Neutral Citation Number: [2005] IEHC 289

THE HIGH COURT

[Record No.2003 22 EXT]

BETWEEN

THE ATTORNEY GENERAL

APPLICANT

AND
P.O.C.

RESPONDENT

AND
THE HIGH COURT
JUDICIAL REVIEW

[Record No.2004 257 JR]

BETWEEN

P.C.

APPLICANT

AND
THE ATTORNEY GENERAL

RESPONDENT

Judgment of O'Sullivan J.delivered the 27th day of July, 2005

Introduction
1. In this judgment, I am dealing with two cases namely an application by the Attorney General in the first case for an order extraditing P.O.C.to the State of Arizona in the United States and an application by the latter in the second case for a perpetual injunction restraining such extradition.

2. For convenience I will refer to the applicant throughout this judgment as "the Attorney General" and to P.O.C.as "the applicant".

3. Following an initial hearing in April 2005 I was requested to postpone judgment pending a further hearing into further information which came to light on the morning I intended delivering judgment.Having held that further hearing, I have decided to deliver my judgment in the form originally intended, but with an added postscript covering the additional information.

Background
4. The applicant is a Roman Catholic Priest accused of three incidents of sexual abuse with a minor, then ten years old, which allegedly occurred in the last three months of 1978 at a time when the minor was an altar boy, and comprising allegations of oral sexual contact, attempted oral sexual contact and anal intercourse.

5. The first time the complainant made known these allegations to any law enforcement authority in Arizona was on 12th December, 2002 when he was thirty-four years old and following a television programme from which he learnt that similar allegations against the applicant made by another complainant were dismissed because of the statute of limitations.The present complainant says that he then decided to contact the Maricopa County Attorney about "what happened to me".

The extradition case
6. In *A.G.v.Parke* (Unreported, 6th December, 2004) Murray C.J.made the following observations (p.8) in relation to the extradition process in this country:- "The role of the trial judge in an application for an order of extradition is unique.The hearing is not a criminal trial, in the adversarial sense where the State must prove the guilt of the accused beyond all reasonable doubt.Nor is it a civil case between two parties.It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act, 1965, as amended, have been met.Further, this law has been established against the backdrop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States.Thus, the cases are founded on the Comity of Nations and the Comity of Courts.

7. I am satisfied that there is a duty on a trial judge in an extradition case to make such inquiries of counsel as are relevant…"The Attorney General's application for extradition was presented in court with punctilious attention to detail by Shane Murphy S.C.As the matter progressed and as the specific proofs were identified one by one and in sequence, I was enabled to be satisfied, subject to the three points of challenge raised by the applicant, that the extradition application was in order.No challenge was raised in relation to identity and no challenge was raised in relation to correspondence of offences.There is a full professional transcript of both hearings before me.

8. Three challenges were raised by Mr.O'Connell S.C.on behalf of the applicant as follows:-

> (a) The warrant is defective in two respects, namely (i) it has not been shown to have been issued by a lawful person and (ii) it is not satisfactorily authenticated;
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> (b) The sentencing provisions in Arizona have not been established with sufficient clarity to satisfy the court; specifically the deponent Catherine Leisch, the Deputy County Attorney for Maricopa County, Arizona, has sworn a number of affidavits attempting to deal with this matter with clarity but has had to correct herself on so many occasions that her final affidavit is thereby rendered unreliable; and
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> (c) Due to elapse of time extradition should not be granted in this case pursuant to s.18 of the Extradition Act, 1965 as amended.

9. A further challenge relating to conditions in Maricopa County jail has arisen in the second hearing.

The challenges
10. (a)(i) The judge signing the arrest warrant is described by Ms.Leisch in one affidavit as a judge and in a later affidavit as a commissioner.Further explanation is given to show that he was appointed a temporary judge and appropriate documentation adduced.Under the relevant provisions, a temporary judge is appointed initially but that appointment must be approved by the

Maricopa County Board of Supervisors.The challenge relates to this specific point.It is submitted that it is not sufficient for Ms.Leisch merely to aver that Judge Benjamin Vatz's appointment was approved by the County Board, as she does.In reliance on the well-known observations of McCarthy J.in *McMahon v.Leahy* [1984] I.R.525 at p.544 and on the judgment of O'Higgins C.J.in *The People v.Farrell* [1978] I.R.13 at p.26 it is submitted that the court should have been given sight of the relevant document proving the County Board's approval.In the latter case O'Higgins C.J.condemned as inadequate a recital on a form (to the effect that the Garda Commissioner had authorised a Superintendent to extend Mr.Farrell's period of detention) as being of no evidential value whatsoever and he said that evidence could have been supplied either by the production of the written authorisation or possibly by evidence of the fact that such authorisation had been given.He rejected the suggestion that everything should be presumed to be in order as where liberties are involved no presumptions can be made.Furthermore, it is submitted that there is no indication of when the County Board approved of Judge Vatz's appointment.

11. In response Mr.Murphy points to s.37(3) of the 1965 Act which where relevant provides that:-

> "… a document that purports to be certified by –
>
> > (a) the judicial authority in a Convention country that issued the original, …to be a true copy… and issued in accordance with the procedure laid down in the law of that country, shall be received in evidence without further proof…."
> >
> > (a)(ii) It is also submitted that the appointment of Judge Vatz is not satisfactorily authenticated.This point, described by Mr.O'Connell as "not my best point", insofar as I understand it, queries the power of the deputy clerk (as distinct from the clerk) of the Superior Court to sign the warrant.Ms.Leisch deposes to such power.

12. In my view, these points of challenge are not well founded.In the first place s.37(3) provides the answer; secondly there is evidence from Ms.Leisch of the confirmation of Judge Vatz's appointment by the County Board and of the appropriate power of the Deputy Clerk, and thirdly there is nothing exceptional about those links in the chain of evidence and in this respect they are distinguished, in my view, from the Garda Commissioner's authorisation under scrutiny in The *People v.Farrell* and dramatically so from the patent untruth of the averment which so justly attracted the ire of McCarthy J.in *McMahon v.Leahy*.

> (b) The second point of challenge asserts the unreliability of Ms.Leisch in relation to the sentencing regime which will apply to the applicant in Arizona.

13. It is true that Ms.Leisch has corrected herself on a number of occasions.Furthermore, an affidavit has been sworn by Bruce Feder, a lawyer practising in Arizona since 1977 and a specialist in criminal law which states that if the applicant were convicted "it is unknown what sentence he would receive assuming the applicable laws at the time of the allegations (1978) were applied."

14. Notwithstanding this averment, a tolerably clear picture emerges from the affidavits sworn by Ms.Leisch (and I note her point that it is surprising that a specialist criminal lawyer can aver that it is simply unknown what sentence the applicant would receive).In relation to the two non-attempt allegations the applicant could be sentenced to a term of imprisonment from 5.25 years to 14 years on each of the counts with a presumptive sentence (that is a sentence which the judge must impose unless mitigating or aggravating factors apply) of seven years for each offence.Mitigating factors are determined on the preponderance of evidence whereas aggravating factors are found to exist by a jury beyond reasonable doubt.In relation to the attempt allegation the minimum period is 3.75 years and the maximum is 10 the presumptive sentence being 4 years.

15 In light of the fact that the errors in her earlier affidavits are corrected by Ms.Leisch of her own motion (it is unlikely that the authorities in this country could have divined incongruities in her first account of the sentencing regime), and in light of the complexity of the matter dealing with first offences, different classes of felonies and the law as it applied in 1978, and also in light of the fact that at no point could it reasonably have been thought that the maximum sentence was less that the one year required for extradition, I consider that the sentencing regime has been satisfactorily established before me and that this particular challenge has not been made out.

16. Ms.Leisch's general reliability, however, will require further consideration at a later point in this judgment.

> (c) the third challenge relates to delay.It is grounded on s.18 of the 1965 Act which provides as follows:-
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> "Extradition shall not be granted where the person claimed has, according to the law of either the requesting country or the State, become immune by reason of lapse of time from prosecution or punishment."

17. This challenge is founded on the recent Irish case law on delay in sex case prosecutions.Clearly, a prosecution commenced twenty-six years after the alleged offences would raise serious questions were it to be brought in this country.One particular point, amongst others, made in this regard is that an affidavit sworn by the complainant is demonstrably incorrect.In that affidavit the complainant says that he went to the authorities after a television programme revealing that, the applicant had been released in another case similar to his own because of the statute of limitations.Following that programme he went to the authorities he says on December 12, 2002.This is demonstrably incorrect because a certified copy of a minute entry recording proceedings in the Superior Court of Arizona Maricopa County establishes that the applicant was released at 9.50 am on 8th January, 2003.It is therefore impossible that the complainant can be correct when he says that some four weeks earlier he went to the police in Maricopa County and that that was after the applicant's release.

18. The point being made is that if the complainant can be shown to be inaccurate (by reference to an extraneous objectively determinable fact) concerning a matter as recent as events in the winter of 2002/3, this raises the distinct possibility that he might also have been capable of being shown to be inaccurate and his evidence tested in relation to alleged events occurring a quarter of a century beforehand if such objectively determinable and independent events (such as mass lists, recent recollection of witnesses, altar boy practice schedules and the movements of the applicant himself) could be established.In relation particularly to mundane and trivial events these are classically increasingly less capable of identification and proof as time goes on and in the present case almost certainly forgotten and lost to memory.

19. It is submitted that the foregoing considerations constitute an element of specific prejudice quite apart from a presumptive prejudice arising simply from the passage of time.

20. It was submitted in response to the foregoing challenge that s.18 of the 1965 Act is concerned with specific statutory exceptions such as limitations of time by statute or pardons conferring immunity rather than the exercise of discretionary jurisdiction on an

application to stop a trial.

21. In light of this latter submission I considered it more appropriate to defer making a conclusion on this point until after I had heard the full application for judicial review where the delay point would be elaborated, with others, in full.Accordingly, I turn now to deal with the judicial review application.

The judicial review proceedings
22. This application was grounded, initially, on two main points and a number of subsidiary points as follows:-

> (a) The unexplained delay in this case means that an order extraditing the applicant would breach his fundamental rights guaranteed under the Irish Constitution;
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> (b) The absence of bail, the claim that he is entitled to bail under Arizona law being illusory and unrealistic, would also mean that an extradition order would be a breach of those rights; an additional feature of this point being that the alleged offences became "non-bondable" (to use the description employed by the Arizona authorities themselves), only in very recent times thereby constituting further specific prejudice arising because of delay;
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> (c) Under the sentencing regime the applicant, if convicted, must be sent to prison for a presumed term at least (reduced by any mitigation factors) thereby ruling out any possibility of an alternative type sentence or even a suspended sentence which possibility would be open were the trial to take place in this country.The applicant submits that whilst this feature if the only element in the case might not of itself warrant an injunction, nonetheless it is something the court should bear in mind when considering the first two primary points;
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> (d) Likewise the court should bear in mind the inhuman and unacceptable prison conditions in the State of Arizona.The applicant is acquainted with these because he was already incarcerated for a month in relation to another complainant's allegations before being released "on a technicality" as the local media expressed it.The "technicality" was that after a search that other complainant's approach to the authorities twenty years beforehand was unearthed and, I am told, a subsequent conclusion after investigation that the offence had not been committed.It is provided by Statute in Arizona that proceedings must be brought within seven years of such an approach.The jail conditions were such that the Icelandic Supreme Court refused to extradite one person to Arizona in 1997 because of them.In response it is said that those conditions were the subject of inquiry, recommendation and substantial reform and that now none of the grounds of complaints apply.The Icelandic judgment predated these reforms.Nonetheless it is submitted for the applicant that the Sheriff remains the same and that he has not reformed and continues to humiliate inmates by continuing to require them to wear pink underwear.This is something which, like the mandatory sentence point, should be borne in mind by the court when considering the first two primary submissions in relation to delay and bail.This submission attained the status of a separate ground justifying relief at the second hearing, for reasons which I will explain later.
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> (e) A further point relates to media coverage.At the time of the change in the law so that these offences (along with other serious offences) became "non bondable" there was widespread prejudicial media coverage, the worst example of which was an editorial in "The Arizona Republic" in January, 2003, in the context of the applicant's release on foot of the statute of limitations (which provided that a prosecution must be brought within seven years of the alleged offence coming to the attention of the authorities or of a time when they ought to have become aware of them) which said, *inter alia*
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> > "Make no mistake.The public has already made its judgment about C.Very few people believe justice has been done… Legal technicalities are for mobsters and drug dealers.Not the pious shepherds of men who betray that trust and abuse women and children."

23. It is submitted that whilst the Supreme Court rejected a challenge to extradition on publicity grounds in Coleman v.O'Toole [2003] 4 I.R.222, (where a programme had contained an unqualified assertion that the applicant was guilty), nonetheless in doing so, Hardiman J.(for the court) said

> "It must be emphasised that publicity of this sort, and in particular an express assertion of the guilt of the person charged, is undesirable in the highest degree… .
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> This decision cannot properly be cited in any future case as providing a licence for media comment such as occurred in the present case.Indeed, any such comment in a future case would be all the more objectionable by reason of having occurred after the court has clearly expressed its attitude in relation to such comment."

24. I note that that judgment was delivered on 28th November, 2003 and also that the offending article in the Arizona Republic was published in January of that year some ten months before our Supreme Court judgment.Nonetheless the applicant submits that it is a factor to be borne in mind as an indication of public opinion, and a general media attitude which, it is also submitted, is shared by the prosecuting authorities and indeed Ms.Leisch who at one point avers that the evidence shows that the applicant is guilty.

(a) Delay
25. The applicant submits that long delay gives rise to a presumption of prejudice contrary to a counter submission on behalf of the Attorney General.

26. Moreover, it is submitted that this is a case of considered delay in that it appears from the complainant's own affidavit that he made a conscious decision on learning from the television that the applicant was to be released, to make his own complaints.There is no suggestion that he was psychologically inhibited by reason of the alleged events or his relationship with the applicant from doing so at an earlier stage.On the contrary, the fact that he appears to have made a "tactical" decision to make his complaint shows the opposite of an inhibition namely a ready capacity to do so when he wanted.

27. Because my decision on this submission will not turn on whether or not it is part of Irish domestic law that delay in and of itself and without more and in the absence of explanation would justify an order stopping a trial is not necessary for me to reach an elaborated conclusion on the point.I do note, however, that Keane J.(as he then was) in the seminal case of *P.C.v.D.P.P.*[1999] 2 I.R.25 said at p.68:-

> "The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even

though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired."

28. More recently Fennelly J.in *J.L.v.Her Honour Judge Buttimer and the D.P.P.*(Unreported, Supreme Court, 20th December, 2004,) after an analysis of the case law summarised the Irish approach to the issue in four principles which included at No.4:-

> "The burden of proving that the trial should be prohibited lies on the applicant.However, where the delay is *prima facie* such as to give rise to a presumption that the applicant's right to a fair and speedy trial is infringed, the court will have regard to the adequacy of any explanation offered by the complainant."

29. These dicta, acknowledging that pure delay without explanation gives rise to a presumption that an accused person's rights have been infringed, are not the only ones from high authority which could be cited.I do not accept, therefore, the submission made on behalf of the Attorney General that under Irish law pure delay, without more, will not warrant an order stopping a trial.Nonetheless in the present case there are in my opinion elements of specific prejudice which take this case out of the category of "pure delay without more and without explanation" and it is therefore not necessary for me to further elaborate my conclusion on this submission.

30. The applicant claims that the process to which he will be subjected has been altered to his disadvantage and the conduct of his defence prejudiced in specific ways in consequence of the long delay.These are

> (a) The complainant has sworn a short affidavit which can be demonstrated to be inaccurate by reference to external and independent documentation.This affidavit deals with recent events.This raises a reasonable inference that this deponent might well have been shown to be inaccurate and his evidence tested in relation to the allegations of events which he said occurred twenty-seven years ago by reference to similar external and independent events had the prosecution been brought within a reasonable time.The possibility of this has effectively evaporated due to the lapse of almost three decades.The case is now likely to be one of mere assertion countered by mere denial and there is a real risk that the applicant has been deprived by lapse of time of an ability to cross-examine the complainant as to his accuracy and reliability.
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> (b) A second point of prejudice arises because of the recent change in the bail laws.The requesting State describes the alleged offences as "non-bondable" and the applicant says that this is indeed accurate.Whilst it is averred by Ms.Leisch that he is entitled to bail and a bail hearing and will be incarcerated only if the prosecution can show on the preponderance of evidence that he is likely to have committed the alleged offences, it is submitted that there is no reality in this submission.Of course a prosecution is likely to be able to meet this preponderance test, as interpreted, because if it failed to do so then it would inevitably follow that the prosecution would collapse and there is no indication that this has been happening.Moreover, against the background of hostile media, hostile public opinion and the politicisation of governmental and judicial officials in Arizona it is submitted that the high probability is that the applicant will not get bail and will continue in jail for between six and twelve months before trial.This arises out of a recent change in the law which would not have applied if the trial have been brought earlier; and
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> (c) Because of the passage of time the applicant if convicted will now face a long sentence at an older age in a rigorous (even if not unacceptably inhumane and degrading) jail regime and this, in turn, is a matter of specific prejudice due to the passage of time.

(b) Bail

31. It is submitted that the bail regime, quite apart from its impact in the context of the delay point by reason of its recent origin, is of itself an infringement of the applicant's fundamental rights guaranteed by the Irish Constitution.It is submitted that effectively he will not get bail.Reliance is placed on the fact that he has already been incarcerated for a month, and on the high probability that despite the law as outlined in Ms.Leisch's affidavits, he will remain incarcerated for up to a year before trial.That is something which, if it applied to a trial in this jurisdiction, would amount to an infringement of the applicant's right entitling him to an order stopping the trial.Furthermore, in the context of delay, the fact of the applicant's continued incarceration will mean that the preparation of his defence will be inhibited because whilst his lawyers will be free to prepare it he himself will not be enabled to travel about conducting researches and interviewing people and attempting to jog their memories.

(c) Prison conditions

32. With regard to the point made on prison conditions it was accepted at the first hearing that objective reforms have indeed occurred and that the applicant if convicted would not be in the category of convicts who are consigned to a tent in the desert (which in any event would not nowadays be permitted to reach unacceptably high temperatures), would only be made part of a chain gang if he consented to it, and would be reasonably fed and accommodated.However, it is submitted by Mr.McDermott on behalf of the applicant that the Sheriff who presided over the regime before it was reformed and continues to preside over it now is himself not reformed.This can be shown by the continued humiliation of inmates by his insistence that they wear pink underwear.Mr.McDermott points to the obvious sexual connotation of this in the context of the incarceration of males together in a tough prison regime.The excuse offered to the effect that this is a requirement arising out of the stealing by inmates of underwear so as to prevent it and the explanation that underwear is never visible inside other clothing should not be accepted, he submits, given the past history and admission by the Sheriff that he has intentionally made conditions in the tents uncomfortable and further that he has said that he may spend more to feed his dogs that it costs to feed inmates.

33. Whilst the applicant accepts, I think, that this regime can be reviewed, including judicially reviewed, and that such has occurred in the past, he submits nonetheless that the regime continues to fall on the wrong side of the line identified by Finlay P.(as he then was) in The *State (C) v.Frawley* [1976] I.R.365 at p.374 when he distinguished between harsh regimes related to one or other of the main purposes of keeping an inmate from escaping and preventing him from injuring himself on the one hand and restrictions and privations which are punitive or malicious on the other.

34. The applicant did not initially put forward this specific matter as a ground justifying an injunction but rather one that I should bear in mind.In doing so my view is that if the Sheriff were a truly reformed character sensitive to the basic human dignity of the inmates in his jail but nonetheless concerned to prevent the theft of underwear, it would have been possible for him to devise methods of doing so other than a continuation of the widely known and humiliating requirement that they wear pink underwear.

35. This aspect of the case will fall for further consideration in light of information which came to light only after the first hearing had concluded and which gave rise to a second hearing.

(d) Publicity
36. A further point relates to adverse publicity.Again this is not put forward as a ground justifying an injunction on its own but rather as something which I should bear in mind when considering the main submissions.

37. In my view it is probable that in the opinion of at least some media publications in Arizona the applicant is guilty of having committed these offences, and that in their view this represents public opinion in that State.At least one leading article has clearly and unambiguously asserted him guilty.This is quite unacceptable and if the applicant's trial were proceeding in this jurisdiction it might of itself be sufficient reason to ground an order stopping his trial especially if published after the Supreme Court decision in *Coleman v.O'Toole*.The applicant asks me in the present case to bear this publicity in mind and I do so because I think the request is a reasonable one.

(e) Mandatory jail sentence
38. The remaining factor which I am asked to bear in mind is the feature of the sentencing law which requires that the applicant if convicted be given a mandatory minimum sentence in jail.In this jurisdiction the Irish courts have a jurisdiction in these cases to impose suspended sentences or alternative sentences.This freedom of discretion is not available apparently in Arizona.In this jurisdiction we too have mandatory sentences most obviously in the case of murder but also in the case of certain drug related offences albeit that this latter regime is so heavily qualified that, it is submitted, sentences for periods less than the mandatory minimum comprise the majority.Indeed I am told that so true is this the case that draft legislation is underway to amend this law.Furthermore it is suggested that it is simply not known whether a mandatory sentence regime is constitutional because no such challenge has been taken.

39. For present purposes I do not have to make any decision on these interesting points: I do accept as a matter of probability that if convicted the applicant would have to serve a mandatory minimum sentence.

Conclusions
40. As I understand domestic Irish jurisprudence on delay in sex cases, the longer the delay the more ready will be a court to give weight to claimed elements of specific prejudice and arrive at a conclusion that there is a real and serious risk of an unfair trial.

41. In the circumstances of this case if the applicant were being prosecuted in this jurisdiction I would conclude for reasons already indicated that such a risk exists and order his trial to be stopped.These reasons are (a) that due to the elapse of time there is, in the circumstances of this case already indicated, a real risk that the applicant will not receive a fair trial and (b) if he were extradited he would be subjected to a bail regime which would amount to an infringement of his constitutional right to freedom, because in reality he is unlikely to be granted bail.

42. However, I must now consider how the foregoing conclusion applies in the context of the extradition proceedings.This arises because the response to the foregoing submissions on behalf of the Attorney General is, primarily, that in the context of extradition proceedings the court is concerned primarily with processes and procedures in the requesting country and once it is established that processes and procedures exist which do not infringe the fundamental rights of the applicant then an order for his extradition should be made.

43. Clearly, an alteration in the traditional constitutionally guaranteed right to bail as enunciated in the well-known O'Callaghan case required a constitutional amendment in this country in recent times.The regime described in Arizona also required an amendment to the Constitution of that State.In the context of the inordinate delay in the present case and accepting as I do that there is a probability that the applicant will be incarcerated if extradited for a period of up to twelve months before his trial (and possibly much longer if the utterances of Sheriff Arpaio on Irish radio are to be believed) I would conclude, that the bail regime also, would constitute an infringement of the applicant's fundamental rights.

44. I turn now to consider, having reached the above conclusions, what impact they have, if any, in the context of the Attorney General's application for the applicant's extradition.

45. In this context the Attorney General relies on the judgment of Walsh J.in *Ellis v.O'Dea* [1990] I.L.R.M.87 where he says at p.91:-

> "All persons appearing before the courts of Ireland are entitled to protection against all unfair or unjust procedures or practices.It goes without saying therefore that no person within this jurisdiction may be removed by order of a court or otherwise out of this jurisdiction where these rights must be protected to another jurisdiction if to do so would be to expose him to practices or procedures which if exercised within this State would amount to infringements of his constitutional right to fair or just procedures…in other words there must be not only a correspondence of offences but also a correspondence of fair procedures.No procedure to which the extradited person could be exposed must be one which if followed in this State would be condemned as being unconstitutional."

46. The Attorney General submits that on an application for extradition the court must be concerned with the requesting country's practices and procedures but not with the possible outcome of the instant case under those practices and procedures.Mr.Murphy on his behalf submits that the State of Arizona has laws which correspond in every important respect with those of this country.He submits that there is no real risk that the applicant if extradited would be put in a position that his fundamental rights would be infringed arising out of the judicial processes and procedures in Arizona.He stresses that there is a judicial process, a clear body of laws corresponding with our own relating to the applicant's trial and his bail and all of this is subject to judicial review and administrative review.The applicant if returned will be subject to a formal criminal process supervised by the courts system subject to an appeal and governed by relevant fundamental legal requirements.He is entitled to apply for bail and will receive a fair trial.These procedures include a right to petition for a trial other than in the town of Maricopa if adverse publicity indicates he will not receive a fair trial there.

47. He further submits that the extradition cases indicate that on these applications I should adopt a different methodology to simply treating an application to judicially review an extradition application as if it were an application to stop a prosecution by the Irish Director of Public Prosecutions in the State.In the extradition context the Irish courts must bear in mind that there is an international agreement and that pursuant to the comity of nations and comity of the courts the request for extradition will be granted if the processes and procedures in the requesting country satisfy the basic requirements to protect the applicant's fundamental rights.Furthermore there is no authority to justify the conclusion that because the applicant's trial in this country would be stopped he therefore should not be extradited.

48. It is further submitted that when the critical issues dealing with delay, bail, jail conditions and media coverage are considered that the court should conclude that the evidence (as distinct from inferences and assumptions) gives rise to no real risk that the applicant

if extradited will receive other than a fair trial.The issue in an extradition case is correspondence in substance of procedures and processes which guarantee a due process of law.This submission is supported by the citation of the judgment of Walsh J.in *Ellis v.O'Dea* and is also supported by the decision of the Supreme Court in *Coleman v.O'Toole* [2003] 4 I.R.222.Reliance is place on what was said by Hardiman J.(speaking for the court at p.233) as follows:-

> "It may be necessary to emphasise that, on the hearing of an application for relief under s.50, the court is concerned to exercise the jurisdiction conferred by the section, and not to exercise some general supervisory jurisdiction over An Garda Síochána or any other police force.The court has recently addressed this topic in *Lynch v.O'Toole* [2003] 3 I.R.416.There, the High Court made un-appealed findings of grave misbehaviour on the part of a Garda concerned to execute two English warrants…in the circumstances of the case, however, this did not lead to the grant of relief to Mr.Lynch on the basis that '(T)o permit the Garda's misdeeds to have this effect would be to put the agreement between nations at the mercy of any single member of the police force…'."(Hardiman J.at p.438)

49. It had earlier been pointed out by Hardiman J.in that case that s.50(1)(bbb) involved the following concepts:-

> "(a) the elapse of time;
>
> (b) and other exceptional circumstances;
>
> (c) such that having regard to all the circumstances;
>
> (d) it would be unjust, oppressive or invidious to deliver up the plaintiff under s.47."

50. He further pointed out that the first two of those concepts namely elapse of time and other exceptional circumstances were conjunctive and not disjunctive, as had already been pointed out by Keane C.J.in *M.B.v.Conroy* [2001] 2 I.L.R.M.311.Much of the focus of the judgment was addressed to the question whether the circumstances relied on constituted "other exceptional circumstances".

51. In response Mr.McDermott submits that the rights in contemplation for protection in *Ellis v.O'Dea* were rights guaranteed by the Irish Constitution and as such are to be protected in an appropriate case on an application for extradition.It is not surprising that the sex delay cases were not referred to in the judgment of *Coleman v.O'Toole* because that was not a sex case at all but rather a case where the applicant had been accused of grievous bodily harm.If the submission now made on behalf of the Attorney General were correct then there could be no question ever of an extradition application having been refused if requested by the United Kingdom or indeed by the Northern Ireland authorities, as in fact has been done in the past.Moreover, probably every country in the world, including North Korea, would have a judicial process which might be capable of a generalised description which would make it comparable in general terms with the processes available in this country.That is not the test; rather the test is whether there is a real risk that if extradited the applicant would not receive a fair trial as judged under the laws of this country.

Conclusion

52. I have carefully read the judgment in *Coleman v.O'Toole*.The court there was concerned with the inquiry mandated by s.50(1)(bbb) of the Act of 1965 as amended.However, it is clear from the judgment that the court carefully scrutinized elements of claimed prejudice constituting "other exceptional circumstances" in that statutory context which might have rendered it unjust, oppressive or invidious to extradite the applicant.In the context of a claim that his trial would be prejudiced because his English solicitor had destroyed his file after six years Hardiman J.noted that the applicant carefully avoided making any comment as to his attitude to the charge outstanding against him, the nature of his defence or the witnesses he might require to support that defence.Whilst the plaintiff was entitled to be reticent on these points his reticence meant that he had failed to discharge the onus of proof which was upon him.He went on to say "I am very conscious indeed that a fourteen year interval between the alleged offence and the trial may have very serious consequences.But these consequences are to be laid at the door of the plaintiff who by his own act prevented a trial taking place thirteen years ago.In any event, the mere possibility of an unfair trial is insufficient: what must be shown is a real risk and demonstrating that is simply not consistent with the reticence which the plaintiff has maintained."

53. I note for present purposes the emphasis on the test that what must be shown is a real risk of an unfair trial.That seems to me consistent with the applicant's present submission that if in an extradition context such as present case and *Coleman v.O'Toole*, the court were persuaded that there were a real risk of an unfair trial then an extradition order should be refused.

54. I note, further, that in reaching his conclusion in *Coleman v.O'Toole*, Hardiman J.said:- "Moreover, we are very conscious of the fact that thirteen years is a long period of time, during which memories may decay (as this case demonstrates) and prejudice may accrue or even in some circumstances be presumed.But the plaintiff here has put his case on an extremely narrow basis.Assuming the lapse of time to be exceptional, he has in my view failed to demonstrate any other exceptional circumstance and wholly failed to show that it would be unjust, oppressive or invidious to render him for trial in Leeds." There is nothing in this case or in Ellis v.O'Dea or any other extradition case that I am aware of to suggest that on an extradition case where the court is satisfied that the applicant's trial would be stopped if it were being prosecuted in this country because of features including delay and specific prejudice he would nonetheless be extradited if only the Irish court is satisfied that processes and procedures comparable to those which exist in this jurisdiction also apply in the requesting state.

55. I may be wrong but it appears to me that if the plaintiff in Coleman v.O'Toole had, contrary to what occurred, established that there were "other exceptional circumstances" which having regard to the matters referred to by Hardiman J.in his summary of the section at p.228, applied, then there is every indication that his application to prohibit extradition would have succeeded.

56. One last point in relation to the extradition application arises from a comparison between s.50(1)(bbb) which was under consideration in *Coleman v.O'Toole* and s.18 which is said to apply to the present case.Section 18, it will be recalled, prohibits extradition in cases where the relevant person has "become immune".Section 50(1)(bbb) provides for a more elaborate regime as summarised by Hardiman J.in *Coleman v.O'Toole*.Section 18 applies *inter alia* to the extradition agreement between this country and the United States whereas s.50 applies to the agreement between this country and the United Kingdom.It is suggested that the less elaborate regime under s.18 restricts the court's consideration to matters such as statutory limitations, but not questions of constitutional rights.

57. It is fundamental that the Irish courts will construe post-Constitutional statutes in a way which is consistent with the guarantees provided in the Irish Constitution, unless such a reading is clearly contrary to the intention of the legislature as expressed by the words used.

58. Section 18 refers to the person having "become immune by reason of lapse of time from prosecution or punishment"."Immune" is not defined.

59. So far from prohibiting the interpretation contended for by the applicant the language of s.18, in my opinion, tends to suggest it.Furthermore, it would take extremely clear language for the same legislative instrument to provide such radically different regimes as between the two different contracting parties.In my opinion the applicant has become immune by reason of lapse of time from prosecution of the alleged offences as contemplated by s.18 of the 1965 Act and I propose to make an order refusing the Attorney General's request for extradition.

Postscript
60. I had originally intended delivering the forgoing judgment on the 22nd April 2005 when on that morning I was approached by counsel and requested not to do so, the reason being that it had come to the notice of counsel for the Attorney General that an article in the Sun newspaper published that morning depicted a chain gang of the inmates of Maricopa County Jail being paraded in an apparently public way wearing nothing but pink underwear and being linked together with pink handcuffs all under the supervision of Sheriff Arpaio.The occasion was apparently one when the authorities were arranging the mass movement of several hundred inmates from one jail to another.

61. This clearly gave the lie to the case, theretofore made by the U.S.authorities, to the effect that not only were the practices in Maricopa County Jail reformed but so was Sheriff Arpaio himself.It further gave to the lie to the case made that the wearing of pink underwear could never been seen by the public because they were always worn under outer garments.

62. Following this publication there were interviews with Sheriff Arpaio in the Irish media and I have been furnished with transcripts of these interviews which are not in controversy.In one the sheriff indicates that the applicant could be in his jail for two or three years before he ever gets a trial and states that everybody arrested there (in Maricopa County) comes to the jail that he operates.It is submitted on behalf of the applicant that the sheriff's tone is that of a man gloating over the inhumane treatment in his jails.

63. There is, in my opinion, ample justification for the submission that Sheriff Arpaio gloats over the inhumane treatment he dishes out to his inmates.He is reported as explaining why he insists on them wearing pink underwear by saying "because they don't like it".And further "…by the way just for those people who don't like pink, I just dyed all the sheets pink too, pink is a soothing colour, if you look at your dictionary, or talk to psychologists, you will see that pink is very soothing, maybe it will stop some of the assaults I have in the jails".He said "I have got the only female chain gang in the history of the world ...I started that one eight and a half years ago.I'm an equal opportunity incarcerator".And "...I formed a high school, Hard Knocks High, the only one in the United States so I had kids going to High School, and then I do put these kids on a chain gang, the only juvenile chain gang in the history of world, so they are wearing the pink underwear, striped uniforms, cleaning the trash on the streets of Phoenix"."...we have a restraint chair, when people come in the jail drunk or they are high on drugs or hitting everybody, slashing themselves, we put them in the restraint chair to protect them, that is why we have the restraint chair, I am sure not going to tie them up and put them in a cell, so it has been proven that it is a very good product, so I am not going to change my policy"."One person did die in the chair many, many years ago that you keep talking about, not you but the press keeps talking about, probably that is the only thing they can zero in on other than the pink underwear and the hot tent, it is 130° in the tent that I put the inmates in ...the tents are Korean war tents, they are free, when I took office in 1993 I said I was going to put tents up, I did, we have a jail overcrowding problem and we put the convicted people in the tents and if our men and women are in tents now fighting for their Country in Iraq, I am not concerned about convicted criminals living in tents, I know it gets hot here, it probably goes up to 130° , but it is 140° that our dedicated soldiers are living in, in Iraq, so I am not concerned about criminals in tents".

64. And elsewhere "...we have animals in jail, we kicked out all the inmates and put animals in the air conditioned jail and the inmates are learning how to love and take care of the animals…".He is also recorded as saying "I have been investigated by Amnesty International, Civil Liberties, Justice Department, but you know what, I have been the Sheriff going on 16 years, I just got re-elected, ...they must like what I am doing, why do they keep re-electing me?"

65. When it was suggested that the inmates might think that pink underwear was humiliating he said "Why, pink is the favourite colour right now, I think Martha Stewart is pushing pink in her products..."

66. There is a chillingly sadistic tone to the above comments and it is the duty of any Irish Court, I believe, to ensure that there could be no possible risk of an extraditee finding himself in a regime governed by Sheriff Arpaio.Accordingly if the undertaking now furnished that P.C.if extradited will not be incarcerated in such a prison is in any way flawed this is something which I would take most seriously.In this context it is appropriate to subject the latest affidavit from Miss Leisch to the closest scrutiny given the sequence of errors albeit self corrected already referred to and the acknowledged erroneous and misleading nature of the information which has already been put before the court.

67. This matter was taken up with the Arizona authorities by the Attorney General and their response can be shortly described as indicating that at the time Miss Leisch swore the information referred to above she was relying on information provided by legal counsel for the Maricopa County Sheriff's office which at the time she believed to be a reliable source.She had no advance knowledge as to how Sheriff Joseph Arpaio intended to move the prisoners from the jail as depicted in the newspaper articles (the contents and import of which are not denied) and in light of these revelations regarding conditions in the Maricopa County Jails and actions and statements made by Sheriff Arpaio she asserts that the applicant will at no time be housed in the Maricopa County Jail, but instead he would be held in the custody of the Federal Government.Undertakings and letters in relation to this are furnished to the court.She proceeds to say that the applicant is entitled as of right to a speedy trial by both the Constitutions of the United States and of Arizona.He has a right, she says, to be tried within 150 days of arraignment if in custody and 180 days if not.She further asserts that bail is not prohibited in this case but does not, I note, suggest that the authorities would not oppose it.

68. The undertaking referred to was given by Miss Leisch in the following terms:

> "In light of the recent revelations regarding the conditions in Maricopa County Jails, and the actions and statements made by Sheriff Arpaio, should C.be extradited to the United States, and should he be incarcerated before and/or during the pendency of his trial, Mr.C.will at no time be housed in the Maricopa County Jail.
>
> Instead Mr.C.would be held in the custody of the Federal Government.This office has made arrangements with the Federal Government whereby Mr.C.would be held in an institution operated by the corrections corporation of America a federally approved private prison facility that houses federal prisoners in Florence Arizona".

69. Attached to her affidavit is a letter which she says confirms that the Corrections Corporation of America has agreed to house

Mr.C.on behalf of Maricopa County.In the first place this undertaking applies only to a situation where P.C.could be "incarcerated before and/or during the pendency of his trial".It does not, at least unambiguously and in explicit terms, cover the situation where he is convicted and after his trial although there is an e-mail indicating that, if convicted, the applicant would be detained in a State, not a county prison.Secondly it is stated that the Corrections Corporation of America has confirmed its agreement to house

70. Mr.C.on behalf of Maricopa County and in this regard a letter from Chelli Jones, Assistant General Counsel for that corporation is exhibited to Miss Leisch's affidavit.

71. This letter recites the writer's understanding that Maricopa County is requesting segregated housing for P.C.at the corporation centre and confirms its agreement to house the inmate on behalf of the County.It refers to an agreement with Pinal County and states "should Maricopa County desire to contract with Pinal County, Pinal County could elect to house the inmate at F.C.C.(Florence Correctional Centre).The corporation is also willing to enter into a direct agreement with Maricopa County to provide housing for the individual inmate and a direct agreement can be forwarded should the county so desire".This was a letter dated the 3rd June and the renewed hearing before me took place on the 8th July more than five weeks later.

72. Nowhere in the documentation before me is there anything approaching a direct written request from Maricopa County to avail of the arrangements described in the letter from Chelli Jones: on the contrary that letter dated the 3rd June contains an explicit invitation in respect of which there is no evidence that it was ever taken up or acted upon by or on behalf of Maricopa County.Furthermore the undertaking as described in the affidavit of Miss Leisch only covers the period up to and including the trial of P.C.but not thereafter in the event that he is convicted.

73. In the context of this documentation the observation of Lord Upjohn adopted by Ó Dhálaigh C.J.in *Bourke v.Attorney General* [1972] I.R.36 at p.64ff leaps to the foreground of one's attention.He said "there may be a genuine difference of opinion as to the proper interpretation of the undertakings".That was a reason given as to why a court should not accept an undertaking and I cannot see why it would not apply to the present case.

74. On a renewed hearing of the application a number of points are now made on behalf of the applicant as follows:

> First it is not open to this Court to accept the undertaking that the applicant will not be housed in a Maricopa Jail.Reliance is placed on *Bourke* at p.64ff where Ó Dálaigh C.J.relying on the observations of Lord Upjohn in *R.v.Governor of Brixton Prison -- Ex p.Armah* [1968] A.C.192 pointed out that the word "undertaking" in this context is a is a misnomer and that generally speaking it should not be accepted because there may be a change of Government which may not feel bound by the acts of their predecessor, there may be a genuine difference of opinion as to the proper interpretation of the undertaking and it might in some circumstances be the duty of a government to depart from its expressed intention in the discharge of its duty in the good governance of the country and its inhabitants as a whole.

75. Mr.Murphy S.C.counters on behalf of the Attorney General that *Bourke* applies only to the limited situation where the court is considering specifically the question of the kind of offence alleged against the intended extraditee and in particular whether it is a political offence.He submits that the principles enunciated in *Bourke* are of limited application only and do not apply to this case.

76. Secondly the applicant submits that I should not accept the evidence now tendered in relation to bail to the effect that the applicant would be entitled to a trial within a 150 or 180 days as indicated because of the indication given in interview by Sheriff Arpaio that he could be waiting for two to three years in jail before he would get a trial, and also because of the unreliability of Ms.Leisch.

77. Thirdly, It is submitted that it is noteworthy that Miss Leisch has used these later events to bolster up the case for extradition in regard to bail by introducing new information but has not in any way attempted to counter the submissions made last April alleging inconsistency in the affidavit of Paul Liano and that in fact her affidavit sworn on the 5th October 2004 at para.1 is suggestive of improper collusive activity on the part of the authorities in Arizona.He relies on the following averment from Ms.Leisch:

> "In this case, the victim did not report the abuse until he learned that P.C.had been arrested for allegedly molesting another child.We cannot speculate on the victim's motivations (that will be established at trial), but one might argue that learning of the prosecution brought the issue to the forefront for him, gave him the courage to report the abuse he suffered, or that the knowledge that his abuser may be released from custody instilled a sense of responsibility to report the abuse for fear that his abuser would escape unpunished, to possibly abuse again".

78. It is submitted that this paragraph shows speculation on the part of Miss Leisch and suggests that Paul Liano (who states that he made his complaint on December 12th 2002 that is some four weeks before the release of P.C.) knew in advance of the release of P.C.and it is further submitted that he could only have known this (which became public knowledge only some four weeks later) if he had been given some prior indication thereof by the authorities.If this or something like it were not the background scenario how could Miss Leisch, it is further submitted, make the surmise which she does in the above paragraph? Equally if this or something like it is the background scenario then it would further imply that the authorities held or might have held P.C.in continued detention after they knew they were bound to release him and only for the purpose of ensuring the making of a further complaint by Paul Liano.If anything like this occurred it would, of course, have constituted a gross violation of P.C.'s rights and in this context the applicant relies on the judgment of Finlay C.J.in *The State (Trimbole) v.The Governor of Mountjoy Prison* [1985] I.R.550 who at p.573 where he said:

> "The Courts have not only an inherent jurisdiction but a positive duty: (i) to protect persons against the invasion of their constitutional rights; (ii) if invasion has occurred, to restore as far as possible the person so damaged to the position in which he would be if his rights had not been invaded; and (iii) to ensure as far as possible that persons acting on behalf of the Executive who consciously and deliberately violate the constitutional right of citizens do not for themselves or their superiors obtain the planned results of that invasion".

79. The applicant also relies on the judgment of Lord Lowry in *Bennett v.Horseferry Road Magistrates' Court and Another* [1993] All E.R.138 and in particular at p.163 where he said:

> "If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice".

80. They point out that this judgment was approved by Geoghegan J.in *Zoe Developments v.The Director of Public Prosecutions* (Unreported, 3rd March 1999).

81. In response it is submitted that in all cases where the courts have stopped trials or prohibited the executive from enjoying the fruits of their endeavours because these constituted an abuse of process this came only after the court had carefully scrutinized the evidence and had tested it on cross-examination.In particular it was submitted that in the present case the court should not speculate or attempt to draw inferences or speculations from the averments made and referred to above in the affidavit of Miss Leisch which are in turn only her speculations about what may have motivated Paul Liano.

Conclusions
82. The two reasons why after the first hearing I had decided to refuse the extradition of P.C.were firstly because I concluded that by reason of the delay in reporting the alleged offence and the specific prejudice arising therefrom in relation to the conduct of his defence there was a real risk that he could not obtain a fair trial and therefore I should not accede to the extradition request.The new information and evidence in no way affects this reason.The second reason for refusing extradition related to the bail regime which I concluded would amount under Irish law to an infringement of his Constitutional right to liberty.There is now before me, of course, additional information in a new affidavit from Miss Leisch to the effect that the applicant is entitled to a trial within 150 days if in custody or 180 days if not.Given however the inaccuracy if not unreliability of the earlier affidavits of Miss Leisch and her acknowledged acceptance that the picture she painted in relation to Maricopa County Jails and in relation to Sheriff Arpaio must now be accepted as inaccurate I have to say that I am at the very least troubled at the careless approach and lack of attention to detail which has characterised the submission of information by the requesting authorities to the Attorney General.I place this information, also, side by side with the statement on Irish radio by Sheriff Arpaio that the applicant would probably be in his jail for two or three years before he got a trial.In this context I refer to the well known observation of McCarthy J.in *McMahon v.Leahy* [1984] I.R.525, at p.547 where he said:

> "...for my part, where the liberty of any person, be he citizen of this State or otherwise, is concerned, where valid arrest is fundamental to the validity of the proceedings, where sweeping powers are given to the police forces of two adjoining jurisdictions, I am not prepared to overlook the careless approach and lack of attention to detail to which I have referred and which I have sought to illustrate...Narrow though this approach may appear to be, the insistence on strict compliance with all the requirements of the exercise of statutory powers is a fundamental feature of our jurisprudence; it is the duty of the superior courts to exercise the vigilance necessary to ensure such compliance".

83. For this reason I am not prepared to revisit my conclusion following the first hearing last April on the basis of fresh information now put forward by Miss Leisch.

84. With regard to the question as to whether this Court may or may not accept an undertaking I would point out that this issue arises in the following context, namely, the circumstances of inmates in Maricopa County Jail and the attitude to them of Sheriff Arpaio.This aspect of the case is central neither to my earlier conclusions in relation to delay nor to my conclusions in relation to bail.Regardless of what conditions obtained in the jail regime to which P.C.might be consigned were he to be extradited I would still conclude that the delay before complaint and the consequential prejudice to P.C.'s defence of the allegations would constitute an infringement of his Constitutional rights as would the bail regime regardless of prison conditions.In those circumstances the issue in relation to conditions in Maricopa County Jail is not central to my earlier conclusions in this case.

85. I would add, however, that I can see no reason why the principles enunciated by Ó Dhálaigh C.J.in Bourke would not apply to the undertaking furnished in the present case because I think that they make sense in a general way and not in the limited way contended for by the Attorney General.Accordingly, I take the view on these authorities that I am precluded from relying on the undertaking furnished.I would emphasise, as other judges have done before me when applying this principle, that the *bona fides* of the high officials, including the Secretary of State, involved in processing the undertaking in this case, are not of course in question.Nonetheless, on this authority, I must disregard the undertaking and treat this application upon the basis that if extradited P.C.would find himself or could find himself in Maricopa County Jail under the jurisdiction of Sheriff Arpaio.There is no way that in making an extradition order I could ensure and guarantee that such would not be the case and under the authorities cited it seems to me that I should accordingly I proceed upon the basis that for this reason also, namely for the reason that P.C.'s incarceration is likely to breach his constitutional rights because of the inhuman conditions in Maricopa County jail, an order extraditing P.C.would constitute a breach of those rights and I note in particular that it would simply be out of my control once such an order was implemented to ensure that he did not find himself in an unacceptable detention regime.

86. With regard to the last point to the effect that the application amounts to an abuse of the process of the court because, initially at least, it was based on information which it is now conceded was misleading I have carefully considered the authorities and the submissions of both sides.My view is that the request has been characterised by lack of attention to detail, a failure to check the reliability of information submitted to the Irish Attorney General, a degree of confusion characterised by serial self correction and finally what amounts to an admission that the original information to the court in relation to Maricopa County Jail was misleading and no reliance can now be placed upon it.It is because of this worrying characteristic in the request that I have declined to accept the latest averment from Miss Leisch in relation to bail entitlement.I am not, however, prepared to go the further step and hold that the processing of the request on the part of the requesting State amounts to an abuse of the process of this Court.Nor am I prepared to speculate that the authorities in Arizona colluded with Paul Liano in the manner suggested by the applicant's counsel.I agree with Mr.Murphy that to arrive at either of these conclusions would involve speculation on my part as distinct from a decision based on evidence.Nor am I prepared to characterise the degree of carelessness, lack of attention to detail, self correction and admitted misleading error as reaching the point where it could be properly be characterised as an abuse of the process of this Court.Accordingly I would not be prepared on this ground to refuse to accede to the extradition application.

Decision
87. Having therefore found in favour of the applicant in the judicial review proceedings brought by him, the court, in lieu of a permanent injunction as sought by him, will order that the application for extradition made on foot of the warrant in this case shall stand refused.