Neutral Citation Number: [2006] IEHC 43

THE HIGH COURT

[2005] 39 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
ROBERT FRANCIS STAPLETON

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 21st day of February 2006

1. The respondent's surrender is sought by the United Kingdom authorities on foot of a European arrest warrant which issued on the 20th July 2005 at Bow Street Magistrates' Court. The decision on which that warrant is based is stated therein to be a "warrant of arrest dated 15th January 2004 issued at Lincoln City Magistrates' Court, Lincolnshire, England". The 30 charges for which the respondent's surrender is sought are alleged to have been committed between 25th May 1978 and the 20th July 1982, and consist of various fraud type offences - i.e. false accounting, obtaining pecuniary advantage by deception, procuring the execution of a valuable security by deception, attempting to obtain a pecuniary advantage, furnishing false information, conspiracy to procure the execution of a valuable security, and conspiracy to defraud.

2. The European arrest warrant itself sets out some general description of the nature of the alleged frauds by the respondent in the following way:

> *"In August 1985 an investigation was launched following allegations made by the Department of Trade and Industry that the Directors of two Lincoln based companies, Lumiere Limited and Ultraleisure Limited had committed large-scale fraud. Robert Francis Stapleton, the person sought, was the Chairman of both companies which manufactured and supplied fold-away squash courts. It is alleged that between 20th May 1978 and 31st December 1982, the period of time covered by the offences, Robert Francis Stapleton masterminded a fraud from which he obtained in excess of £3 million to support his companies and fund an extravagant lifestyle. The nature of the fraud was essentially very simple. Bogus invoices and supporting documents, for example shipping certificates, were typed up that purported to show that Ultraleisure had exported goods and services to foreign buyers. Two banks, Coutts and Co. and Lloyds Bank, then advanced funds to Ultraleisure in the belief that the transactions represented on the documents were genuine. When it became necessary for Ultraleisure to repay an advance on the maturity of the relevant promissory note, a larger advance was obtained on similarly false documents and part of that used to repay the earlier borrowing. Ultraleisure therefore had to borrow ever larger sums of money to hide the fraud……."*

3. The respondent denies the charges. In fact in his first affidavit sworn on the 18th October 1985 he states that what he refers to as "the arrangements" referred to in the warrants as set forth above "*were in fact the creation of the United Kingdom ECGD" [Export Credit Guarantee Department], and that the "the purpose of those arrangements……was to circumvent EC State Aid rules intended to prevent a state's subvention of its own export trade to the competitive detriment of traders in other member states.*" He goes on to state that Banks such as Lloyds Bank and Coutts & Co. were happy to collude in such covert arrangements by supplying the necessary bridging finance because such borrowing was guaranteed by the ECGD. He goes on as follows:

> *"However a problem arose for the ECGD when investigations by a local journalist in Denmark uncovered the existence of a £4.5 million sterling charge registered to a Swiss company which was in fact the vehicle to provide security for the ECGD. The response of the ECGD was to leave that company unaided and financially overextended in circumstances that resulted directly in its liquidation. In order to conceal its own unlawful activity, the ECGD has done nothing to assist either my wife or me in rebutting the unwarranted allegation that the company's collapse was attributable to an alleged fraud on our part. Nor will the banks willingly assist us in our Defence because they do not want to risk losing the benefit of the loan guarantees provided to them by the ECGD."*

4. Mr Derek Canton, a retired police officer who was involved in the investigation of these matters since 1985, has sworn an affidavit in which he deals with a number of matters including what the respondent has stated above about the allegations. He responds at paragraph 27 of his said affidavit by stating as follows:

> *"I say that at no stage during the course of the investigation by the Lincolnshire Police of the matters from which the charges against the respondent are brought was any evidence of criminality uncovered which would tend to show or support the matters raised by the respondent in relation to the ECGD. The avoidance or circumvention of EC Aid rules has no relevance on the alleged action of the respondent as set out in the EAW charges. I confirm that the trial judge ruled that certain evidence of ECGD employees (probably Mr Robert Rand and Mr Gordon Granville Bird) was not relevant to any issue in the trial of Mrs Julia Stapleton, in that the alleged avoidance or circumvention of EC Aid rules did not occur until after all the dates of the offences for which Mrs Stapleton was found guilty. The evidence to which I refer was in fact admitted in the second trial of Mr Coles held at Leicester Crown Court."*

5. I will deal in due course with the manner in which the lapse of time/delay is said to prejudice the respondent in his defence to the charges.

6. The issues raised by the respondent by way of resistance to the application for his surrender under s. 16 of the Act are set forth in Amended Points of Objection dated the 1st December 2005 and may be conveniently summarised as follows:

> **Firstly**, that the European arrest warrant is not in accordance with law, and is void and of no legal effect;
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> **Secondly,** that the offences alleged do not correspond to offences in this State;
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> **Thirdly**, that the surrender of the respondent is prohibited by s. 37 of the Act in that his surrender would be incompatible with the State's obligations under the European Convention on Human Rights and Fundamental Freedoms and the Protocols thereto, and in particular the prohibition on inhuman and degrading treatment or punishment under Article 3 thereof, and the right to a fair trial contrary under Article 6 thereof;
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> **Fourthly**, that the delay on the part of the requesting authorities in requesting the surrender of the respondent for the purpose of prosecution on the said charges is excessive, unconscionable and inexcusable in all the circumstances, and

that the lapse of time between the acts alleged and the making of the request for surrender is excessive and has caused prejudice to the capacity of the respondent to defend himself against the charges;

Fifthly, that the surrender of the respondent is prohibited by s. 40 of the Act in that the respondent could not, by reason of the passage of time be proceeded against in the State in respect of the act or omission constituting the offences in the warrant.

Some background facts

7. The respondent is an Irish citizen aged about 62 years and who has lived continuously in this jurisdiction with his wife and family, according to his evidence, since December 1994. He is a director of three information technology companies, and he states that he employs twelve people. Prior to 1994 he had lived in France for a short time, and prior to that he had lived in Spain between the years 1985 and about 1991.

8. Prior to 1985 he and his family had resided in the United Kingdom, although he worked abroad according to his affidavit evidence. But in June 1983 his company went into liquidation. In that year also one of his sons was born apparently with a serious skin condition and he states that he and wife consulted experts who recommended to them that they move to a warm climate as this held out the best hope for his son's recovery. They remained in the UK but started looking for accommodation in Spain around June 1984. He states that they found a suitable house in Valentia, Spain eventually in March 1985, and that the purchase was completed in September 1985 whereupon they moved to that location.

9. It appears that in October 1985 his UK solicitor telephoned him to say that the police in Lincolnshire had obtained a warrant to search his house in Lincoln. He flew back the following day in order to be present when that search took place, but in fact found that the search had been conducted before he arrived. The following month, October 1985 he again returned to the UK, but before doing so he telephoned the police in Lincoln to Say that he wanted to collect some items which they had removed, such as birth certificates, marriage certificate and his son's medical records. He was unsuccessful in so doing despite three visits to the police, and he returned to Spain. Later that same month his solicitor again contacted him to state that he was required to attend the Crown Court "for a directions hearing on a charge of obtaining property by deception from Her Majesty's Customs and Excise namely an overclaim of £19,995 in VAT". He was sufficiently unwell apparently not to be able to travel but sent a medical certificate, but nevertheless a warrant was issued for his arrest. He believes that this warrant simply lapsed eventually.

10. However, it appears that his wife returned to the UK on her own on the 3rd November 1985 in order to confer with their solicitor about the return of their son's medical file from the police. She returned to Spain two days later, and some ten days thereafter on the 15th November 1985 she again returned to the UK to again consult their solicitor and to make arrangements for the transportation of their furniture to Spain. She was arrested by the police on the following day charged with dishonestly obtaining financial advantage of £38,670 from Lloyds Bank, Lincoln. She was refused bail at first but about three months later was released on bail. He states, and I have set this matter out in more detail already in my previous judgment on the discovery application, that she was detained for some or all of that three month period as what is referred to as a Category 'A' prisoner - that being a category reserved, according to his affidavit for "violent, dangerous or suspected terrorist detainees." It is worth stating now that the fear expressed by the respondent that if surrendered to the UK now he will be subjected to inhuman and degrading treatment, is because, as he states, his wife was held as a Category 'A' prisoner twenty years ago. In any event she was in due course convicted of the offence and received an eighteen month suspended sentence.

11. The respondent has stated also that the reason why he did not return to the UK upon the arrest of his wife was that they both feared that if he did so he would also be arrested and that thereupon his children would be placed in care. He denies all the charges levelled against him, and he denies also that the reason he and his family moved to Spain was to avoid prosecution for offences arising out of the liquidation of his company in 1983. It will be recalled that the offences range in date from 1978 to 1982. The UK authorities on the other hand believe that he went to Spain for the purpose of avoiding arrest and prosecution and in the knowledge that there were not at the time any extradition arrangements in place between the UK and Spain and that therefore he could remain there without fear of arrest and extradition back to the UK.

12. One matter which I have not referred to so far is that according to the affidavit evidence the Lincolnshire police visited him in Spain in 1991. He had by that date moved from Valentia to Madrid in order to set up a business there. He says that he was contacted there by UK Treasury solicitors who travelled to Madrid and to whom he volunteered to speak during a series of meetings over a five day period.

13. He states that he and his family have always lived openly wherever they have lived, whether in Spain, France or Ireland. In relation to his return to this jurisdiction in December 1994 he states that for two years after their return in 1994 they lived in "very constrained financial circumstances", and that after that he was in receipt of social welfare assistance. However he commenced in business here and says that he has always filed any necessary returns in the Companies Registration Office and has always used his own name. He believes that the UK authorities from 1994 onwards could easily have located him here just as they did in 2005.

The Issues Raised:

The European arrest warrant is not in accordance with law, and is void and of no legal effect

14. The Points of Objection raised a number of points under this heading, but when the matter was argued before me Counsel for the respondent indicated that only those set forth at paragraphs 1(c), 2 and 2A thereof were being pursued. I will use that numbering in order to avoid any confusion.

> *1(c): The machinery for the arrest committal and surrender of persons provided by the European Arrest Warrant Act 2003 ("the 2003 Act), as amended by the Criminal Justice (Terrorist Offences) Act 2005 ("the 2005 Act") is repugnant to Article 40.4.1 of the Constitution of Ireland as permitting the deprivation of personal liberty by procedures, and in circumstances, disproportionate to the legitimate object which the Act seeks to attain, namely the enforcement within the State of the requirements of the European Union Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender procedures between Member States (2002/584/JHA)("the Framework Decision"):*

15. Under this head, the respondent refers to the fact that the 2003 Act was enacted in order to implement into Irish law the Framework Decision. He refers also to the fact that in that Act a number of safeguards for any person who might be the subject of a surrender request were included, such as the requirement which was set forth in s. 11(3) of that Act that a European arrest warrant must be accompanied by a statement in writing of the issuing judicial authority that (a) the person has been charged with, and a decision to try him or her for, the offence has been made, or (b) where the person has not been charged with the offence concerned,

a decision to charge him or her with, and try him or her for, the offence concerned has been made, by the equivalent person in that state to the Director of Public Prosecutions.

16. Other such safeguards referred to are those which were set forth in s.22(1) (relating to the rule of specialty), s. 23(1)(b) and 2(b) (relating to onward surrender to a third member state), s.24(1)relating to onward surrender with the consent of the High Court or the Minister), and s.42(c) (relating to a situation where the DPP or Attorney General has decided not to prosecute (or has entered a *nolle prosequi*) the respondent in respect of an offence which comprises in whole or in part the offence referred to in the warrant.

17. In respect of each of these so-called safeguards either a statement (as in the case of s.11(3)), or an undertaking in respect of the remainder had to be provided by the issuing state before an order for surrender could be made. The point being made in this case is that the relevant amendments made to these provisions by the 2005 Act and by which the necessity for the statement or undertakings in question was removed and replaced by the creation of rebuttable presumptions, so impairs the right to liberty of the respondent as to offend against the principle of proportionality in the sense that the amendments go far above any concept of "as little as possible". Making this submission, David Keane BL on behalf of the respondent has referred to the judgment of Costello J. (as he then was) in *Heaney v. Ireland* [1994] 3 IR 593 at 607 in which he made reference to the case of *Cox v. Ireland* [1992] 2 IR 503, and in which the test of proportionality was thus explained:

> *"The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*
>
> > *be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; impair the right as little as possible; be such that their effects on rights are proportional to the objective."*

18. Mr Kean refers to the fact that the Supreme Court has applied such a test on a number of occasions, and refers in that regard to Rock v. Ireland [1997] 3 IR 484; *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 12; *Re Article 36 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321; and *DK v. Crowley* [2002] 2 IR 744.

19. Mr Kean submits that the removal of the safeguards contained in the statement/undertakings, and their replacement by presumptions which a respondent, including the respondent in the present case, must have some evidentiary basis for rebutting, cannot be rationally connected to the objective of the 2003 Act which was to give effect to the Framework Decision, and that these amendments are therefore arbitrary, and unfair and disproportionate. He submits that it is a heavy burden to impose on a respondent, whose surrender is sought, that he/she be required to produce evidence to rebut the presumption the issuing state will comply with the obligations upon it in connection as far as the procedural safeguards of a respondent are concerned upon his/her surrender. He submits that its effect is to reverse the position as it pertained under the 2003 Act prior to the amendments where the issuing state had to provide undertakings. He submits also that these amendments constitute a breach of the respondent's right to personal liberty in as much as they make it unreasonably difficult for a respondent to invoke the safeguards designed for his protection, and that in so far as some impingement of a respondent's rights may be necessary in order to achieve the goal of the Framework Decision, namely to speed up and simplify the surrender of persons, the impugned provisions go too far and are disproportionate.

20. George Birmingham SC for the Applicant has responded to this submission by making the interesting point that perhaps by the enactment of the 2005 amendments the position of a respondent is in fact improved or ameliorated, since a respondent is not permitted to bring forth evidence if he/she can in order to show that these presumptions or any one of them is rebutted, whereas under the previous regime, once a statement or undertaking, as the case may be, was provided by the issuing state, there was nothing which a respondent could do to go behind that undertaking or statement.

21. Apart from that submission, however, he submits that the effect of the respondent's submission is that he would prefer to have in place the regime as it existed under the 2003 Act. He points to the fact that under the terms of the Framework Decision itself, no undertakings were mandated as such, but were simply included in the 2003 Act by the Oireachtas in order to give effect to the terms of the Framework Decision. In this regard Mr Bermingham submits that the Oireachtas must be afforded a good measure of appreciation as to the manner in which it implements an instrument such as the Framework Decision, and of course he points to what is contained in paragraph (10) the Recital section to the Framework Decision itself, namely that "the mechanism of the European arrest warrant is based on a high level of confidence between Member States", and submits that this confidence was reflected in the provision which was made for a statement or undertakings as the case may be under the 2003 Act, and is reflected equally in the 2005 Act by the substitution of presumptions, in order to remove the need for producing an actual statement in writing or undertaking from the issuing state in relation to the matters referred to already.

22. Mr Bermingham submits also that there is in fact no constitutional right affected either disproportionately or otherwise by the provisions of the 2005 Act to which Mr Kean has referred, and that the right to liberty is necessarily going to be affected by the procedures for surrender, but that they are not interfered any more by the 2005 Act than they were previously by the provisions of the 2003 Act. He submits that the respondent never enjoyed any constitutional right to the undertakings or statement to which reference has been made. He refers also to the fact that the surrender of persons between states is a matter of foreign policy between nations which is entrusted to the Executive, and that the legislation put in place in order to give effect to these arrangements is a matter solely for the Oireachtas and that the duty of this Court is simply to ensure that the requirements of the legislation are properly complied with in every case before a person will be ordered to be surrendered to another state. In this regard he refers to the fact that the State is required to have surrender arrangements in place between this State and other states who have agreed to be bound by the Framework Decision, and that there is no question of any constitutional right having been infringed by the manner in which the Framework Decision has been given effect to in the 2003 Act, even as amended by the 2005 Act.

23. As far as this area of objection is concerned I am satisfied that the changes brought about by the 2005 Act by way of the creation of the presumptions created in respect of matters previously provided for by way of a statement in writing or undertakings under the 2003 Act do not infringe the constitutional rights of a person whose surrender is sought in any way, disproportionate or otherwise. The Framework Decision sets out the broad principles which are to govern the arrangements between member states who have signed up to that Decision, so to speak. These arrangements are based, as the Framework Decision itself states, on the basis of a high level of confidence between those member states. It would have been open to the Oireachtas to include in the 2003 Act the very presumptions of which the respondent claims. But it must be remembered that the undertakings are not required by the Framework Decision. What was required of the Oireachtas was to enact implementing legislation which gave effect to what is contained in the Framework Decision. That is what the Oireachtas has done when it enacted the 2003 Act, and it is open to the Oireachtas in fulfilling its legislative function to decide that the provisions of that Act should be amended from time to time, perhaps in the light of the experience of how the provisions have worked.

24. What the respondent seeks to do now is to compare what the 2005 Act provides, with what was originally provided in the 2003 Act, and to say that since the burden of rebutting the presumption that certain things will occur or will not occur if he is surrendered now falls to the respondent, in place of the issuing state having to state, or undertake in advance as to, its intentions in these respects, that this in some way is an infringement of the principle of proportionality. I cannot see that there is any room for so contending. These changes have no rational connection to the prospect of loss of liberty of the respondent. Under the 2003 Act, the Court would see that before an order for surrender is made the statement in writing and any required undertakings are in place. The high level of confidence recognised to exist between member states by the Framework Decision allows the Oireachtas, if it so decides, to accept by way of a statutory presumption that any such state which has signed up to the new arrangements will act in a manner which would otherwise have been stated in writing or been the subject of an undertaking, and in matters required of them by the Framework Decision. It is not disproportionate to give the respondent an opportunity to demonstrate that in a particular case such a presumption is unwarranted. Such a situation being shown to arise would, having regard to the status of the issuing state as a Member State of the European Union, have to be regarded as truly exceptional and rare. I should perhaps refer to the fact that during the course of his submission on this point. Mr Kean referred to the fact that in both Poland and Germany similar presumptions to those impugned herein had been found to be incompatible with the principle of proportionality. He helpfully and very fairly pointed out also that in those jurisdictions there is a constitutional provision prohibiting the extradition of its own nationals. In my view that is a very significant distinction and one which renders it irrelevant to this Court's consideration of the issue raised.

The offences alleged do not correspond to offences in this State
25. It is unnecessary in the present case to do more than say that correspondence in so far as it is required to be made out has been made out by the applicant through the submissions in that regard by Mr Bermingham. The offence of fraud which is charged is one of the offences referred to in the schedule of offences in which correspondence is to be presumed. The other offences arise from alleged acts, which if they had been done in this State would give rise to various offences created by the Criminal Justice (Theft and Fraud Offences) Act, 2001 as well as conspiracy to carry out such offences, and conspiracy contrary to common law. I should perhaps add that no submission was made on the respondent's behalf that the offences charged did not correspond, even though there is such a point of objection pleaded in the Points of Objection as filed.

The surrender of the respondent is prohibited by s. 37 of the Act
26. Article 12 of the Preamble to the Framework Decision itself which states as follows:

> *"(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.*
>
> *This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media." (my emphasis)*

27. This statement is reflected in s. 37(1) (a) and (b) of the 2003 Act which provides:

> *"A person shall not be surrendered under this Act if –*
>
> *(a) his or her surrender would be incompatible with the State's obligations under –*
>
> *(i) the Convention*
>
> *(ii) the Protocols to the Convention*
>
> *(b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies)."*

Inhuman and degrading treatment
28. The claim made by the respondent that if surrendered he would be subjected to inhuman and degrading treatment is certainly one which would come to be dealt with under s. 37, as, in the first place it would constitute a breach of a fundamental right if made out, and secondly, the Constitution would protect that right being one of the unenumerated rights guaranteed by Article 40 of the Constitution.

29. In this regard, the respondent relies on the fact already set forth that his wife when arrested in 1985 was kept in custody as a Category 'A' prisoner for three months until she was released on bail, for his submission that if surrendered he too will be subjected to inhuman and degrading treatment. I can deal with that submission briefly, and firstly by stating that simply because such happened to his wife twenty years ago and in the circumstances of that time, there is no possibility that one could assume for the purpose of this application that the same would occur to the respondent. Secondly, however, there has been no evidence in any event as what inhuman and degrading treatment is attached to the conditions under which a Category 'A' prisoner is detained in the UK. Thirdly, the respondent's wife has sworn no affidavit to support this leg of the respondent's argument, which is surprising since she would be in a position to describe exactly how she was treated while in prison for the relevant period. This leg of the respondent's argument is nowhere nearly made out, and it would require very clear, uncontroverted and cogent evidence of the probability that such would occur to the respondent before this Court would be satisfied that the sovereign government of the United Kingdom would intend to breach its international obligations in this regard. I find that submission to be fanciful in the extreme.

Fair Trial
30. Another submission made by the respondent and which I can reject fairly quickly is that because certain evidence was excluded from his wife's trial in 1986, the same will occur in any trial of the charges against him and that any such trial would be rendered unfair as a result. The respondent states that certain witnesses were excluded from his wife's trial which would have supported the contention of the involvement of the ECGD in the transactions giving rise to the charge. In a later affidavit he states that this evidence was excluded on the basis of some public interest immunity, but Mr Canton states in his affidavit that same was excluded on the basis that the trial judge deemed it to be not relevant to any issue in the trial of the respondent's wife. He goes on to state that the same evidence was admitted in the second trial of Mrs Stapleton's co-accused, a Mr Coles. One way or another this is not a persuasive submission. What did or did not happen in the trial of his wife can have no bearing for the purpose of the present

application, and this cannot make any assumptions as to what evidence will or will not be admitted by the trial judge at any trial which would take place. That is manifestly a matter for the trial judge, and the respondent, if surrendered, would have available to him all his rights to due process in that trial.

Delay

31. The submissions made under this heading are in large measure the kind of submissions which would have been made prior to the coming into operation of the 2003 Act (which, inter alia, repealed Part III of the Extradition Act, 1965,as amended, "the 1965 Act") in an application under s. 50(2)(bbb) of the 1965 Act (being within the said Part III) for the discharge on grounds of delay, of a person whose surrender had been ordered under s. 47 of the 1965 Act. Under the repealed s. 50(2)(bbb) an applicant for release had to show that there was an exceptional lapse of time between the date of commission of the alleged offence(s) and the making of the order for his surrender, and also that there was some other exceptional circumstance, so that these matters were considered together with all the circumstances, it would be unjust, invidious or oppressive to surrender him to the requesting state. In other words it was not sufficient simply to show that there had been an exceptional delay or lapse of time. There had to be more. It is clear that s. 50(2)(bbb) did not permit of a situation where a very lengthy delay alone could give rise to an order for release, unless it could be shown the delay given rise to some additional circumstances, such as prejudice to the ability to defend the charges (albeit that a very lengthy delay may give rise to an implied or assumed prejudice presumably), or serious illness, to mention but two possibilities, such that the Court would regard it as unjust, invidious or oppressive to surrender him.

32. However, that section is one of the sections of Part III of the 1965 Act which stands repealed since the coming into operation of the 2003 Act, and so cannot be availed of by the respondent in the present case who points to the fact that the offences with which he is charged in the UK are alleged to have occurred between 25th May 1978 and December 1982. The earliest of these alleged offences is therefore alleged to have been committed almost twenty eight years ago, and the most recent just over twenty three years ago. I will return to the question of whether the respondent can plead delay by the UK authorities in seeking his surrender under the terms of the Framework Decision and the 2003 Act.

33. The respondent claims on affidavit that his capacity to defend himself against these charges has been seriously compromised by the delay, and in this regard he points to the nature of the alleged offences themselves, being fraud type offences, where much documentation would be involved, as well as many witnesses who might need to be called, both from the UK and from abroad, and he has referred to particular witnesses whom he says would be essential to his defence who are either dead or of whose availability he cannot ascertain or be sure. He describes his defence to the proceedings as "both complicated and wide-ranging", and that he would require the presence of a large number of witnesses both from the ECGD and the banks referred to, as well as the disclosure of all relevant documents in the possession of the liquidators of the companies involved, as well as the companies' auditors and accountants, the banks, the ECGD and related government departments. In addition he refers to the fact that the solicitors who acted for his wife in the matter of the charge brought against her in 1986 have confirmed in writing that the files have no longer been retained by them and have been destroyed. In addition to these files, the respondent has received an e-mail communication from the firm which acted as his auditors at the relevant time and which states that all files relating to matters back then have been destroyed. The respondent also states that a Mr John Taylor, manager of Lloyds Bank at the relevant time has died, and goes on to state that before Mr Taylor died he had interviewed him and taped that interview in which Taylor admitted the role of Lloyds Bank in relation to the transactions the subject of the charges against the respondent. He also states that Lincolnshire Police took this tape and despite requests to return it, the tape has never been returned.

34. Other persons who the respondent would wish to call as witnesses are said to be deceased. These include a partner in the firm of auditors to the companies, and also the then Minister for Trade in the British Government, Alan Clarke, as well of course as the Mr John Taylor already referred to. Apart from these potential witnesses who are deceased, the respondent refers to a large number of other persons whose present whereabouts are unknown to him.

35. In addition to these matters he refers to the fact that during the years which have intervened he has got on with his life, raising his family with his wife, both in Spain and France, and in particular in the last eleven or so years here in Ireland of which he is a citizen. As I have already referred to, he has averred to having set up in business here, registering his company in the Companies Registration Office and using his own name and with no attempt to conceal his whereabouts from any authority. As I have also stated he points to the fact that it was as easy for the UK authorities to come looking for him here in 1994 after his arrival as it was in 2005 when they did so.

36. He says that he has at no time tried to evade arrest, and in particular that his going to live in Spain was not for the purpose of avoiding the UK police by reason of the fact that there were no extradition arrangements in place between Spain and the UK, but rather on account of his son's medical condition. He points to his bona fides in that regard by the fact that he and his wife returned to the UK in the immediate aftermath of the emigration to Spain in order to make arrangements as I have described, and, as he says at least, without any attempt to disguise their presence there, and that in addition, as referred to already, he agreed to be interviewed in Spain by members of the Treasury Solicitors offices.

37. Mr Derek Canton, as I have already set forth, states that what the respondent states about the involvement of the ECGD in trying to avoid EU State Aid rules has no relevance to the charges brought against the respondent, and that therefore the prejudice that the respondent submits regarding the unavailability of numerous witnesses to support the ECGD involvement has no reality.

38. He is also of the view also that from the time of his wife's arrest the respondent was well aware of the fact that the Lincolnshire police wished to interview him about the matters referred to in the charges brought and that he made no attempt to make himself available for such interview. The respondent answers that in a second affidavit by stating that the police were aware that he was willing to be interviewed in Spain. However Mr Canton is of the view that in spite of what the respondent states about his son's illness being the reason for moving to Spain, the real reason was to avail of the absence of extradition arrangements between that country and the UK. Mr Canton goes on to say that the Lincolnshire Police were at all times aware that the respondent was an Irish citizen and had an Irish passport, but that they were also aware that an Irish company of the respondent's, Realta Quilts Limited based in Co. Wexford had also gone into liquidation and that the company was the subject of an investigation by the IDA here in relation to the recovery of some £500,000 which it believed to have been obtained on the basis of falsified documentation. For that reason Mr Canton states it was not believed that the respondent would return to Ireland. He refers to a number of contacts made with the respondent by persons from the Treasury Solicitors office while he was in Spain, but says that the police were made aware of these contacts only after they had occurred and that they were never told of the reason for the visits. He says that the police were not invited to participate in the visits by either the Treasury Solicitors office or the ECGD. This would have been around 1991. He states that later information was to the effect that the respondent had moved from Valentia to Madrid, and that he was subsequently believed to have moved to France and/or to the United States of America. No material is exhibited in this regard.

39. In October 1991 it appears that certain information was received that the respondent had moved to Dublin, and that thereafter

contact was set up with members of An Garda Siochana here which revealed that the respondent was living in Enniskerry, Co. Wicklow. He states that thereupon a report was made to the Crown Prosecution Service who then instructed him, who was the only member of the team who had investigated the matters back in the 1980s, to reassess the case "in order to determine viable witness evidence". By June 2002 he had reported back to the CPS. He states then that a decision was made in November 2003 to apply for extradition in respect of these offences. He goes on to state that "the Director of Public Prosecutions for England and Wales thereafter instructed the Lincolnshire Police not to apply for extradition pending the coming into force of the European arrest warrant procedures on the 1st January 2004". The European arrest warrant was duly issued on the 15th January 2004, but appears to have been put on hold since Mr Canton states that in another UK extradition case (Dundon) an appeal was taken to the Supreme Court and then states that the present case was not proceeded with until the conclusion of that case in the Supreme Court. It appears from evidence which I heard in another case in recent times that all UK warrants were put on hold pending the result of the Dundon case in the Supreme Court and thereafter until the 2005 Act was passed. The UK authorities appear to have become aware that the amendments contained in the 2005 Act were due to come into effect. These provisions are, inter alia, those to which I have already referred whereby requirement to produce the statement in writing/undertakings was replaced by certain presumptions.

40. That is the general factual background to the submissions made to the Court by Brian O'Moore SC on behalf of the applicant under the heading of delay/lapse of time. Mr O'Moore pleads the delay point under the provisions of s. 37 of the 2003 Act, which I have already set forth above, and he submits that what this Court must decide is whether the respondent can be surrendered to the United Kingdom without there being a breach of any of the respondent's constitutional rights. He refers to the right enjoyed by the respondent to a trial with reasonable expedition, as well as his right to a fair trial, and in the latter regard points to the averments made by the respondent as to the nature of the defence which he would be mounting to the charges, involving a large amount of documentation, as well as a large number of witnesses, some at least are known not to be now available to him and others whose whereabouts and availability he is unaware. In addition, these factors which it is alleged will hamper his ability to properly and fully defend himself, must be looked at against the fact that the offences are said to have occurred between 1978 and 1982. Mr O'Moore submits that there is no question but that this is a case of extraordinary and inordinate delay on the part of the issuing state, even allowing for the fact that from 1985 until 1993 the respondent was living in Spain. He refers to the evidence that in October 1985 the respondent had returned briefly to the UK when on a number of occasions he actually visited the Lincolnshire police. He refers also to the fact that the respondent and family moved to France for a time in 1994 until December of that year, whereupon they came to Ireland and lived openly here. Mr O'Moore points in particular to the period of eleven years between the arrival of the respondent here and the date of his arrest in September 2005, and submits that no serious effort has been made to justify the delay during these years and during which the respondent cannot possibly be alleged to have contributed to the delay in pursuing him in respect of these charges for which he now wanted to face trial in the UK. He refers to the evidence, such as it is, of Mr Canton which I have already set forth, as to the manner in which matters moved slowly from the time when he says that information came to hand even in September 2001 that the respondent was in Ireland. Mr O'Moore submits that the affidavit evidence which attempts to explain and justify the delay even from that date for a period of four years prior to the arrest is weak and vague. It appears that from Mr Canton's evidence that a period of nine months elapsed from September 2001 until he reported back to the CPS. There is no explanation as to why it took him so long to report back to that body as to the "viable witness evidence" (to use his own phrase). A further period elapsed from June 2002 until November 2003 (one year and five months) before a decision was made, "following the making of a number of enquiries" according to Mr Canton, by the CPS to apply for extradition. At that point everybody appears to have stood still again until such time as the new extradition arrangements were put in place from the 1st January 2004. It would of course have been perfectly feasible to have proceeded under the Part III arrangements, but on the other hand the respondent would have been able to make an application under s. 50(2)(bbb) of the 1965 Act, as amended for his release, so perhaps, for all I know, it was felt that under the new arrangements this step might not be available to the respondent in order to plead delay. However I simply speculate in that regard. Nevertheless, that delay occurred, and the further delay again from the 15th January 2004 when the warrant was applied for, until the passing of the 2005 Act following the Dundon case. All in all the authorities allowed a considerable amount of time to elapse from the time they became aware of the respondent's whereabouts in this jurisdiction. They do not appear to have made any contact with the respondent here during that time.

41. Mr O'Moore submits that it would not be possible for the respondent to reasonably be expected to receive a fair trial on these charges given the lapse of time which has occurred since the dates of the alleged offences and for the reasons stated, and that his constitutional right to such a fair trial and to a trial with reasonable expedition would result if he were to be surrendered, and that this Court should not so order in these circumstances given the express recognition in the Framework Decision (paragraph 12 of the Recital section) that the fundamental rights of requested persons are respected in these new arrangements, and the provisions of s. 37 of the 2003 Act. He goes on to deal with the other question which arises on the documents and to which I have not yet referred and that is whether it would be possible for the respondent to have his constitutional rights in these respects protected by invoking remedies, such as prohibition by way of judicial review, before the English courts if he were ordered to be surrendered.

42. Before dealing with these submissions further, I must refer to the fact that the applicant has filed an affidavit as to law sworn by a barrister practising at the Bar of England and Wales, namely Mr Peter Caldwell. He states that he practices in criminal and extradition law there. He expresses the view, having read the affidavit of the respondent herein, that there are sufficient remedies available in English law "to ensure that Mr Stapleton can have a fair trial." He refers to the fact that under English law a defendant is guaranteed a fair trial, and explains that this means that the defendant is entitled to full disclosure of the prosecution case, sufficient time to prepare his defence, and the opportunity to question ands call witnesses. He makes other averments as to the power of the trial judge to regulate the admission of evidence so that only relevant evidence is adduced, and that evidence will be excluded were its probative value is outweighed by its prejudicial value. He refers also to the obligations of that jurisdiction under the Human Rights Act 1998 and the European Convention on Human Rights. In the context of delay/passage of time, Mr Caldwell refers to Article 6 of the Convention and then states as follows:

> *"……At Common Law, it has been held to be an abuse of the court's process where there has been unjustifiable delay in the proceedings……Where there has been no fault on the part of the prosecution, a stay will not be granted unless the defendant can show on the balance of probabilities that owing to the delay he will suffer prejudice to the extent that no fair trial can be held. Delay due to the actions of a defendant will never be the foundation for a stay.*
>
> *The question of fault for the passage of time since the proceedings against Mr Stapleton were commenced is of great relevance to the court in determining whether Mr Stapleton could have a fair trial. If in fact he is prejudiced by delay, but such delay is of his own making (for example by absconding from the proceedings) then the court is very unlikely to grant a stay."*

43. Mr Caldwell goes on to set out how the Court might consider an application for a stay of the proceedings in order to prevent an abuse of the court's processes, where evidence may be lost or no longer available. He says that a stay is not automatic in such circumstances, and that a number of factors would be looked at, such as the nature and extent of the duty to obtain and retain the evidence, whether there has been a breach of such a duty, whether there will be a resulting prejudice to the defendant on the

balance of probabilities, and yet bearing in mind the capacity of the trial judge to deal with such issues as they arise in the trial. He goes on:

> *"A stay should also be granted if the behaviour of the prosecution has been so bad that it is not fair that the defendant should be tried, and in this regard a useful test is that there should be either an element of bad faith or at least some serious fault."*

44. Finally in this section of his affidavit he states:

> *"It will also be relevant for the court to consider whether the reason for the unavailability of any evidence or relevant material is due to the conduct of the defendant himself. For example, where witnesses have died, or are no longer traceable, the unavailability of this evidence may be attributable to the defendant's conduct rather than to any fault of the investigator or prosecutor. In such circumstances the court would be far less likely to consider a stay of the proceedings."*

45. By way of response to this affidavit, the respondent has engaged the services of Mr Michael Mansfield QC who has sworn an affidavit. He refers to the Convention and to the Human Rights Act 1998, and to s.6 of that Act which he states makes it unlawful for a public authority, such as a prosecutor, to act in a way which is incompatible with a Convention right. He states that a court may order a stay of a criminal prosecution where it considers that the prosecution is an abuse of court process. The affidavit deals in the main with the obligation on the prosecution to disclose as it has evolved from 198i onwards following the issuing in that year of the Attorney General's Guidelines on Disclosure of Information to the Defence. He refers to the case of *R. v. Ward* [1993] 1 WLR 619, and other cases which developed the obligation further and to various statutory interventions in the matter of the obligation to disclose. But he concludes by stating:

> *"The prosecution's duty to disclose and preserve material at the time of the alleged offences faced by Mr Stapleton was very limited. Subsequent authorities and legislation confirmed that the prosecution's obligation was much more onerous. However the authorities cited above indicate that the domestic courts are unlikely to stay the case on the grounds of abuse of process because although the prosecution would have breached current standards of disclosure, they did not breach standards applicable at that time."*

46. Mr O'Moore submits that the evidence even of Mr Caldwell as to the circumstances in which the Courts in England will see fit to stay proceedings on the grounds of delay, prejudice and soforth would appear to be more confined than in this jurisdiction, where the Courts, he submits, have shown a willingness to regard an exceptionally lengthy passage of time or delay to be a breach of a free-standing right to a trial within a reasonable time, even in the absence of prejudice being established to the satisfaction of the Court. In such a situation the prejudice is to be assumed rather than actually made out as such. That submission is of course made without prejudice to the submission that in the present case, the respondent has established on the balance of probabilities that his capacity to adequately defend himself against the charges has been hampered by the unavailability of witnesses to which he has referred in his affidavit.

47. Mr Bermingham for the applicant submits that the appropriate remedy for the respondent is to seek a stay on the further prosecution of these charges before the Courts in England, and that this Court should not interfere with that Court's jurisdiction to deal with such an application if it were to be made by the respondent.

48. He submits also that for the purpose of the present application the Court ought not to deal with the matter from the point of view of with whether the respondent might or might not receive a fair trial in England, but rather whether any constitutional right or Convention right enjoyed by the respondent would be infringed by an order that he be returned to the requesting state. In that respect he has referred to a decision in *Woodcock v. Government of New Zealand* [2002] EWHC 2668 (Admin) in which the Applicant sought a writ of Habeas Corpus in circumstances where he had been committed following arrest in the UK so that he might be returned to New Zealand in order to face trial in respect of certain indecent assault charges alleged to have taken place some twenty years prior to his arrest in 2002. The date of the first complaint was around 1994. In applying for his release he relied on s. 11(3)(b) of the Extradition Act, 1989 on the basis that it would be unjust or oppressive to return him to New Zealand. Mr Bermingham referred to this case because in the judgment of Simon Brown LJ, he considers whether it is appropriate to leave the issue as to whether the applicant could receive a fair trial to the Courts in New Zealand. He noted that the approach of the New Zealand courts was similar to that prevailing in English courts and concludes:

> *"… one might conclude that we in this court should simply ignore the possibility of the New Zealand court itself staying the proceedings if it decides that a fair trial is impossible. In my judgment, however, that would not be the correct approach to this provision. Section 11(3)(b) in terms requires this court's decision not upon whether, having regard to the passage of time, it would be unjust to try the accused, but rather whether it would be unjust to return him (albeit, of course, return him for trial).*
>
> *To my mind that entitles, indeed requires, this court to have regard to whatever safeguards may exist in the domestic law of the requesting state to ensure that the accused would not be subjected to an unjust trial there* "

49. Mr O'Moore referred to a passage appearing just beyond the passage just quoted and where the learned judge states:

> " *If of course we were to conclude that the domestic court in the requesting state would be bound to hold that a fair trial of the accused is now impossible, then plainly we would regard it as unjust (and/or oppressive) to return him. Equally, we would have no alternative but to reach our own conclusion on whether a fair trial would now be possible in the requesting state if we were not persuaded that the courts of that state have what we would regard as satisfactory procedures of their own akin to our (and the New Zealand courts' abuse of process jurisdiction."*

50. It is necessary to bear in mind that the Court in Woodcock was dealing with a s.50(2)(bbb) type of application, and not a matter arising under the European arrest warrant arrangements which have their own discrete provisions regarding the guarantee of respect for fundamental rights and constitutional rights. That is a distinction. Another distinction between the present case and Woodcock is that the latter was not a fraud case, but rather a sex abuse case occurring many years' previously. In this jurisdiction such cases have been regarded as being in a special category where special considerations apply as to the significance of delay booth in terms sometimes as to the whey the delay has occurred, and also in terms of the effect of the delay on the capacity of an accused to defend against the charges. The case at hand is a case of fraud alleged to have taken place up to twenty eight years ago. In that regard I note even within the judgment of Simon Brown LJ referred to, the following passage occurs at the end thereof:

"…But I could not help noting Rose LJ's observation [in re: Sagman [2001] EWHC (Admin) 474…] that 'no case is known to counsel, or to the court, where an extradition has been ordered after a lapse of so long a period as 15 years'. There may or may not have previously been such a case. In my judgment, however, there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive. It hardly needs me to point out that trial after 20 years or more is far from ideal. Sometimes, however, it may nevertheless be appropriate to extradite an accused for that purpose. This, in my judgment, is such a case…"

51. As I have already stated the case in question was a sex abuse case to which different and discreet considerations may and do apply.

52. Mr Bermingham has submitted that it would only be in exceptional circumstances that this Court should refuse to make the order sought rather than allow the courts of the requesting jurisdiction make the decision whether or not a trial should not take place, and that such an approach would be in accordance with the expressed high level of confidence existing between member states as appearing in the Framework Decision.

53. My view in this regard is that if the applicant enjoys a Convention and a constitutional right to a trial of offences with which he is charged within a reasonable time, that is a right which he is entitled invoke and have protected on the first occasion on which it becomes relevant for argument, and that it is not a matter to be postponed so that it can be ventilated at some date in the future in another country, and after the respondent has been returned in custody to that place. Section 37 of the 2003 Act mandates that this Court shall not order the surrender of a requested person if to do so would not be compatible with this State's obligations under the Convention or its Protocols, or would constitute a breach of any provision of the Constitution. Under each instrument the respondent enjoys the right to a trial in due course of law, including within a reasonable period of time. There is in my view no meaningful distinction to be drawn between surrendering the respondent to the requesting state to face a trial which would be either unfair or not within a reasonable time, and him actually facing such a trial.

54. The concept of what is or is not a reasonable period of time is an objective one to a very large extent, even though there can be subjective considerations to be borne in mind such as the degree to which the respondent himself has contributed to the delay in his arrest and hence his trial. This Court is in just as good a position to be satisfied as to whether the respondent would receive a trial on these offences within a reasonable time as a Court in the requesting state. It does so on the basis of a balance of probability. If the standard were to be the higher one of beyond a reasonable doubt the situation could be different since the Court in the requesting state would perhaps be in a better position to assess the available evidence and the alleged prejudice claimed to exist. But in the present case there are perhaps unique circumstances arising from the fact that the earliest of the offences with which the respondent faces trial is may 1978. It is not unreasonable or fanciful in my estimation to suggest that if the respondent was to be surrendered, and everybody concerned worked with some dispatch hereafter in order to ensure as early a trial as possible, such a trial might take place almost thirty years after the earliest of these offences, as a matter of fact.

55. There comes a time in my view when no matter who is responsible for the major part of the delay, the length of time itself must give rise to an assumption of prejudice, even were a Court to conclude that the assertion of actual prejudice was weak. Where this Court is in what in my view is such an obvious position to conclude that no person can be expected to adequately defend himself after such a period of time, (and I exclude from that remark the defence against what have become known as sex abuse charges going back many years and to which special considerations apply), it would be incompatible with the State's obligations under the Convention to now return him to the requesting state in the hope that his rights in this regard will be vindicated there. Indeed, I am not assured by the affidavit of Mr Caldwell that there is the same probability as would in my view exist in this jurisdiction, that the respondent would be successful in his application to have his trial stayed on the grounds of lapse of time. It seems to me from the contents of that affidavit that the fact that the respondent had gone to Spain and remained there until about 1994 may well be interpreted as an action on his part which has caused a major part of the lapse of time from 1985 until 1994, and that this could very likely result in a failure to secure a stay of proceedings.

56. It seems clear that under the English jurisprudence referred to by that deponent, there is not the same regard for what I may refer to as a free-standing right to an expeditious trial, even in the absence of actual prejudice. In that regard I would refer to the discussion of this question in my own judgment in *JF v. DPP*, unreported, High Court, 16th November 2005, in which cases such as *PC v. DPP* [1999] 2 I.R. 25, and *DPP v. Byrne* [1994] 2 I.R. 236 are referred to.

57. I must deal with the matter on the balance of probabilities.

58. There is also no contradiction of Mr Mansfield's opinion that given the date of the alleged offences the more recent disclosure rules would not be applicable to the prosecution's obligations as to disclosure of all material. I cannot accept that the rights of the respondent under the Constitution would not be contravened by his being surrendered at this point in time to face trial on these charges, and I do not believe that it would be appropriate to expose him to the hazard that his rights might not be vindicated there in the same manner in which they would in my view in this jurisdiction. That is not an indication in any way that this Court does not have the high level of confidence in the neighbouring jurisdiction which is referred to in the Framework Decision. That aspiration, if I can call it that for the moment, was not sufficient for the Oireachtas to decide that it was unnecessary to enact s. 37 of the 2003 Act. The Framework Decision itself states that it respects fundamental rights, and that it does not prevent member states from applying its constitutional rules of, inter alia, due process. I do not read that as being confined to the process of extradition, especially when read in conjunction with s. 37.

59. I adverted earlier to the question arising as to whether a person in the position of the respondent is entitled to plead delay and lapse of time under the new European arrest warrant arrangements in much the same way as he would have been under s.50(2)(bbb) of the 1965 Act prior to its repeal. A similar issue arose in another case already heard before me and in which I delivered judgment on the 15th November 2005, namely the case of SR to which I have already referred. I do not wish to add to what I stated in that regard in SR. It is unnecessary to do so, but I am still of the view that the approach of the Courts under the 2003 Act should not be constrained by any jurisprudence which emanated from the Court's pronouncements in relation to applications under s. 50(2)(bbb) of the 1965 Act, and that in considering delay under the latter, it should be done on broad constitutional principles, and not confined to whether it has been shown that to order surrender would be unjust, invidious or oppressive" having made out a case of exceptional lapse of time and other exceptional circumstances, although some of that jurisprudence might indeed be helpful in a consideration of the issues arising under the 2003 Act.

60. Mr Bermingham has submitted in the present case that it could not be correct to say, as I in effect stated in SR already referred to, that with the repeal of s. 50 of the 1965 Act, as amended, the scope for refusing to surrender based on delay under the 2003 Act was wider than it had been under the previous regime. He referred to the Framework Decision in this regard and the aspiration expressed therein at paragraph (5) of the Recital section that the new arrangements would see the introduction of simplified system

of surrender and that it would make it possible to "remove the complexity and potential for delay inherent in the present extradition procedures." He submits that this would not support the notion that delay would be more easily successfully argued than theretofore. There is no doubt in my view that Council of the European Union had seen the existing arrangements as having the capacity to delay surrender, and that it can be seen as intending that the processing of surrender applications should take place with greater speed and less complexity than before. But it is not apparent, especially given the safeguards built into the scheme, that it was the intention that persons who under the old regime would not be ordered to be extradited or surrendered, would be so ordered under the new regime. In other words, the expressed intention is to simplify and make more speedy and efficient the processing and surrendering of persons, but not that it would result in persons being surrendered under the new arrangements than had occurred under the previous arrangements. If that were the intention it would have had to mean that rights previously accorded to persons requested were being diminished or removed completely by the provisions of the Framework Decision, and that it was not simply a matter of speeding up the process and simplifying same. For that reason there is no reason to conclude that it was within the contemplation or intention of the Council that there would be any less protection of the rights enjoyed by requested persons under the new arrangements and that the 2003 Act must be read in that way. Such fundamental rights are respected specifically, including constitutional rights. In SR I referred to some jurisprudence in this State prior to the insertion of s. 50(2)(bbb) into the 1965 Act, and in particular the judgment of Walsh J. in *Finucane v. McMahon* [1990] 1 I.R. 165 where that learned judge stated at p. 216-217 of the judgment states:

> *"… The Courts must remain completely impartial and detached and free from all political or diplomatic pressure in their objective determination of the issues involved. In addition, they must safeguard the constitutional rights of the fugitive and ensure that there will be no rendition which would subject the fugitive to injustice or to any treatment or procedure which would be inconsistent with the norms of our concept of fair procedure……"*

61. I accept of course that the context in which those words are different to the present case.

62. Mr Bermingham submits on the other hand that the Oireachtas, by its repeal of Part III of the 1965 Act, which included the entitlement to relief on grounds of delay in s. 50(2)(bbb), can be seen as consciously excluding from the ambit of the new arrangements the entitlement of a requested person to plead delay/lapse of time, and that the respondent in this case cannot therefore do so. I do not agree that the repeal of Part III can be so interpreted to the disadvantage of requested persons. The repeal of Part III was required under the Framework Decision because Part III was that part of that Act which provided for rendition as between this State and the United Kingdom, specifically. Part II applied to "Extradition Generally" – in other words to all other countries with whom bilateral treaties existed. Under Part II, a person ordered to be surrendered had always the right to apply for an order of Habeas Corpus within fifteen days of his committal if he/she was of the opinion that their detention was unlawful. What I have stated in SR is of relevance to this question. I will not repeat it here.

63. On the general point of the delay itself Mr Bermingham has submitted that the respondent cannot get the benefit of delay in prosecuting him as a result of his going to Spain. He points to the fact that the respondent will have gone to Spain because he was aware that he was suspected of these offences and that that he could not be extradited back from Spain to the UK. He also submits that it is simply not possible that because the respondent says that he did not disguise his whereabouts when in Spain or France or this country that the clock should have stopped running against him.

64. As to a so-called stand alone right to a fair trial within a reasonable time, Mr Bermingham has submitted that there is no stipulated period within which any trial shall take place, ands that there is no Statute of Limitation period applicable. Therefore all the circumstances must be looked at including the obvious contribution by the respondent to the delay which occurred by moving out of the UK to Spain. He submits that it is only prosecutorial delay which should be reckoned and looked at for the purpose of considering whether the delay is unreasonable. He submits that the delay from 1994 has been explained and is not so long as to come within the concept of unreasonable, and that behind that date it is the respondent who is culpable, and that he cannot now be heard to complain that he cannot receive a fair and expeditious trial of the offences charged. He suggests that in respect of the delay since 1994 there would be no question of any Court in this jurisdiction granting an order of prohibition on the grounds of delay. He also asks this Court to bear in mind that by the end of 2003 when the CPS had given the go-ahead for extradition to proceed, it was in the dying days of the life of Part III of the 1965 Act, and that it was reasonable to await the commencement of the new arrangements. In relation to the further delay after January 2004 while no action was taken by the UK authorities until a decision of the Supreme Court was available in the Dundon case, he seeks to draw a distinction between the present case and the SR case to which he referred and in which I expressed somewhat critical remarks about the tactic of waiting until less onerous provisions were enacted by the 2005 Act. He submits that the facts of the SR case are different in as much as the ratio for my criticisms in that case were because the authorities were aware during that period of deliberate that the respondent in that case was a vary ill man (a matter not suggested in any way in the present case), and that their decision to delay was made without regard to the individual circumstances of that respondent.

65. He suggests that even if the Court was considering this case by reference to the previous criteria under s. 50(2)(bbb) the Court would not find the delay on the part of the UK authorities to be exceptional, and that there would be no other exceptional circumstances made out such that when these matters are taken together with all the circumstances it would have been found to be unjust, invidious or oppressive to order his surrender.

66. I am afraid that I cannot agree with Mr Bermingham's submissions even though they are made with great skill. I am not at all as convinced as he submits that the facts of this case if considered under s. 50(2)(bbb) would not have resulted in the respondent's discharge and release. In my view the length of the lapse of time, as I have already stated, is so long, including a period from at least 1994 to 2005 when the respondent was living in this country and for which I regard the authorities in the UK to be very largely to blame, that all other considerations which may be laid against the respondent pale into insignificance. There comes a time, and twenty eight years since the date of alleged commission of a fraud is within this concept, that it must be presumed that it is simply not possible to guarantee a fair trial, no matter how assiduous the trial judge may be to ensure that the jury is appraised and properly instructed as to the potential for delay to dull the memory and prevent the marshalling of evidence.

67. No trial after twenty years can be a trial within any concept of reasonable expedition, even allowing for the time in Spain up to 1993/1994. But that apart, it must be assumed in a case of this kind, and in the light of the evidence set forth by the respondent in his affidavits, that memories of detail will have faded if not disappeared, and this will apply equally to any witness who may still be available to be called either by the prosecution or by the respondent. He has sworn that certain witnesses are deceased or their whereabouts are unknown to him. He must be given the benefit of the doubt in this regard. I am not forgetting that it has been averred by Mr Canton that he does not believe that the ECGD line of defence being asserted by the respondent has any relevance to the charges. I would not expect him to readily agree, but that is not to say that the respondent is not entitled to an opportunity to mount such a defence in order to establish a reasonable doubt. There is evidence in the form of exhibited e-mail communications from the respondent's former solicitors and accountants who acted for him in the early 1980s that their files are by now destroyed. There

is no suggestion made that this occurred other than in the normal course due to time elapsing. That is another potential disadvantage to the respondent by this time.

68. But even if actual prejudice was not established to the required degree, and I lean in favour of the view that it has been, I am completely satisfied that the lapse of time since 1978/1982 to the present time and any further date at which a trial would likely take place, goes way beyond any time by which a fair trial within a reasonable time can take place in respect of these offences. This is not a case in which the time question is in any way marginal. It can be presumed that the respondent is prejudiced, and the sheer length of time which has passed renders to a large extent irrelevant the allegation that the respondent may have deliberately absented himself from the UK around 1984/1985 in order to escape the attentions of the authorities arising from the liquidation of his companies.

69. For these reasons I refuse the application for an order under s. 16 of the Act.

70. In view of this conclusion I prefer to forego any consideration of the objection made by the respondent by reference to s. 40 of the 2003 Act. I dealt with that particular section to some degree in my said judgment in SR, and its capacity for relevance in relation to the question of whether a respondent can plead delay, and suffice to say, that while what I stated in that regard did not affect the conclusions which I reached in that case, I believe Mr Bermingham is correct when he expresses the view that what I stated with regard to that particular section may need to be reconsidered. It is unnecessary to say more for the purpose of this judgment.