ordering the rendition of the applicant;*

28. This ground arises out an unusual situation where some doubt exists as to whether, in spite of the fact that the applicant turned up for his trial each day until the 3rd April 1995, he was under any legal obligation to do so. The learned District Judge heard evidence as to bail being granted. It appears from that evidence that he was first of all released from police custody on unconditional bail to the Magistrates' Court. This is what is sometimes referred to as police bail. The applicant thereafter attended at the Magistrates' Court. He so attended on a number of occasions according to his own testimony, and accepted under cross-examination that there were bail conditions on him which required his attendance at the Magistrates' Court. There are times during his evidence, and the learned District Judge was also so satisfied, that the applicant seemed reluctant to say in evidence that he considered himself under a legal obligation to attend Court having been given unconditional bail, but he did say that his solicitor would advise him in relation to such matters, and when he was asked whether his solicitor had told him that he had to attend court because he was bailed to attend court, the applicant replied "I think that's the case, yes." That was in relation to attendance in the Magistrates' Court. The position is, and accepted by the applicant in his evidence, that he was committed from the Magistrates' Court to the Crown Court on or about the 22nd June 1994. He was remanded to the Crown Court, and he accepted that he was not remanded in custody. He agreed, when it was put to him in cross-examination, that he was granted bail in the Magistrates' Court and committed for trial to the Crown Court at Southwark. He accepted also that he was on bail from that time until the date of commencement of his trial on the 13th March 1994. He also agreed that at lunchtime on the first day of his trial he was not placed in custody, and that for the remainder of his trial he was not remanded in custody. He could not recall, when this was put to him, that his Counsel on the first day of the trial requested the trial judge to continue his bail unconditionally and that the judge agreed. He appeared reluctant to accept that his

attendance on each day of his trial was in answer to his bail obligation in that regard, and he stated at one point of his evidence that he attended because he was very interested in getting the matter finalised, and he was confident of winning. But he said that it was not correct to state that the reason why he attended each day was that he was under a duty to attend at his trial.

29. Counsel for the applicant in the District Court sought to persuade the learned District Judge that given the lack of evidence that there was any Crown Court bail order made it could not be said that the applicant had failed to appear at his trial "as required". The learned District Judge in his judgment came to the conclusion that the applicant was not on Crown Court bail, since it was quite possible that once he had come before and been arraigned in the Crown Court, the bail in the Magistrates' Court ceased. This issue arose subsequently in a later case of *R. v. Central Criminal Court, ex parte Guney* [1996] 2 Cr App R352, and the learned District Court referred to that case and said that this case may have suffered from the same difficulty identified in that case. But nevertheless he went on to state that he was satisfied that what was continued was in fact Magistrates' Court bail, and that "no one involved in the trial had, prior to the decision the following year in Guney any reason to believe that this was not in order. I find therefore that Mr Bolger was not formally on bail during the course of his trial."

30. But he went on to admit the warrants into evidence pursuant to s. 55(1) of the 1965 Act, there being no good reason not to and stated in that regard:

> *"I am satisfied that Mr Bolger was in court on the date when his trial was adjourned to the 3rd April 1995. I have formed the view that he was not on bail; however he, his lawyers and all others central to the trial believed he was and this was in ease of the respondent who otherwise would have been in custody."*

31. He went on to refuse also an application to refuse to admit the documents because of what was submitted to be an error on their face, namely that the applicant failed to surrender as required, and also because he was described in the warrants as "an offender unlawfully at large from such prison" (i.e. a prison in which by order of the Crown Court he was required to be detained). The learned District Judge was satisfied that this statement was factually and legally incorrect since "he could not be unlawfully at large from a place wherein he was never incarcerated". But he went on nevertheless to find that the inclusion of the words "unlawfully at large" were superfluous in any event, and that the warrants would have been good even without them, and that even though there was an inaccuracy in the wording of the warrants, same could not constitute good reason not to admit the documents under s. 55(1) of the Act.

32. I am satisfied that the District Judge was correct in taking the view that while there may have been some errors in the manner in which the warrants were worded, they were not central to question as to whether the applicant should be surrendered to the UK authorities to serve his sentence. I am of the same view. If one looks at the reality of the situation that the applicant was in, it is clear that he has received a sentence of imprisonment from the Crown Court, that he was not available to be detained following the passing of those sentences, and that warrants were issued so that he could be taken into custody for the purpose of serving the sentences. The errors in the warrants, if they be such (and I am not to be taken as agreeing necessarily that it is incorrect to describe the applicant as being unlawfully at large in circumstances where there is s sentence of imprisonment imposed upon him and he is not in custody serving same), are not such as to breach any constitutional right of the applicant to fair procedures or his liberty. They are errors (if they be such) of a technical nature and not such in my view which, in this jurisdiction would mandate relief by way of habeas corpus, for instance. If one looks to the reality of the applicant's situation, he is not in any way prejudiced unfairly by the errors contended for in the warrants, and accordingly in my view the District Judge was entitled to reach the conclusions which he reached under this ground of objection.

> *6. That there was a failure to prove the date on which the warrants were produced to the Garda Commissioner, this being a proof required in order to determine the date on which correspondence of the offences must be established;*

33. The significance of this ground is for the purpose of establishing correspondence of the offences set forth in the warrant with offences in this jurisdiction, it must, under the provisions of s. 42 of the 1965 Act, as amended by s. 26 of the Extradition (European Union Conventions) Act, 2001 that the act constituting the offence would, if done in the State on the day the warrant is produced under section 43(1) (b) of the Act (i.e the date it is produced to the Commissioner for endorsement) constitute an offence under Irish law. The learned District Judge noted in his judgment that he had heard no oral evidence as to the date on which the warrants were "produced" to the Commissioner under s. 43 of the Act, but since he was satisfied that the warrants were dated 25th June 1998 and were endorsed by the Commissioner on the 19th October 1998, and that accordingly they must have been produced to him for endorsement some time between those two dates if not on the date of endorsement itself. In this way he was able to satisfy himself that the offences set forth in the warrants corresponded to offences in this jurisdiction on the date on which the warrants were produced to the Commissioner. He acknowledged that this would be subject to the applicant producing evidence to the contrary, but this had not been done.

34. Counsel for the applicant in the present proceedings submits that it was not permissible for the learned District Judge to arrive at his conclusion as to the date of production of the warrants in the way that he did, and that he ought to required evidence to be given to him as to the precise date on which the warrants were produced.

35. I believe that the District Judge was entitled to find as he did.

> *7. That the District Judge erred in refusing to permit the applicant to question further D/Constable Jennings in relation to the contents of sworn information underlying the application for the extradition warrants, and in permitting the Attorney General to adduce rebuttal evidence at the District Court hearing.*

36. I am not satisfied that the learned District Judge erred in refusing to allow further examination of D/Sgt Jennings, or in allowing the Attorney General to adduce rebuttal evidence. Given the limited number and nature of the matters upon which the District Judge was required to be satisfied for the purpose of reaching his decision whether or not to grant an order under s. 47 of the Act, it is not clear what, if any, relevance there is in evidence relating to the sworn information leading to the issue of the warrants. The District Judge also indicted that if the applicant had a particular issue to ventilate regarding the sworn information leading to the extradition warrant, this should have been flagged to the other side earlier. While I accept that the District Judge, under the general discretion conferred by the words in the section "unless the Court sees good reason to the contrary" is entitled to refuse to make an order, that does not mean that the applicant was entitled to explore on some unspecified and unstated basis the manner in which the extradition warrant was applied for. No relevance was established to the line of questioning sought to be pursued, and in my view the learned District Judge was entitled to rule as he did in this regard.

37. I therefore refuse the reliefs sought in these judicial review proceedings, and now turn to the application by the applicant for his release pursuant to the provisions of s. 50(2) (bbb) of the Act, as inserted.

Application under s. 50(2)(bbb) of the Act:
38. The starting point is of course the provisions of that section itself, which provides;

> *"A direction under this section may be given by the High Court where the Court is of the opinion that -*
>
> *… (bbb) by reason of lapse of time since the commission of the offence specified in the Warrant…and other exceptional circumstances, it would, having regard to all the circumstances, be unjust, oppressive or invidious to deliver him up under section 47, or*
>
> *(c) the offence specified in the Warrant does not correspond with any offence under the law of the State which is an indictable offence or is punishable on summary conviction by imprisonment for a maximum period of at least six months."*

39. There is no need to set out the case-law dealing with the onus upon the applicant in such applications. It can be summarised by stating that the applicant must first show there to have been a lapse of time since the date of commission of the offence or date of conviction and the present date; secondly, and in addition to that lapse of time there must be shown to exist some other exceptional circumstance(s) in the case, so that these matters, when considered having regard to all the circumstances of the case, would render it *"unjust, oppressive or invidious to deliver him up under section 47".*

40. The first matter upon which the applicant must satisfy the Court is that there has been a lapse of time which itself is exceptional. This has recently been confirmed as a requirement upon an applicant by Geoghegan J. in *Carne v. O'Toole*, unreported, Supreme Court, 21st April 2005. I have already set out the chronology of relevant events in this case. That chronology first of all shows that following the sentencing of the applicant at the Crown Court on the 2nd June 1995, there was a delay of some seven months until December 1995 when the first set of extradition warrants were obtained. Those warrants were not endorsed here for execution by the Assistant Commissioner of An Garda Siochana until February 1996 - a period of some eight months from the date of sentencing. The applicant was arrested and brought before the District Court in relation to an application under s. 47of the 1965 Act, on the 23rd May 1996. Eventually, District Judge Windle dismissed the application on the 10th October 1996, some one year and four months after the applicant had been sentenced. It was not until the end of June 1998 that further warrants were obtained in London seeking the extradition of the applicant. These are dated the 25th June 1998, and there was a further delay until the 19th October 1998 before these warrants were endorsed for execution here. The applicant was arrested on the following day, the 20th October 1998. By that date, a period of three years and four months had elapsed, and in fairness to the applicant he cannot in my view be held responsible for that delay. There was a lack of urgency on the part of the UK authorities, as well as the Court processes here following the dismissal of the first application under s. 47, and this resulted in a lapse of time up to the end of October 1998.

41. Following the re-arrest of the applicant in October 1998 he commenced Habeas Corpus proceedings, which were refused by Laffoy J. An appeal to the Supreme Court was dismissed in November 1998. In November 1998 he also commenced Judicial Review proceedings. He was granted leave to seek relief by way of judicial review but was unsuccessful in the High Court. He duly appealed that dismissal to the Supreme Court but in July 1999 the Supreme Court dismissed that appeal also. He commenced further Judicial Review proceedings in December 1999. In June 2000, these proceedings were dismissed by O'Neill J. There was a delay of some five months before the order of O'Neill J. was perfected, and thereafter the applicant appealed to the Supreme Court against the order of O'Neill J. The applicant did not lodge his Books of Appeal until December 2002 thereby preventing the appeal being heard, but in December 2002 the appeal was dismissed by the Supreme Court.

42. In my view the applicant is entitled to regard the period of three years and four months up to the 19th October 1998 as a lapse of time for which the State must bear responsibility, and for which the applicant cannot be held to have contributed. Thereafter, however, I regard the delay as being the responsibility of the applicant, including the five month period during which the applicant was apparently awaiting the perfection of the High Court order made by O'Neill J. in June 2000. The applicant in my view ought to have taken appropriate steps to ensure that he obtained a perfected order for the purpose of completing his Books of Appeal, and he appears to have tolerated that delay and cannot in my view add that period of five months to the period of three years and four months delay by the State for the purpose of calculating a lapse of time under the section.

43. The delay by the State until 23rd February 2003 in seeking to have the matter re-entered in the District Court following the dismissal of the appeal by the Supreme Court in December 2002 is not in my view a culpable delay or an inordinate delay. There had been several years of litigation from 1998 to the end of 2002 at the suit of the applicant, all of which had been unsuccessful, and the fact that it took the State another couple of months after the conclusion of that litigation to communicate with the President of the District Court with a view to having the matter re-entered is not something which can be added to the period of culpable delay to which I have referred. Following contact being made with the President of the District Court in February 2003, the matter was eventually re-listed in the District Court in April 2003 for mention. Again, in an ideal world, one would wish that the matter would have been re-listed more swiftly, but it is another matter altogether to suggest that the delay was one which was exceptional and culpable. On the 9th April 2003 it appears that a date for hearing was fixed for hearing on the 27th November 2003. I do regard that delay as one which can be counted as culpable delay. The fact that the District Court could not accommodate the application at an earlier date is something which can be criticised, since there is an obligation in extradition matters to proceed with as much haste as possible, and if necessary special arrangements must be put in place to deal with the case. The State is obliged to provide a courts system which can deal with matters with appropriate expedition, and a situation where in April 2003 no sooner date than the end of November 2003 can be allocated could not be reasonable, and in my view some date prior to the end of July 2003 would have been reasonable. Therefore I am prepared to add a period of four months to the period of three years and four months already found to be culpable, making three years and eight months delay which can be regarded as a lapse of time, which is exceptional.

44. Once the hearing commenced, I am satisfied that the time between the commencement and the date on which the learned District Judge gave his decision and made the order on the 15th June 2004 is not one for which the State can be to blame. That is the time the matter took. Many issues were required to be dealt with since they were raised during the course of the hearing; evidence had to be called, and the judge reserved his decision. But all that period was a reasonable period of time in all the circumstances.

45. Section 50 requires that the period of time to be considered in the context of lapse of time is from the date of commission of the offences or the date of conviction. The section does not state "whichever is applicable", so that in each case whether it be one in which a trial has not yet taken place or where there has been a conviction, the Court must look to see whether there is culpable or exceptional delay in the prosecution of the offences. In this case the commencement date is January 1991 being the earliest date for the commission of any offence referred to in the warrants. The applicant stated in his evidence to the District Court that he first became aware that there were complaints being made against him in about April 1994, and that the authorities wanted to interview him. His trial commenced in March 1995. I do not consider the time spent between the possible date of the earliest offence and the

date of his arrest as a lapse of time which must be regarded as exceptional. The investigation of complaints, particularly perhaps complaints of alleged fraud type offences, takes time and the authorities must be given a degree of latitude in that regard. There would be an onus upon the applicant to establish that there was exceptional delay in the investigation of these offences and bringing them to trial, and I am satisfied that he has not done so in this case.

46. The lapse of time which I must consider therefore is the period of three years and eight months which I have identified already from the date of conviction.. That is certainly a lapse of time, but the question is whether it is an exceptional lapse of time for the purpose of s. 50 of the Act. In terms of pure length it is not of itself exceptional, in the sense that there have been many cases where the delay has been very much longer. But there was a degree of dilatoriness on the part of the UK authorities in pursuing the second attempt to extradite the applicant, and this was not due to any effort on the part of the applicant to disguise his whereabouts in this jurisdiction. He appears to have lived openly here. It is necessary to consider whether on the facts and circumstances of this particular case the period of three years and eight months should be regarded as exceptional. In my view it should, because I am entitled to have regard to the fact that this is not a case in which the surrender of the applicant is requested for the purpose of his trial on the offences alleged.

47. This is a case where a three year prison sentence was imposed on the 2nd June 1995, and there is, as found by me, a lapse of time of three years and eight months thereafter in relation to the extradition process. I am of the view that for the purpose of the section, this factor – the length of the delay in the context of the length of the sentence – is sufficient to render the lapse of time exceptional for the purpose of triggering the next step in the section, namely to see if there can be identified "other exceptional circumstances" such that it would having regard to all the circumstances be unjust, oppressive or invidious to surrender the applicant.

48. One could imagine that if the extradition procedure had been completed within a normal or reasonable time, it could well be that with remission the applicant could have served his sentence of imprisonment by the end of October 1998 when the applicant was again arrested on the fresh warrants obtained in June of that year.

49. In this regard I am mindful of the remarks of Barron J. in *Kwok Ming Wan v. Conroy* [1998] 3 I.R. 527 at page 541 where he states:

> *"The sentence which the plaintiff would be required to serve would be four years. The length of the sentence must be a consideration. The shorter the sentence, the more compelling the delay and other exceptional circumstances would be to retain him within the jurisdiction. The longer the sentence the less compelling such circumstances would be."*

50. The circumstances said to be exceptional circumstances in this case are the applicant's medical condition, his conviction and sentencing in absentia, the stress and anxiety caused to his and his family, and the disruption caused to his business activities by the lapse of time.

51. In *Kwok Ming Wan v. Conroy* it was held that the exceptional circumstances were that the plaintiff made no effort to conceal his presence in this country, that he lived and worked openly within this jurisdiction, was in contact with the gardai and immigration authorities and that he applied for and obtained a passport from the British Embassy. In the present case, the applicant lived and worked openly.

52. But that fact alone in the context of the reason for the delay in this case which followed the applicant's conviction, namely the refusal of the District Judge to order his rendition in October 1996, followed by a delay in the second attempt to obtain his surrender, does not necessarily amount to exceptional circumstances. It is worth noting that in Kwok Ming Wan the delay between the absconding of the applicant and the issue of the extradition warrant in London was about eight years, and no inquiry was made of the Irish authorities in that case for a period of about three years, following which no serious effort to locate the person was made. A further four years elapsed thereafter.

53. In *MB v. Conroy* [2001] 1 I.L.R.M. 331, a period of three years and four months was considered to be a lapse of time sufficient for the purpose of the section.

54. One "exceptional circumstance" in the present case in my view is that the applicant had to go through what turned out to be unsuccessful attempt by the UK authorities to obtain an order under s. 47 of the Act. I have already taken account of the period of time from the date of that refusal to the issue of the new warrants, and that delay itself cannot then be counted again as an exceptional circumstance. But I am I believe entitled to have regard to the fact that the applicant for the greater part of 1996 was engaged with the court process, and ultimately successfully, in resisting his surrender to the UK authorities on foot of the first warrants. I can also have some regard to the fact that during the period following October 1996 he made no effort to disguise his whereabouts, although I feel in the circumstances of the present case, that fact alone would not carry as much weight as it was found to in Kwok Ming Wan.

55. In addition, as was found to be the case in MB, there was in the present case some dilatoriness on the part of the UK authorities in seeking the extradition of the applicant after the refusal of the order in October 1996 in the District Court, and in MB that dilatoriness was held to be an exceptional circumstance. In this regard, Keane CJ stated as follows at page 318:

> *"As is clear from the authorities to which I have referred, one of the factors which may constitute an exceptional circumstance is the dilatoriness of the prosecuting authorities, if established, in applying for the extradition of the plaintiff. It was, of course, the action of the plaintiff in absconding to this jurisdiction which led to that delay in the first place. However it is not in dispute that the only action taken by the Manchester Police to secure the plaintiff's return was to circulate his name on the police national computer in the United Kingdom. It is also not disputed that, had enquiries been made with the plaintiff's estranged wife, who was the mother of the complainant, it should have been possible to ascertain his whereabouts in Ireland. In these circumstances, I am of the view that the failure of the Manchester Police to take any steps to secure his extradition until the enquiry was made by the Irish Garda in August 1995 was an exceptional circumstance which can be taken into account in considering whether his release should have been ordered by the High Court."*

56. There is no reason on the facts of the present case not to conclude that question in the same way.

57. The medical condition of the applicant is central to the present application both for judicial review and for the application under s. 50. The question is whether it comes under the heading of an exceptional circumstance, or whether it is solely something to be regarded in relation to whether it would be invidious or oppressive to deliver him up. This question also arose in MB, albeit with the distinguishing feature that it was after that plaintiff's conviction and his absconding that he was afflicted with an undisputed illness.

Keane CJ, was of the view, as was the judge in the court below, that this illness was an exceptional circumstance, since it was the case that if extradition had taken place sooner, the plaintiff would have served out his sentence before the onset of illness. The present case is different in that respect since he was already ill during his trial and certainly by the 3rd April 1995 and his sentencing hearing.

58. But all things considered I believe that it appropriate to regard the illness as a further exceptional circumstance. Having reached these conclusions, the Court's task is then to determine whether by reason of the lapse of time and these exceptional circumstances, *"it would having regard to all the circumstances be unjust, oppressive or invidious to deliver him up".*

59. In MB, Keane CJ accepted the defendant's submission that the chronic illness ("severe steroid dependent asthma" and "insulin dependent diabetes mellitus") was not such as would prevent the plaintiff from instructing his lawyers and being present during the proceedings, and would not be such as to prevent him from standing trial in this jurisdiction, and that therefore there could be no question of the plaintiff's surrender to the English authorities being regarded as "unjust" for the purpose of the section, but that this did not conclude matters since the Court had to consider also if this illness might make it oppressive or invidious to do so. In the circumstances of that case, where the illness had emerged during the period of delay in the extradition process, the learned Chief Justice found that it would in all the circumstances of the case be "oppressive and invidious".

60. That of course does not mean that in the present case the same must apply. In the present case the applicant was already suffering from some illness when sentence was passed, so it cannot be said that he commenced being ill during the period of delay. Each case must be examined on its own facts and circumstances.

61. In view, first of all, of my finding in the judicial review proceedings that the conviction and sentencing of the applicant in absentia did not constitute a breach of his constitutional or Convention rights, I am of the view that it could not therefore be said to be "unjust" to surrender the applicant. The same observation is true in relation to the illness of the applicant. That does not go to the question of whether it would be unjust.

62. The question of the applicant's illness is crucial. Of course, in this application under s. 50 of the Act, the Court is not concerned at all really with the state of health of the applicant in April or June 1995. What is relevant is the medical condition of the applicant today, since the Court must consider whether it would be invidious or oppressive to surrender him given his state of health. This is the aspect of the case made by the applicant which causes most difficulty. There was some evidence of a medical nature before the trial judge in England when the jury was retiring and when sentencing was taking place. The trial judge does not appear to have been overly impressed with that certificate evidence from a doctor in Dublin, and he decided to proceed with matters before him even though the applicant was absent. I have dealt with that. The learned District Judge was also provided with some medical evidence in relation to the matters he was dealing with and I have already dealt with that in the judicial proceedings.

63. There is a paucity of evidence before me as to the *current state of health* of the applicant. In this regard I refer again to the judgment of Keane CJ in MB, where at page 315 it refers to the fact that the plaintiff's own averments as to his current state of health was confirmed by the plaintiff's consultant respiratory surgeon attached to St. James's Hospital, and there was reference to various hospital admissions in situations which were regarded as life threatening. The learned Chief Justice at page 320 refers to "the undisputed evidence as to his present medical condition".

64. I have learned from the transcript of the evidence given in the District Court that in or about 1997 the applicant was, in spite of his illness, able to conduct some of his business affairs abroad at various times, even though he maintained that his state of health made it more difficult. In the present application under s. 50 of the Act, the applicant has sworn two affidavits dealing with the various matters of relevance to that application, although the Special Summons at the time of its issue was grounded only upon an affidavit of the applicant's solicitor, Mr Haughton. During the course of these affidavits reference is made to his illness, but more in an historical context, than as to his state of health at the present time.

65. In his affidavit sworn in these proceedings on the 23rd February 2005 the applicant states at paragraph 12 thereof:

> *"Due to serious illness, particulars of which are set forth in evidence before the District Judge in this case as evidenced by the transcript thereof, I was unable to further attend at his [sic] trial on and after the 3rd April 1995."*

66. In paragraph 21 of the same affidavit, he states:

> *"…In the course of that week-end [commencing 31st March 1995] I became seriously ill and was unable to travel back to the UK for the morning of Monday the 3rd day of April 1995."*

67. In paragraph 22 he again refers to the certification of his illness at the time of his conviction and sentence, and in another paragraph he refers again to the medical evidence given in the District Court hearing, which is not of course evidence in this application, but I have had the benefit of reading it nonetheless. For the most part it relates to his condition in 1995 and the treatment undergone. However, in paragraph 24 he states as follows:

> *"I say that my medical condition continues and that as recently as this month [February 2005] I have been subject to further investigations and tests in respect of Crohn's disease."*

68. I would have thought that this averment provided an ideal opportunity to exhibit an up to date report from some doctor the applicant may still be attending, which report could provide to the court some evidence on this present application as to the state of the applicant's ill-health. Such a report would presumably have been able to express some view to which the court could have regard as to the nature of the condition which the applicant states he is suffering from (i.e Crohn's disease) and the effect on the applicant, given that *current* state of health, of being returned to the UK to serve the sentence of three years imposed upon him. The Court has of course heard of Crohn's Disease and has a general knowledge of the nature of that condition, but nothing which could justify the Court in relying on some sort of judicial notice of the condition. The Court should have been provided with that sort of information from a professional in order to discharge the onus which is upon the applicant to establish the matters required to be established for the purpose of obtaining an order under s. 50 (2) (bbb) of the Act.

69. Such a report would presumably have contained details of what treatment and/or medication the applicant may be receiving at the present time, and whether that or other treatment and medication might be required on an on-going basis, so that the Court might be placed in a position to consider whether such treatment would likely or not be available to him in prison in the UK, and whether in all the circumstances it would be invidious or oppressive to surrender him.

70. As things are, the applicant has simply stated certain matters on affidavit himself, and through his solicitor, unsupported by any evidence or expert opinion as to his state of health at the present time.

71. The applicant also makes the point in paragraph 27 of his affidavit of February 2005 that he could have been extradited in 1996 after he had recovered from an operation in 1996, and that he could then have attended for his sentence hearing and he states that he anticipates that he would have received a lighter sentence. However, that is pure speculation on his part.

72. In paragraph 28 of the same affidavit he states that the lapse of time in this matter has caused him severe stress and anxiety. He goes on:

> *"My medical condition is partly stress related and on-going anxiety of the extradition proceedings, particularly where they have been resuscitated after a two year gap between 1996 and 1998 have exacerbated my medical condition."*

73. In addition he says that his business activities have been disrupted as a result of the resuscitation of the extradition proceedings.

74. What is remarkable about this affidavit evidence is the complete absence of any details as to how the illness currently impacts on the applicant in order to assist the Court is coming to a decision as to whether it might be invidious or oppressive to return him to the UK so that he can serve his sentence. Extraordinary also is the absence of any up to date medical report or other evidence from his treating doctor, if he has one. The Court has much evidence both in the form of the certificates of Dr Collis and other doctors in 1995, as well as the transcript extracts from the District Court hearing, but again that deals mainly with matters pertaining in 1995, since that is what was of relevance to the submissions being made to the District Judge, and not relevant to the consideration of his condition now for the purpose of an application under s. 50 (2) (bbb) of the Act.

75. The Court is left with just the one paragraph in the affidavit of February 2005 that he is still suffering the symptoms of Crohn's disease. This Court has no detail of that whatsoever. As I have said, this is in contrast to the type of evidence which appears to have been provided to the High Court in MB. I also point to the fact that in Carne v. O'Toole, unreported, Supreme Court, 21st April 2001, the applicant in that case exhibited a medical report in his grounding affidavit which dealt inter alia with the effect of the undoubted medical condition on his capacity to defend himself against the charges for which his extradition was being sought. In that case the application for release failed, and at the conclusion of his judgment, Geoghegan J. states:

> *"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".*

76. That underpins in my view what I have found in relation to the paucity of evidence as to the applicant's state of health, and I am satisfied that he has failed to discharge the onus which is upon him to satisfy the Court on the basis of a probability. It follows that while I am prepared to regard this illness as an exceptional circumstance in this case so that the final task of the court under s. 50(2) (bbb) is triggered, I cannot go further and find that as part of all the circumstances the alleged medical condition has been sufficiently made out and established as being such that it would be invidious or oppressive to deliver the applicant to the authorities.

77. Therefore if one takes the medical condition out of the equation, the Court must consider whether the remaining circumstances would justify a conclusion that it would be invidious and oppressive so to do.

78. One other such circumstance, even though I have found that there was no constitutional or Convention infringement in relation thereto, is the conviction and sentence in absentia. I have already concluded that it would not therefore come within the concept of being "unjust". I must also consider whether that circumstance could, when added to all else, make it invidious or oppressive. I do not believe that it can be so regarded. I take "invidious" to connote, as recited in the Concise Oxford Dictionary, something "likely to excite resentment or indignation against the person responsible, esp. by real or seeming injustice". There appears to be some overlap in that meaning with the concept of "unjust", but I do not consider that the conviction and sentencing which took place would cause that sort of feeling, given that the applicant remained fully represented by his lawyers and was at all times in communication with them. Justice was done and was seen to be done by the manner in which the matter was dealt with in all the circumstances in my view.

79. The same dictionary defines "oppressive" as "harsh or cruel" or "difficult to endure". In my view, the dealing with the applicant in absentia is not something which brings the case within these concepts. The sentence of three years is no harder to endure or any harsher by reason of having been given in absentia. The same applies in respect of the conviction itself in the circumstances of this case.

80. The applicant has suffered stress and anxiety and he states that these factors impinge on his particular illness, and this is another potential circumstance to have regard to. But this circumstance is affected by the fact that I have no expert evidence in that regard. I can take judicial notice that the applicant, like any other person facing a sentence of imprisonment and going through an extradition process will suffer stress and anxiety, but I am entitled to consider that stress and anxiety in the context of the three years and eight month culpable lapse of time, but also in relation to the overall length of time which has passed since April 1995.

81. He has also pleaded that his business life has been adversely affected, but I am not satisfied on the evidence adduced on this application that there is sufficient force in that argument to affect my consideration of the overall circumstances. The same applies in relation to stress caused to his wife and family. There is simply an averment in that regard, and while I have no doubt that these persons would have been stressed by what the applicant was dealing with, there is nothing unusual or out of the ordinary about that. It would, it seems to me, be the case in all cases.

82. The remaining matter to be considered in the context of all the circumstances is the question as to whether the entire lapse of time since the 3rd April 1995 (being the date on which the applicant absented himself on medical grounds) is something which now makes it, in the context of a three year sentence, invidious or oppressive to surrender the applicant so that he can serve his sentence. In that regard I believe the period of culpable lapse of time of three years and eight months is very relevant. In that regard it is worth recalling that in MB, the learned Chief Justice referred at page 317 to the judgment of Hamilton CJ in *Kwok Ming Wan v. Conroy*, as follows:

> *"It is clear from the judgment of Hamilton CJ in that case that, although the expression 'lapse of time' is used rather than 'delay', the court is entitled to have regard to where responsibility lies for the lapse of time, since that may affect the court's conclusion as to whether it would be unjust, oppressive or invidious to deliver up the person whose extradition is sought."*

83. As already referred to, I accept as reasonable the meaning of *invidious* referred to above, namely something "likely to excite resentment or indignation against the person responsible, esp. by real or seeming injustice".

84. In relation to whether in all the circumstances it would be oppressive in the sense of "harsh or cruel" or "difficult to endure", I do not believe that the lapse of time itself, absent the medical condition plea, makes it any worse to serve the sentence from now as opposed to from April 1995. There would have to be something in the circumstances which demonstrates as a matter of probability that it would be more harsh or more cruel or harder to endure for this particular applicant than another person suffering from the same or similar illness. In other words, illness per se cannot be a reason, since there would be many prisoners who are ill or unwell, and who can receive appropriate treatment from within the prison.

85. However, I have, albeit with great difficulty and not without very great care and consideration, reached the conclusion that the entire lapse of time, regardless of the reason it may have happened, is something which sits uncomfortably beside a sentence of three years now to be served, especially when one takes into account the normal level of remission of sentence which presumably will apply. This lapse of time can be regarded as being part of "all the circumstances", even if much of it resulted from the applicant's various and unsuccessful court applications during the extradition process, leading eventually to the making of the order of the District Judge.

86. The relevant lapse of time, therefore, when considering "all the circumstances" is in the order of ten years, even if much of that longer period is not such as can be regarded purpose of satisfying the first requirement under the section, namely a lapse of time, which is exceptional.

87. But even in relation to the period of what I am satisfied was culpable delay of three years and eight months (leaving aside altogether any element of system delay as was submitted by the applicant and on which I prefer to make no finding in this case), a term of incarceration of perhaps two years after such a time is something which can reasonably be regarded as coming within the concept of invidious, taking all circumstances into account, but perhaps even more so in the context of ten years. I think it is worth mentioning at this point also that while much of the applicant's litigation proved unsuccessful I cannot recall it ever being suggested that his applications were frivolous or in any way verging on being considered an abuse of process. For that reason, I consider that some element of credit should be accorded him in relation to availing himself of his undoubted right of access to the courts, even if eventually unsuccessfully. That is not to say that in all cases, time spent litigating pending extradition can be counted as delay constituting a lapse of time for the purpose of the first hurdle to be overcome in an application under s. 50, but that period of time does seem to me to be part of "all the circumstances".

88. In this regard generally, and in particular in relation to that period of unexplained or culpable lapse of time, it is worth recalling the importance which the Courts have always attached to the requirement that committal warrants be executed within a reasonable period of time as a matter of fairness to the person to be committed. One example of this is to be found in the judgment of Barron J. in *The State (McCormack and Flynn) v. The Governor of Mountjoy prison, High Court*, unreported, 6th May 1987 where he stated:

> *"In my view, it is implicit that the warrant should be issued there and then when the sentence is imposed, and, where the sentence is imposed on appeal, as soon as reasonably possible. Likewise once it has issued, it must be executed as soon as is reasonably possible. If not, then a defendant sentenced to a term of imprisonment may find himself or herself serving such sentence at a future date merely through a failure of administrative processes. The term of a sentence is not its only feature; its commencement date is equally important. If it is likely to be delayed, then there can be no certainty as to the sentence imposed; and, if it is delayed, then the sentence served may well not be the sentence imposed. Of course none of this is applicable to a case where the failure to execute the warrant is the result of evasion on the part of the defendant himself."*

89. In relation to the final sentence of this passage, I would be of the view that the present applicant's absence from the sentencing hearing on medical grounds is not within what the learned Barron J. had in mind when he contemplated an evader from execution. There was not so far as I am aware any effort made by the applicant to disguise or conceal his whereabouts here or evade the process of execution. That did not cause the lapse of time of three years and eight months which I find to be a very relevant and significant lapse of time in the context of the sentence imposed. There seems simply to have been dilatoriness on the part of the UK authorities after the failure of the first unsuccessful application to the District Court for an order under s. 47 of the Act. That dilatoriness in my view can be equated to the sort of delay in executing the warrants with which Barron J. was dealing, albeit in a different context, and there does not seem to be any reason in principle why the same considerations ought not to apply in the present case where, due in part to that lapse of time, the commencement of the applicant's sentence would have been significantly delayed.

90. Finally, for the sake of completeness, I should say that if I had been required to be satisfied as to correspondence, I am so satisfied in relation to all the offences set forth in the warrants, including that of forgery.

91. I therefore make an order for the release of the applicant/plaintiff under s. 50(2)(bbb) of the 1965 Act, as amended.