

## THE HIGH COURT

Record Number: 2003 No. 20 Ext.

BETWEEN

ROBERT LLOYD HEYWOOD

APPLICANT

AND  
THE ATTORNEY GENERAL

RESPONDENT

**Judgment of Mr Justice Michael Peart delivered on the 26th day of October 2006**

1. This is an application brought by the applicant for his release pursuant to s. 50(2)(bbb) of the Extradition Act, 1965, as amended ("the Act"), on the basis of the lapse of time since the date of commission of the offences alleged against him, and on the basis of what are submitted to be other exceptional circumstances in the case. That section provides that:

*"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... "*

2. In this case an order has been made under section 47 of the Act for the surrender of the applicant to the authorities in the United Kingdom, so that he can face trial for three offences set forth in three warrants, namely possession of heroine for the purpose of supply, and two

3. charges of assault causing grievous bodily harm. Those offences are alleged to have been committed on dates between 1st March 1995 and 7th August 1996.

4. Before dealing with the present application for release, I will first set out a chronology of events since the alleged offences were committed.

5. As I have stated, the offences are alleged to have been committed by the applicant in 1995/1996. Before the applicant was even questioned in respect of these offences he came to this State in January 1987, and has remained here since that date. Since 2002 he has been in a relationship with his partner and they have a young daughter. It appears that in January 1998 the authorities in the United Kingdom learned that the applicant was residing here, but it was not until the 21st October of that year that the three warrants in respect of the said offences issued for his arrest. These warrants were received here for backing, and the arrest of the applicant was ordered by the Assistant Garda Commissioner of An Garda Síochána on the 4th January 1999. He was duly arrested shortly thereafter on the 19th January 1999, taken into custody, and brought before the District Court, where eventually on the 5th May 1999 an order for his extradition to the United Kingdom was made pursuant to an application under s. 47 of the Act. He was granted bail following his Appearance in the District Court but was unable to meet the terms of the bail fixed, and therefore remained in custody.

6. Following the making of that order under s. 47 of the act, the applicant appealed same, but on the 31st May 2001, withdrew that appeal. He secured his release from custody on the 6th July 2001 on foot of an order of Mr Justice O'Neill on that date, the learned judge having found that his continued detention was unlawful. By that time he had been in custody for some two years and five months.

7. He was re-arrested on the 9th February 2002 but on foot of the same 1999 warrants as had been the basis of his first arrest in January 1999. He challenged the legality of his detention thereafter. That challenge was at first unsuccessful on the 12th February 2002 in the High Court, but on appeal to the Supreme court on the 15<sup>th</sup> February 2002 his release was ordered on the basis that the 1999 warrants were spent.

8. Fresh warrants duly issued in the United Kingdom, but not until the 28th November 2002, some nine months later. These were not backed here by the Assistant Commissioner of An Garda Síochána for a further nine months on the 29th August 2003, and the applicant was rearrested on foot of same on the 1st September 2003. He applied unsuccessfully to the High Court on the 23rd September 2003 for his release pursuant to Article 40.4.2 of the Constitution on the basis that the delays in seeking his extradition were such as to make his detention unlawful. His appeal from that refusal was also unsuccessful.

9. The application for his surrender under s. 47 of the Act came before me in February 2004, and I refused same. Thereafter, some two years later, on the 14th March 2006 the Supreme Court allowed the appeal, set aside my said order dated the 24th February 2004, and directed that this application under s. 50(2)(bbb) be remitted to me for decision. On that date it appears that no order was actually made by the Supreme Court under s. 47 and on the 22nd March 2006, following the matter being mentioned again in the Supreme Court the matter was remitted to the High Court for such an order to be made. That happened eventually on the 11th April 2006, when an order for his delivery to the United Kingdom was made, and he was taken into custody pending arrangements being put in place. Seventeen days later, on the 28th April 2006, the applicant was released on bail, the terms of which on this occasion were capable of being met by him. This application for his release came before me on the 21st July 2006 when I reserved my judgment.

10. It will be seen therefore that there is a period of ten years and eight months between the earliest date on which it is alleged that the applicant committed an offence, namely the 1st August 1995, and the making of the order under s. 47 of the Act on the 11th of April 2006. The applicant was in custody, following his first arrest, from the 19th January 1999 until the 6th July 2001 when his release was ordered, this being a period of some two years, five and a half months. The last five days of that custody was found to have been unlawful custody. In February 2002 he spent another six days in unlawful custody. Following his arrest on foot of the new warrants on the 1st September 2003, he spent another almost six months in custody awaiting the application under s. 47 made on the 24th February 2004. During the period of ten years and eight months referred to, the applicant has spent almost three years in custody, some eleven days of which was found to have been unlawful custody.

11. That is a brief summary of what occurred during the years following the date of the alleged offences. When considering the present application I am of the view that it is appropriate to consider the period of time from 1st August 1995 to the 11th April 2006 as being the time to be reckoned when considering whether this represents, in the circumstances of how it arise, an exceptional lapse of time sufficient to 'trigger' a consideration of the second requirement of the section, namely whether there are other exceptional

circumstances in the case, such that the third requirement can be considered, namely whether that lapse of time, and those circumstances would, having regard to all the circumstances, would render it 'unjust, oppressive or invidious to return the applicant to the United Kingdom to face a trial on these offences.

### **Lapse of time**

12. The first matter is easily decided in my view. A lapse of time of the order of ten years cannot but be regarded as an exceptional lapse of time, unless, which is not the case, a substantial part of that period was caused by the applicant himself. In the present case I would not regard that as being the case, even though there was a period of a couple of years from the 5th May 1999 following the making of the first order under s. 47 in the District Court, and the withdrawal of the applicant's appeal therefrom on the 31st May 2001, which clearly must be laid at the applicant's door. But while not in custody here there was never any attempt on the part of the applicant to hide his whereabouts or in any other way avoid the authorities. He appears to have lived openly and his location was always known to the authorities following the original information in 1998 that he was to be found in this State. Neither did he abscond from the requesting state since he appears to have travelled to this State at a time before the police in the United Kingdom had even interviewed him, let alone charged him.

13. The question as to whether the authorities are responsible or culpable for the delay which occurred is something to be considered under the third leg of consideration, namely whether in all the circumstances it would be unjust, oppressive or invidious to return the applicant to the United Kingdom, and if necessary, I shall return to that topic in due course.

### **Other exceptional circumstances**

14. Having so found, I must move to the next part, namely whether in addition to this exceptional lapse of time there are any other exceptional circumstances which need to be considered. In this regard, the applicant points to the dilatoriness on the part of the United Kingdom authorities in the manner in which they acted between 1995 and May 2001, and the further period from February 2002 until the issue of the new warrants in November 2002, and the further delay until the arrest of the applicant in September 2003. I have already concluded that these passages of time are sufficient to render the lapse of time exceptional. To again consider them under the heading of "other exceptional circumstances" would be to engage in an exercise of double counting. "Other exceptional circumstances" must consist of matters other than the lapse of time already considered.

15. A matter contended for by the applicant under this heading is that he never come to this State in order to avoid arrest, or in breach of any bail conditions, and he makes the point that he has never even been questioned by the U.K. police in relation to these alleged offences. The applicant places some reliance on the judgment of Hamilton CJ. in *Ktivok Ming Wong v. Assistant Commissioner Noel Conroy* [1998] 3 IR 527. In that case the learned Chief Justice considered that the dilatoriness in that case on the part of the UK authorities from 1987 until 1995 in issuing an extradition warrant, and their complete failure during that time to try and locate the respondent in this State despite the fact that he had made no effort to conceal his presence here, was an exceptional circumstance for the purpose of the section. The present case must be distinguished from that situation, since there was little delay between the date of commission of the alleged offences and the issuing of a warrant to seek extradition. The applicant had moved to this State in January 1997, and it was just one year later that it was discovered that he was here. Warrants issued later that year. That is not an exceptional circumstance of itself. I have already concluded that the overall time taken to obtain the order under s. 47 of the Act is an exceptional lapse of time, but it cannot come again under the concept of "other exceptional circumstances". There was some dilatoriness later on from, say July 2001 until August 2003, but I would not regard that as of sufficient magnitude, the more so since during that period the applicant was at liberty apart from six days from the 9th February 2002 until the 15th February 2002.

16. Another matter said to constitute an exceptional circumstance is that the applicant spent time in detention even though bail had been granted, because he was unable to take up his bail. That in my view is not an exceptional circumstance. The Court is entitled to set such bail conditions as seem appropriate to ensure the presence of the applicant at the hearing of the application, and his availability for extradition should an order be made. It could not be the case that the setting of such terms could then be regarded as militating against the very objective of setting those conditions, namely that the applicant would in the event of an order being made under s. 47 be available for extradition on foot of same.

17. It is submitted that if the applicant is convicted in any trial which he may face in the United Kingdom, there can be no guarantee that he will be given credit for the time which he has spent in custody here at various times since his original arrest in 1999. That period is one of almost three years. But in my view the question of sentencing is a matter entirely within the competence of whatever Court deals with the prosecution of these charges, and this Court cannot pre-empt the matter in any way by working on an assumption that credit will not be given. This Court is entitled to presume that any sentence to be imposed will be a sentence in accordance with law. That is a matter for the trial judge. While it may not be therefore an exceptional circumstance sufficient to trigger the remaining consideration, it would be a matter to be considered under the heading of "all the circumstances" if I reach the point of considering whether it would be, for example, oppressive to return the applicant to the United Kingdom.

18. Finally it is submitted as an *exceptional circumstance*, that the delay which has occurred has compromised the applicant's ability to properly and fully defend himself against the charges being brought against him. No particular matter has been brought to the attention of the court in relation to a particular prejudice. It has not been shown for example that a witness is no longer available, or that in some specific way his capacity to defend against these charges has been compromised. It is simply asserted in a general way that the delay which has occurred will make it impossible for him to receive a fair trial, or a trial in due course of law in the sense of a trial within a reasonable time. In his written submissions, it is stated in this regard that "*there is every possibility that any Defence would be greatly impaired ten or eleven years after the offences are alleged to have occurred*". Such a possibility alone is insufficient to establish prejudice. In this regard I refer to the remarks of Herbert J. in *Martin v. Conroy* [2002] 1 ILRM 461 at p. 474-475, in relation to a similar submission made in that case. I respectfully agree with what the learned states.

19. In the same case the learned judge was of the view that "*the wholly unexplained dilatoriness of the requesting authorities in seeking extradition, together with the inferred reality of a real and serious risk of an unfair trial amount to 'exceptional circumstances' within the meaning of s. 50(2)(bbb) of the [Act]*". The delay he was speaking of in that case was of the order of seven and a half years, even though no specific prejudice had been identified by the applicant.

20. But in my view there is the important distinction in that case that the seven years' delay was between the date of the alleged offences and the issue of the extradition warrant, whereas in the present case there was no real delay in that regard. It is important that this Court does not confuse its consideration of whether the delay or the effects of such delay constitutes "other exceptional circumstances", with its later consideration, if applicable, of whether "in all the circumstances" it would be unjust, oppressive or invidious to deliver up the applicant. The Act is very specific as to how the Court must approach its task, and indeed, Denham J. in her judgment in *Fusco v. O'Dea (No.2)* [1998] 3 IR 470, the relevant passage from which is quoted in *extenso* by Herbert J. in his judgment in *Martin v. Conroy*. Each case must be considered on its own facts, and it is for the applicant to discharge the onus upon him to satisfy the Court that it would be unjust, oppressive or invidious to deliver him up on foot of the order made under s. 47 of the

Act.

21. As far as the culpability of the authorities is concerned in the present case, there was a short period of time taken from January 1998 until October 1998 before the three warrants were issued for the applicant's arrest following information becoming available as to his whereabouts here. If that was to be the sole delay, I would not regard it as in any way excessive or culpable. Some reasonable latitude must be given for the time taken to put everything in properly in place before the successful application for the warrants. Neither would I criticise the further time until the applicant was arrested in Dundalk in January 1999. Furthermore, the time until the order under s. 47 in May 1999 does not seem to be one which is unreasonable. Thereafter the delay was the applicant's alone due to his appeal which he did not withdraw until May 2001.

22. However, there is a period of delay between then and February 2002 when he was re-arrested on foot of the same warrants, and those months have not been explained. Clearly, given that his arrest was on foot of the same warrants, it could have been done more quickly. In addition, the delay following his release by the Supreme Court in February 2002 until his rearrest on foot of new warrants in September 2003 is a significant delay in circumstances where all that was required to be done was to apply for new warrants and have them transmitted to this State for backing, and in a situation where there was no doubt as to where the applicant could be located for arrest. That period has not been explained.

23. But thereafter, until the eventual making of the order under s. 47 by Mr Justice McMenamin on the 11th April 2006, while there was a considerable passage of time, it cannot be laid at the door of the authorities to any meaningful or relevant extent. One could always suggest that certain things could have been done somewhat more speedily, given the requirement that extradition matters be dealt with expeditiously, but there was not delay other than some system delay in the time it took to get the appeal from my decision of February 2004, heard in the Supreme Court in March 2006. That period is perhaps something to have regard to if considering 'all the circumstances' at a later stage of consideration, if necessary.

24. In my view the delay which has occurred, not in the time taken to first issue warrants, but in the procedures thereafter, are not such as to constitute "other exceptional circumstances", albeit that it constitutes an exceptional lapse of time. There is not in this case in my view any prejudice, even an inferred prejudice, to the applicant in his defence against the charges being brought.

25. As was pointed out and explained by Denham J. in *Fusco v. O'Dea (No. 2)* [supra] at p. 469:

*...the fact that the exemption is defined so strongly is in keeping with the nature of extradition where once the executive branch of government has made a policy decision that extradition or rendition agreements exist between two countries and the legislature has passed the requisite legislation, extradition becomes mandatory subject to the law and the Constitution. Thus it is understandable that exemptions are so strongly defined in the legislation. However they must be strictly construed.*

*The word 'exceptional' indicates that the exemption will be rare, will be the exception, unusual... "*

26. Clearly, in *Martin v. Conroy* [supra], Herbert J. was satisfied not only that the lapsed of time was exceptional, but that same, in addition, constituted "other exceptional circumstances", by reason. It would appear from a reading of the judgment that the learned judge was influenced to a considerable extent not only by the length of the delay in the issuing of the warrants (seven years) but also by the fact that no explanation was offered for that delay. He was of the view, as expressed by him at p. 473 of his judgment, that *"the wholly unexplained lapse of seven years in issuing these warrants ... .. is a negation of the right of the plaintiff to a trial with reasonable expedition."* He stated later that after such an unexplained delay, he was entitled to infer from the excessive length of time itself that the risk of an unfair trial has been established as a reality. In the present case, the entire delay is not unexplained. Much of it is clearly explained, and the portion which is unexplained is, relative to the overall delay, not sufficiently extensive. In my view that is sufficient to enable me to distinguish the facts of the present case from those in *Martin v. Conroy*, and enable me to conclude the question of delay in a manner different from Herbert J. and without any apparent contradiction. I do not regard the delay in the present case to constitute "other exceptional circumstances", because it would constitute a double counting as already stated. There is no additional feature to be taken into account separately from its length, as seems to have been the case in *Martin v. Conroy*.

27. The applicant referred to my own judgment in *Minister for Justice, Equality and Law Reform v. Stapleton*, unreported, High Court, 21st February 2006 - a case under the European Arrest Warrant Act, 2003, as amended. That case involved charges dating back some eighteen years as far as I recall, and I was of the view that given the length of time involved this Court could be in no doubt that a trial on offences of fraud would be unfair, and that the respondent in that case was entitled to have his constitutional right in that respect protected and vindicated in this jurisdiction without having to await a determination in another jurisdiction. That case is very different to the present case in terms of the length of the delay and its capacity to prejudice a fair trial. It is also relevant to state that it was not an application under s. 50(2)(bbb) of the Extradition Act, 1965, as amended, the terms of which lay down a very specific mechanism by which the Court is to reach its decision. That decision does not add weight to the arguments of the applicant in the present case.

28. In addition the applicant has referred to Article 6 of the European Convention on Human Rights, and to the decision of the European Court of Human Rights in *Barry v. Ireland* where a delay of some ten years was found to constitute a breach of Article 6 rights. It must be borne in mind, however, that the European Court of Human Rights has determined that Article 6 of the Convention is not applicable to extradition decisions, given that such cases do not concern the determination of a person's civil rights or obligations or of a criminal charge (See, for example, the Court's judgment dated 4th February 2005 in *Mamatkulov and Askarov v. Turkey* (Cases 46827/99; 46951/99)). Any issue to be raised under Article 6 of the Convention in relation to the trial itself, as opposed to the application for extradition, is a matter for the courts in the requesting state, given the distinction which I have drawn between the present case and that of *Minister for Justice, Equality and Law Reform v. Stapleton*, to which I have already referred.

29. The applicant points also to the fact that the warrants on foot of which he is sought do not specify precise dates for the offences in question and that accordingly it would be impossible for him to provide an alibi. I do not regard this latter point to be relevant to whether his trial can be fair. It is not within the meaning of "other exceptional circumstances".

30. Warrants will often be worded in this way without any unfairness to be inferred, and certainly on an application for extradition it does not seem to be of any relevance.

31. It will be the exception rather than the rule that persons will not be extradited to a requesting state for all the reasons so clearly stated by Denham J. in *Fusco v. O'Dea (No 2)*. While things should have proceeded in this case with more rapidity at certain stages of the process, there is no other exceptional circumstance to add to the exceptional lapse of time found to have occurred. The charges

to be faced by this applicant are of a very serious nature, and there is an entitlement on the part of the United Kingdom authorities to prosecute him in relation to them, on behalf of the citizens of the United Kingdom. That right must not be too easily or readily frustrated by assertions of delay in the process of extradition - subject of course to the requirement that this court fully and adequately protects and vindicates the constitutional and statutory rights, and where relevant, Convention rights, of the person whose extradition is sought.

32. In circumstances where I have not been satisfied that in addition to there being an exceptional lapse of time, there are any other exceptional circumstances, the Court is not permitted to proceed further to consider whether in all the circumstances it would be unjust, oppressive or invidious to deliver up the applicant under s. 47 of the Act.

33. I therefore refuse the application for relief under s. 50(2)(bbb) of the Act.