CA347

Irish Court of Appeal

Judgment

Title:	The Minister for Justice and Equality -v- W.B.
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THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 347

CA Record No: 2016/41

High Court Record No: 2015/16 EXT

Birmingham J.
Mahon J.
Edwards J.

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003, AS AMENDED, SECTION 16 (5) (a)

THE MINISTER FOR JUSTICE & EQUALITY

Respondent

V

W.B.

Appellant

Judgment delivered on the 21st day of November, 2016 by Mr. Justice Edwards

Introduction

1. The appellant is the subject of a European arrest warrant dated the 16th of December 2014 on foot of which the Kingdom of Sweden seeks his rendition for the purpose of prosecuting him for the offence of rape. Having been arrested in this jurisdiction of foot of the said warrant, the appellant opposed in the High Court the making of a surrender order with respect to him on the grounds, inter alia, that his surrender would place him at real risk of an egregious breach of his fundamental rights. It was specifically contended that in the circumstances of his case his surrender was prohibited by s. 37 of the European Arrest Warrant Act 2003 (the Act of 2003), and more particularly by s. 37(1)(a) and (b) of that Act, because Sweden does not have a bail system that leans against pre-trial incarceration unless it is absolutely necessary. Indeed it was contended that under Swedish law there is, in the case of serious offences, effectively a presumption in favour of pre-trial detention, rather than the reverse, and it was apprehended as a matter of very high likelihood that, if surrendered, the appellant would be placed in pre-trial detention immediately upon his return, notwithstanding his presumption of innocence and the absence of evidence tending to suggest that he was either a flight risk or likely to interfere with witnesses.

2. The High Court did not uphold the appellant's objections to his surrender and on the 20th of January 2016 made an order pursuant to s. 16(1) of the Act of 2003 directing that the appellant be surrendered to such person as was duly authorised to receive him on behalf of the Kingdom of Sweden. In a reserved judgment delivered on the same date Donnelly J gave detailed reasons for the court's decision.

3. By a further order also made on the 20th of January 2016, the High Court (Donnelly J) pursuant to s. 16(11) of the Act of 2003 certified that its said decision, and order to surrender the appellant, involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Court of Appeal.

4. The point of law so certified was the following:

> "Does the Swedish system of pre-trial release which requires that where there is probable cause that a person is suspected of a serious crime that he or she will remain in custody unless it is obvious that this is not necessary and where Swedish law requires a weighing up of the detriment to the suspect and other interest as against detention amount to such an egregious violation of human rights that the surrender ought to be refused as a result?"

The relevant facts

5. The authorities in the issuing state maintain that the appellant, an Irish citizen, raped a woman in Sweden in November 2012, while he was temporarily living and working in that jurisdiction. The applicant has deposed in an affidavit sworn for the purposes of these proceedings on the 28th of April 2015, that when he left Sweden he was unaware of any criminal investigation in Sweden but learned of it in late 2013 when he was contacted by Gardaí who had received a mutual assistance request from the Swedish authorities and who were asking for his co-operation in that regard. In response to this request the appellant attended voluntarily at a local Garda Station on the 17th of January 2014 with his solicitor where he was interviewed for some three hours during,

or following, which he provided a lengthy voluntary statement to Gardai.

6. In his affidavit sworn for the purposes of the proceedings before the High Court the appellant exhibited a letter from the inspector of An Garda Síochána in his local area. The inspector stated that the respondent cooperated with their enquiries as part of a mutual assistance request from the Swedish authorities and that he furnished a detailed account and statement to that effect. The inspector also stated that as a result of the cooperation given by the respondent, the enquiries were completed as expeditiously as possible.

7. Subsequently the Swedish authorities issued their European arrest warrant on the 16th of December 2014, which was based upon a domestic detention order of Attunda District Court dated the 26th of November 2014.

8. At the contested surrender hearing the High Court had before it the aforementioned affidavit of the appellant, in which he also deposed that he had been at all times cooperative with the European arrest warrant process and that he met Detective Sergeant James Kirwan on 6th February, 2015 in order to execute the warrant. He stated that he has no wish to frustrate the criminal investigation in Sweden. He had given his cooperation to it from the earliest stage and had hidden nothing.

9. In addition, the High Court had before it an affidavit of Torben Setterlund, a public defence counsel in Sweden, sworn in these proceedings on the 4th of May 2015. In it, Mr Setterlund had stated, inter alia, that:

> *"If [W.B.] returns to Sweden, he will probably be remanded in custody. According to Swedish law a person who is on probable cause suspected of such a serious crime as rape shall remand in custody unless it is obvious that detention is unnecessary. There is no bail system in Sweden."*

10. The correctness of Mr Setterlund's succinct précis of the position under Swedish law was subsequently confirmed in additional information furnished by the Swedish public prosecutor in response to a query raised by the Irish Central Authority. She stated in a letter to the Irish Central Authority dated 25th of June 2015 that:

> *"The answer to your question is that there is no bail system or an equivalent system in Sweden. The description Mr [W.B.]'s public defense has left is correct, i.e. when someone is on probable cause suspected to such a serious crime as rape he/she shall remain in custody unless it is obvious that detention is unnecessary."*

11. The official record and order of Attunda District Court arising from the proceedings before on the 26th of November 2014 was exhibited, in the Swedish language, with the said affidavit of Torben Setterlund. A translation of it was exhibited with the appellant's own affidavit. This document records that the appellant had been summonsed to appear at a remand hearing to be held on that date in response to a request by the public prosecutor that he be detained on suspicion of aggravated rape. He failed to appear in person, as he was required to do, although a defence lawyer assigned by the court, the said Torben Setterlund, appeared on his behalf. This was the third occasion upon which the appellant had failed to appear in person, the matter having been previously adjourned both on the 6th of November 2014 and on the 13th of November 2014 due to his non attendance. The Attunda District Court, having heard the appellant's lawyer, declared itself satisfied that there had been no lawful impediment to the appellant's attendance and that he had not provided a valid reason for his non-attendance. In the circumstances the court ruled that it would proceed to hold the remand hearing in his absence.

12. The document further notes the submissions made by the lawyers on both sides at the remand hearing, which was held in camera, and then records the decision of the court, which was announced in open court, which was to remand the appellant in

custody.

13. It further records the court's reasons for doing so under the heading "*Probable Cause for Detention"*, as being that:

> *"1. There is a risk that [W.B.] will abscond or otherwise evade legal proceedings or a sentence;*
>
> *2. There is a risk that [W.B.] will, through removal of evidence or in other ways, obstruct the investigation of the case;*
>
> *3. For this crime no sentence milder than two years of imprisonment has been specified, and it is not obvious that reasonable cause for detention is lacking.*
>
> *For the presently accounted judgement, [W.B.]'s failure to appear before the hearing of the day was not without significance."*

14. It was confirmed in additional information dated the 20th of October 2015 furnished by the Swedish authorities in response to a query raised by the Irish Central Authority that Swedish law requires a weighing of the detriment to the suspect, or other opposing interests, against the need for pre-trial detention and a consideration of whether other less intrusive measures such as restrictions on travelling and reporting to the police might suffice instead.

15. In that context the record of proceedings before Attunda District Court, also records, under the further heading "*Probable Cause for Detention to Consider*", that:

> *"The causes for detention outweigh the disruption that this action means for [W.B.] or any other opposing interest"*

16. With the leave of the High Court, the appellant was allowed to introduce and rely upon an e-mail from Mr Sutterlund dated 30th October 2015 responding to the additional information dated 20th October 2015 from the Swedish public prosecutor. In that e-mail he stated:

> *"[i]t is under certain conditions possible for a Swedish court to let a suspect person to remain at liberty and instead oblige the suspect person restrictions of travel and oblige the suspect person to appear at the police station, but it is very uncommon that the Swedish courts use this possibility. Under Swedish law, a person who is on probable cause suspected of such a serious crime as rape shall remain in custody unless it is obvious that detention is unnecessary. In a Swedish court, a person who is on probable cause suspected of such a serious crime as rape can be released if he, for example, is attached to respirator in hospital. In Swedish courts, it is uncommon that a person who is on probable cause suspected of rape is released from custody pre-trial. In Swedish courts, it is only in exceptional cases that a person, who is not resident in Sweden and is on probable cause suspected of rape, will be released from custody pre-trial."*

17. The document comprising the official record and order of Attunda District Court concluded with information concerning "HOW TO APPEAL", which made clear that the appellant could appeal the pre-trial detention order made in respect of him to the Swedish Court of Appeals, and that any such appeal would not be time limited. The appellant has not exercised his right of appeal to date.

18. The High Court also had before it for its consideration at the contested surrender hearing certain documents, exhibited to an affidavit sworn in these proceedings by the

appellant's solicitor, consisting of a June 2009 Report on Sweden by the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the 2009 CPT Report) and a fact sheet prepared by "Fair Trials International", both of which offer criticisms of how suspects are treated at the pre-trial stage in Sweden in terms of having their liberty significantly restricted or alternatively being detained. It was conceded by counsel for appellant at the hearing before the High Court that the 2009 CPT Report only dealt with pre-trial restrictions on the liberty of remand prisoners in Sweden and did not deal directly with pre-trial detention.

The judgment of the High Court

19. The High Court judge comprehensively rehearsed the arguments put forward on behalf of the appellant, noting in particular the central contentions that the only interpretation that can be placed upon the Swedish legal system was that there is a presumption against liberty; that in those circumstances, not only was this a violation of Irish constitutional law, but it meets the criterion of an egregious breach of fundamental rights as required by the decision in *Minister for Justice Equality and Law Reform v. Brennan* [2007] 3 IR 732; that it was plain from the disclosed facts that, on any fair system, the respondent would be considered for pre-trial release; and that the detention order was made in circumstances where there was manifestly unfair weight attached to the risk of interference with witnesses.

20. The High Court noted the appellant's reliance upon the fact sheet from Fair Trials International, and commented that this "*represented the sole independent criticism of Swedish pre-trial detention law and practice relied upon"* by the appellant. The High Court judge felt that important support for the criticism voiced by Fair Trials International was lacking in as much as the appellant's counsel was unable to point to any adverse findings or even criticism from the European Court of Human Rights (E.Ct.H.R.) concerning the Swedish system of pre-trial detention, nor was he able to point to similar criticisms emanating from other Human Rights NGOs such as Amnesty International or Human Rights Watch, or from International Human Rights Treaty monitoring bodies, or from well recognised reliable sources of country information such as U.S. State Department Reports. The trial judge concluded in the circumstances that:

> *"The reference by Fair Trial International does not, therefore, amount to cogent evidence of a breach of fundamental rights by Sweden in respect of pre-trial release."*

21. The High Court judge nevertheless considered and had regard to the other evidence relied upon by the appellant. In doing so she carefully reviewed and took account of the principal legal authority drawn to her attention and relied upon by counsel for the appellant i.e., *Attorney General v. P.O.C*. [2007] 2 IR 421.

22. In that case the respondent (*P.O.C.)* had sought to resist extradition to the United States of America to face trial before a court in Arizona on charges of the alleged sexual abuse of a minor. He complained firstly that the delay in reporting the alleged offence and the specific prejudice arising therefrom in relation to the conduct of his defence meant that there was a real risk that he could not obtain a fair trial if extradited, and secondly that the bail regime in Arizona, United States of America, would amount under Irish law to an infringement of his constitutional right to liberty.

23. The specific problem in regard to the bail regime in Arizona was that the evidence in *P.O.C.* showed that the bail laws had recently changed in that state and that the alleged offences were now "non-bondable". That change meant that, while P.O.C. would have had an entitlement to a bail hearing, he would nonetheless be incarcerated if the prosecution could show on the preponderance of the evidence that he was likely to have

committed the offences.

24. The appellant in the present case contended before Donnelly J that O'Sullivan J. had decided in *P.O.C.'s* case that the bail regime in Arizona, was, per se, a flagrant denial of that respondent's fundamental rights. Counsel for the respondent in the present case submitted that the *P.O.C.* case should not be read in that light.

25. Donnelly J noted that while O'Sullivan J in the *P.O.C.* case had concluded that the bail regime in the state of Arizona would, in the circumstances of the case, constitute an infringement of the applicant's fundamental rights, his decision on whether or not to extradite had been rendered "*in the context of the fairness of the respondent's proposed trial"*.

26. Donnelly J concluded that O'Sullivan J's decision "*does not appear to be a decision based upon the bail system per se that operated within Arizona*." In so far as the bail aspect of the case was concerned the crucial evidence that had influenced O'Sullivan J to come to the decision that he did was case specific, i.e., evidence that the applicant, if extradited, would be incarcerated for up to twelve months (and possibly much longer). Although there had been other evidence to the contrary from a Ms Leisch, the deputy county attorney for Maricopa County, Arizona, suggesting that *P.O.C.,* would in fact receive a trial within 150 days if in custody, or 180 days otherwise, O'Sullivan J had ultimately concluded that Ms Leisch's evidence could not be safely relied upon for reasons set forth at some length in a postscript to his judgment.

27. Donnelly J concluded in the circumstances that the interpretation urged upon the court by counsel for the respondent was therefore correct. The High Court judge stated:

> *"It does not appear to be a decision based upon the bail system per se that operated within Arizona. It was a decision directed towards the change in the bail system in the intervening time between the alleged offence and the extradition and the manner in which it would operate now to prejudice that respondent. I do not consider that the concluding comments in the postscript to the judgment were intended by O'Sullivan J. to convey anything other than he had earlier stated with regard to the bail regime and the delay."*

28. Extradition had not therefore been refused in the *P.O.C.* case because exposure to the bail regime in Arizona, would, per se, amount to a flagrant denial of that respondent's fundamental rights. Rather it had been refused because of an concern on the judge's part, which the applicant for extradition had been unable to allay, that *P.O.C*. faced a real risk of not receiving a fair trial, both in the light of prejudicial delay and case specific evidence that he could face pre-trial detention for up to twelve months and possibly much longer.

29. Donnelly J observed that the case of *Attorney General v P.O.C*. had in any event been decided before the Supreme Court had given it's decision in *Minister for Justice, Equality and Law Reform v Brennan* [2007] 3 IR 732 and in which Murray C.J. had said [at paras 39-40] :

> *"39. The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our*

Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.

40. That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused …"

30. Noting that the Supreme Court had recently reiterated these views in *Minister for Justice and Equality v Buckley* [2015] IESC 87, Donnelly J considered that "*the issue is not whether the Swedish criminal procedure rules on pre-trial release would be found unconstitutional in this jurisdiction, but whether there is a clearly established and fundamental defect in a system of pre-trial detention in Sweden*."

31. Importantly, she subsequently added (at para 39): "*I am quite satisfied that the reference by the Swedish judicial authority to the lack of a bail system in Sweden, does not mean that Sweden has no system of pre-trial release. There is such a system. The issue that remains to be determined is whether that system, and/or the operation of that system, amounts to a flagrant denial of rights."*

32. The High Court judge went on to consider and review the jurisprudence of the E.Ct.H.R. in the cases of *Labita v. Italy* (6th April, 2000, App. No. 26772/95, Reports 2000-IV), *Kudla v. Poland* (26th October, 2000, App. No. 30210/96, Reports 2000-XI) and *Ilijkov v. Bulgaria* (26th July, 2001, App. No. 33977/96), on which particular reliance was being placed by the respondent (the appellant here) in support of his case that presumptions against bail and reverse onus practices in the context of bail were contrary to the spirit and intention of Article 5 ECHR.

33. In this jurisprudence Article 5 ECHR has been repeatedly characterised by the E.Ct. H.R. as "*a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases*" e.g., in *Ilijkov* at para 85.

34. Further, in *Kudla* the E.Ct H.R. had said (at para 111) that:

"The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty."

and in *Ilijkov* it had said (at para 84):

> *"84. The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is per se incompatible with Article 5 § 3 of the Convention (see the Letellier v. France judgment of 26 June 1991, Series A no. 207, §§ 35-53; the Clooth v. Belgium judgment of 12 December 1991, Series A no.225, § 44; the Muller v. France judgment of 17 March 1997, Reports of Judgments and Decisions 1997-II, §§ 35-45; the above cited Labita judgment, §§ 152 and 162-165; and the above cited Jecius v. Lithuania, §§ 93 and 94).Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention (see the Contrada v. Italy judgment of 24 August 1998, Reports 1998- V, §§ 14, 16, 18, 23-30, 58-62), the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.*
>
> *85. Moreover, the Court considers that it was incumbent on the authorities to establish those relevant facts. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention… ."*

35. The High Court judge further noted and took account of reliance by respondent to the present appeal (the Minister) on the judgment of Peart J in the High Court in *Minister for Justice, Equality and Law Reform v Ollsen* [2008] IEHC 37 in so far as it dealt with Swedish pre-trial detention laws. In *Ollsen* the High Court judge had been satisfied that there was a system of pre-trial release in Sweden. Peart J had noted that there was no case against Sweden at the E.Ct.H.R. in which the regime had been subjected to criticism, much less an adverse finding. He had further opined that the designation of Sweden under s. 3 of the Act of 2003, as a country that has given effect to the 2002 Framework Decision, implied that this State recognises that their relevant criminal justice procedures conform to, at the very least, the minimum standards required by the ECHR.

36. Donnelly J noted that the respondent (the appellant here) sought to distinguish *Ollsen* on the basis:

> *"…that there appears to have been no analysis in the case of the applicable legal test which is at issue in these proceedings. Counsel submitted that while there was a reference in the judgment to the "weighing of the detriment" against the "reason for the detention", the Swedish prosecutor does not appear to have adverted to the fact that this weighing up takes place in the context of a legal test which strongly presumes that detention is required."*

37. In her determination of the issues raised the High Court judge noted the rebuttable presumption in s. 4A of the Act of 2003, the consequence of which was that the burden rested on the respondent (the appellant here) to adduce evidence that there were substantial grounds for believing that he would be at real risk of being exposed to a flagrant denial of justice in the event of being surrendered. She expressed herself to be satisfied on the evidence that "*Sweden operates a system whereby pre-trial release from detention may be ordered*", and that under Swedish law "*where there is probable cause that a person is suspected of a serious crime such as rape, he/she shall remain in custody unless it is obvious that detention is unnecessary".* Swedish law further required "*a weighing up of the detriment to the suspect and other interests as against the detention of the person."*

38. Donnelly J, in considering the case advanced by the respondent (the appellant here), was satisfied that "*the only evidence adduced by the respondent is that release is uncommon and that it is probable that the respondent will be remanded in custody pending trial.*"

39. The High Court was prepared to accept as an authoritative statement of the law a passage from 'Human Rights and Criminal Justice' (Emmerson and Others, 3rd Ed. 2012, Sweet and Maxwell) to which she had been referred, and in which the authors had stated:

> *"[a]ccordingly the Court has held that the proper construction of the second limb of Article 5(3) is that a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continued detention. "Relevant" means falling within the recognised categories or reasons for withholding liberty…*
>
> *In addition to being legally relevant, the ground for refusal of bail must be "sufficient". That means they must be established objectively on the facts of, and by the evidence in, the particular case. The Court has stated on a number of occasions that the grounds relied upon by the domestic courts will not be regarded as sufficient if their application to the case in hand is "abstract" or "stereotyped" without reference to concrete facts or analysis."*

40. Nevertheless, in Donnelly J's view the case law of the E.Ct H.R. made it clear that the "reasons" justifying detention pending trial cover the circumstance of the persistence of a reasonable suspicion or probable cause that he has committed a serious offence which is relevant to the risk of absconding, interfering with evidence or indeed of re-offending. In Sweden, the existence of probable cause that the person committed the serious offence was the basis for the deprivation of liberty applicable in the respondent's case. The seriousness of the offence included the severity of sentence and was a relevant element in the assessment of the risk, amongst other matters, of absconding. Moreover, in Sweden probable cause was not a sole or automatic basis for determining the deprivation of liberty. The Swedish court was also required to consider whether it was obvious that such detention was unnecessary. There was nothing in the case law of the E.Ct.H.R that demonstrated that such a legal regime was, of itself, contrary to Article 5. If it is obvious that detention is unnecessary, the person must be released. It had also been established that there was a weighing of the detriment to the accused and the other interests as against the detention of the accused.

41. Donnelly J went on to state that while it had been suggested that Swedish law contained "a presumption against release", this required to be considered in light of the justification for continued detention notwithstanding the presumption of innocence where there were specific indications of a genuine requirement of public interest which outweighed the rule of respect for individual. She opined that:

> *"The identification of those specific indications of genuine requirements of public interest can, as indicated in case law, include the calculation that being accused of an offence of a certain seriousness creates a presumption of a risk of absconding or tampering with evidence (e.g. para. 58 in Contrada where the ECtHR noted this type of presumption expressly contained in the Italian Criminal Code). Such a presumption can be understood not as a presumption against release, but more as an evidential presumption."*

42. The High Court judge concluded and held that, although the Swedish Criminal Code

does not expressly state that the requirement to detain on probable cause for serious offences (unless unnecessary) is based upon a presumption of absconding or of interference with the evidence, she was satisfied in the circumstances of the case that the risk of absconding or of interference with the investigation/evidence had formed the basis of the decision making process by Attunda District Court in considering pre-trial release. The reference to detention on probable cause of having committed a serious offence was therefore directed towards the assessment of those genuine requirements of public interest. Furthermore, the weighing up of interests was an assessment of the sufficiency requirement required under Article 5 ECHR. In the circumstances Donnelly J. was not satisfied that there was evidence of a presumption against release in the Swedish Criminal Code in the sense that is outlawed under Article 5 of the ECHR. Rather, the finding of probable cause for a serious offence amounted to an evidential presumption that there was either a risk of flight or of interfering with evidence. That evidential presumption, however, was rebuttable and detention might not be ordered where it is unnecessary. Thus, the High Court was satisfied, the Swedish Criminal Code only provided for pre-trial detention where relevant reasons sufficient to justify it existed. Accordingly, no egregious breach (in the *Brennan* sense) had been established and the respondent (the appellant here) was not at real risk of being subjected to a flagrant denial of justice.

43. Finally, the High Court judge made it clear that she considered that she was also being asked, in effect, to review the fairness of the remand hearing before Attunda District Court and that, while the decision in *Minister for Justice and Equality v Marjasz* [2012] IEHC 233 had suggested the possible existence of a very limited jurisdiction to conduct such a review in rare and wholly exceptional cases, to do so would be wholly inappropriate in the circumstances of the present case. Donnelly J remarked:

> *"In so far as the respondent complains that the process leading to the detention order was unfair, this Court is bound by the presumption that the court hearing was fair and respected the respondent's rights. Furthermore, that was a decision of first instance and carried with it a right of appeal. That right of appeal has not been exercised. I would also say that unlike the exceptional situation in Rostas, the issuing judicial authority has dealt with the issues as they have arisen in this case. Finally, the domestic decision itself is before the Court in this case and it is that decision that the Court has been asked to review. There is nothing on the face of that document that would cause this Court to be put on its enquiry that unfairness had occurred. It is not, therefore, appropriate that this Court would second guess the inferences drawn and conclusions reached on the materials and submissions placed before the Swedish court."*

The case made on appeal to this Court

44. The appellant contends quite simply that the High Court judge got it wrong, and in several respects. It was submitted that the judge erred in fact in stating that the only evidence adduced by the appellant was that release was uncommon and that a remand in custody was 'probable'. The appellant contends that the evidence went much further and that it was to the effect that it is only in exceptional cases that a person, who is not resident in Sweden and is on probable cause suspected of rape, will be released from custody pre-trial.

45. It was further submitted that the relevance of the Attunda District Court's decision of the 26th of November 2014 was not, as the High Court judge seemed to think, that the appellant should not be surrendered now, because of a previous procedural unfairness in his case. Rather, the case that was being made was that the Attunda District Court's reasoning was tainted by the overarching principle that release can only be granted where obviously required. Thus, if the Attunda District Court had applied a

fair test, there is a strong possibility that there would have been a different outcome. Crucially, it was submitted, the appellant will face the same unfair test if surrendered, and inevitably face the same outcome as before for the same reason.

46. Counsel for the appellant has argued that whether or not the Swedish system is properly characterised as giving rise to only an 'evidential presumption' against bail, the practical reality is that the test for securing pre-trial release is so stringent that it denies release to an entire class of accused persons, irrespective of the objective merits of their detention. It was submitted that the 'weighing of interests' undertaken by the Swedish Courts, and relied on by the High Court judge as evidence of proportionality in the process, is undermined by the overarching principle that release will only be granted if this is obviously required. This purported safeguard, it was contended, is therefore ineffective in securing a ruling on release that properly reflects a balancing of the individual and the public interests.

47. It was further submitted that the High Court judge erred in failing to have regard to the fact that the rational criteria for refusing release applied by the Swedish Courts, of flight risk and of interference with witnesses, are undermined by the constant and unjustifiable presumption that these criteria will be present in all serious cases to such an extent that release must be refused.

48. Finally, it was submitted that the Swedish system of pre-trial release effectively shifts the burden of proof onto an applicant, who must demonstrate that it is obvious that their release should be granted. This onerous obligation, says counsel for the appellant, negates the protections afforded by Article 40.4.1 of the Constitution and by Article 5 of the ECHR and therefore amounts to a flagrant breach of those protections.

49. It was suggested by counsel for the appellant that one might usefully ask: Is it fair that an accused would only be granted bail in exceptional circumstances, merely because of the nature of the offence itself? If, as the High Court held, such a principle does not amount to a flagrant breach of the Convention (because it meets the dual tests of relevance and sufficiency), it is submitted that it does still amount to a flagrant breach of our own constitutional right to liberty. In support of this argument counsel referred us to a dictum of Hedigan J in the case of *Dumbrell v. Governor of Castlerea Prison* (High Court, ex tempore, Hedigan J 6th August 2010) to the effect that, on occasion, the Constitution provides stronger protections to the individual than the ECHR:

> *"In my view, Irish law has set higher standards that those of the European Convention on Human Rights. It is fundamental to the Convention system that each country can take a much more rights as they choose but no less. In this case, Irish law provides stronger rights than those agreed by the 47 Convention signatories, some of whom from the former Soviet Union struggle with even those minimum rights. Ireland has higher standards"*

50. We were further reminded that bail is routinely granted in this jurisdiction in rape, murder and terrorism cases. Where bail is refused, it is because the prosecution has convincingly demonstrated that detention is required in that particular case, and only after a rigorous demonstration of 'concrete' facts in support of detention. There can be no question of refusing bail to a class of individuals, or in any class of case, relying solely on formulaic and inevitably-present grounds. Such a process is so far removed from our own conception of the right to liberty that it amounts, it was submitted, to a flagrant breach of that right.

51. Responding to these submissions, counsel for the respondent concentrated for the most part on those arguments based on Article 5 ECHR, but also made clear that he would relying on similar arguments in reply to the arguments based on provisions of the

Irish Constitution. *Citing McKay v. The United Kingdom,* Application No 543/03, [2006] ECHR 820 § 30, and *Rio del Prada -v- Spain,* Application No 42750, as his authorities, both of which were decisions of the Grand Chamber of the E.Ct.H.R., he contends that the key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty. In order to meet the requirement of lawfulness, a person's detention must be "in accordance with a procedure prescribed by law". This means that detention must conform to the substantive and procedural rules of national law. In that regard the E.Ct.H.R. stated in *Rio del Prada -v- Spain*:

> *"25. It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the low, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see Kafkaris, cited above, § 116, and M. v. Germany , cited above, § 90). The "quality of the law" implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (see Amuur v. France , 25 June 1996, § 50, Reports 1996-111). The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".*

52. It was submitted that Article 5(1)(c) makes provision for pre-trial detention in circumstances where either there is reasonable suspicion that the person has committed an offence, or where there is a fear of flight or the further commission of offences. These provisions are not conjunctive and the jurisprudence relied on by the respondent (*Labita v. Italy ; Kudla v. Poland* and *Ilijkov v. Bulgaria)* involves cases where after a lengthy period of pre-trial detention the balance may move away from reasonable suspicion being sufficient (along with the other factors) to justify an ongoing detention. It was submitted that there is nothing in this case to suggest that any pre-trial detention that the appellant may face will be, or is likely to be, unduly lengthy.

53. Further, it was submitted that the High Court judge was correct in finding that the task faced by the trial court was not to seek to overlay the Swedish justice system with our constitutional requirements in order to consider the case before it, and that the principles as established in the case of *Minister for Justice, Equality and Law Reform v. Brennan* set out the appropriate test to be applied. Counsel submitted that the test to be applied by the court was fully and correctly stated by the High Court Judge in paragraph 33 of her judgment. (See quotations at paragraphs 29 - 31 of this judgment).

54. Counsel for the respondent submitted that differences in approach as between the Irish Courts and the Swedish Courts with regard to the issue of bail do not amount to a flagrant breach of the right to liberty and are not sufficient to warrant the refusal of surrender, and that the High Court, in looking at any factual differences was entirely correct in finding that the appellant did not overcome the "truly significant hurdle" required to enable the court to make a finding that his surrender was prohibited on a fundamental rights basis.

55. It was further submitted that that the High Court judge's findings of fact in relation to the impact of any differences not amounting to an egregious breach of fundamental

human rights are a binding factual finding, and do not amount to an issue of law for the consideration of this Court. It was also submitted that in the question posed by the appellant, the effect of the appeal being brought is to ask this Court to substitute its own view of the facts for that of the High Court.

56. It was submitted that it was clear from the record of the remand hearing before Attunda District Court on the 26th November 2014 that the appellant, who was not present by his own choice, was afforded a full hearing in which both the prosecutor and the appellant's lawyer, respectively, had the opportunity to make, and in fact made, submissions on the relevant issues of fact and law. Accordingly, the decision rendered, in the absence of any evidence to the contrary, must be presumed to be one where due consideration was given to the facts of the case and the applicable law. Although the appellant had sought to assert that while the hearing had the appearance of having been conducted according to a rational set of considerations closer examination revealed that that was not in fact the case, counsel for the respondent submitted that there was nothing by way of evidence had been put before the High Court to support that assertion.

57. It was submitted that the High Court judge was correct in her view that the submissions advanced to her on behalf of the respondent (the appellant here) amounted to a request that the Irish High Court would substitute its view for that of the Court in Sweden as to the necessity for pre-trial detention. For the High Court judge to have engaged, as she was in effect being invited to do, in her own weighing of the evidence that had been before the Attunda District Court, would have required her to trespass into an area which was entirely the preserve of the Swedish Court, and in respect of which she had no jurisdiction to conduct any review. This, it was submitted, would be a negation of the principle of mutual recognition, and also contrary to the presumption, arising from the trust and confidence that exists between the parties to Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/J.H.A.), O.J. L190/1 of 18.7.2002 ("the Framework Decision"), that the principles of a fair hearing were adhered to by the courts of the issuing member state in any proceedings leading to a domestic arrest warrant or order of detention on foot of which a European arrest warrant is based. It is also a matter of significance in this regard, counsel for the respondent urges upon this Court, that the decision on pre-trial detention is one which can, in any event, be re-visited and appealed before an appeal court in Sweden. The appellant has not, however, lodged any appeal.

58. Counsel for the respondent submits that in so far as the appellant has contended that there exists in Swedish law what is described as "a constant and unjustifiable presumption" that the criteria of flight risk and interference with witnesses are present in all serious cases "to such an extent that release must be refused", this was not borne out by the evidence before the High Court. He submits that that the High Court judge was entitled to make the ruling that she did. and to rely on the presumptions in place with regard to Sweden's compliance with the ECHR.

Analysis and Decision

59. I agree with counsel for respondent that the High Court judge was correct in concluding that she was bound by the findings of fact by Attunda District Court in so far as flight risk and risk of interference with witnesses was concerned. It is a matter for the Swedish courts as to how they assess and rate such risk and the Irish High Court, faced with a request to execute a European arrest warrant based on a detention order made by a Swedish court, which has engaged in such an assessment and rating according to their own criteria, has no entitlement to review the substantive underlying domestic decision.

60. The case before the High Court, and also before this Court, was presented on two distinctly different bases. First, it was contended that the appellant's surrender is prohibited under s. 37(1)(a) of the Act of 2003 as amended because it would be incompatible with the State's obligations under the ECHR. Secondly, and in the alternative, it was contended that the appellant's surrender is prohibited under s. 37(1)(b) of the Act of 2003 as amended because it would constitute a contravention of a provision or provisions of the Constitution of Ireland. These alternative claims require to be approached separately and differently.

61. Dealing with the s.37(1)(a) objection in the first instance, the correct approach to such an objection was described by O'Donnell J in his recently delivered judgment in the Supreme Court in the case of *Minister for Justice and Equality v Balmer* [2016] IESC 25 (unreported, Supreme Court, 12th of May 2016) (at para 66):

> *When an issue under s.37(1)(a) arises in respect of surrender to another contracting state, there is no question of Article 29 [of the Constitution] requiring a degree of tolerance, or some relative test as approved by this Court in Brennan and Buckley. Unlike the Irish Constitution, the ECHR applies with full force in the requesting state. The only question, therefore, for the requested court, is whether the requesting state will comply with its own obligations under the Convention. The potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention. Furthermore, the Irish court is entitled to apply a presumption that the national court of the requesting state is best placed to make a determination as to compatibility, at least in the first place. Such a state has, after all, the obligation of conducting the trial and administering the sentence. It may be rare, therefore, for a national court to have to address the question equivalent to a determination under s.37(1)(a) of the EAW Act without the benefit of reports and decisions from the institutions of the Council of Europe or in circumstances where it is not entitled to rely, at least in the first place, on the existence of national courts bound to uphold the provisions of the Convention. However, where such an issue does arise, the question for the national court would be whether the particular provision in issue is a breach of rights guaranteed in the Convention. That is an entirely distinct test from the test posed under s.37(1)(b) of the EAW Act, which is whether what is proposed is both such a direct consequence of surrender, and would, if it occurred in Ireland, be so egregious in breaching the guarantees of the Irish Constitution that the Court cannot, consistently with its constitutional obligations, order surrender."*

62. In this case the High Court judge correctly started from the position that, by virtue s.4A of the Act of 2003, it was to be presumed in law unless the contrary is shown that Sweden will comply with the requirements of the Framework Decision which, as recital 12 to that document makes clear, *"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*."

63. I also agree with counsel for the respondent, and with the High Court judge, that the evidence does not support the case that the Swedish system of pre-trial remand hearings, such as that conducted by Attunda District Court in this appellant's case on the 26th of November 2014, flagrantly disregards the Article 5 ECHR rights of suspects and represents egregious circumstances sufficient to justify a refusal of surrender in the present case. Despite what has been urged upon this Court, it is clear that the possibility does exist in Swedish law for a suspect to be allowed to remain at liberty but

subject to a regime of restrictions. It is not automatic that a person suspected of a serious crime will be remanded in custody, albeit that such a disposition is the most common outcome. The evidence was that a weighing of the detriment to the suspect, or other opposing interests, against the need for pre-trial detention and a consideration of whether other less intrusive measures such as restrictions on travelling and reporting to the police might suffice instead, must be performed. Moreover, the evidence was that such a weighing was in fact performed in this case.

64. It is also fair, in terms of the complaint made in general terms concerning alleged unfairness of the Swedish pre-trial remand system, to point to the absence of criticisms from the ECHR and human rights monitoring bodies (other than the UK based NGO Fair Trials International). As O'Donnell J also pointed out in Balmer (at para 23):

> *"…there is a system of scrutiny, review and reporting on the protection of rights under the Convention, and ultimately a supranational court which can definitively rule on the compliance of a particular system with the Convention."*

65. Later in the same judgment, he further added (at para 66):

> *"The potential for international friction is further reduced by the existence of institutions which are entitled to report, and in the case of European Court of Human Rights, to determine, whether or not a regime is compatible with the dictates of the Convention."*

66. The absence of criticism of Sweden's system of pre-trial detention before relevant fora is not therefore an insignificant consideration and it seems to me to be one which the High Court was justified in having regard to.

67. That having been said, it is a truism that someone has to go first in ventilating a complaint and conceivably the appellant might have been the first to be in a position to do so, unlikely though this might seem in circumstances where Sweden has been a full party to the ECHR since 1952. However, if that were so it begs the question why the appellant has not raised his apprehension that his rights under Article 5 ECHR will be breached before the Swedish courts. The rights guaranteed by the Convention apply in the requesting state. Sweden is therefore obliged to enforce a person's rights under the ECHR and, for reasons analogous to those advanced in *Minister for Justice, Equality and Law Reform v. Stapleton* [2008] 1 IR 669, is best placed to do so. It is highly relevant in this court's view that the appellant did not seek to appeal the Attunda District Court's ruling if he truly believed that his rights would be breached by enforcement of that court's order.

68. The High Court Judge's analysis was in my view rigorous and thorough and I am satisfied in all the circumstances that the case based on s.37(1)(a) was correctly dismissed by the High Court judge.

69. Turning then to the case under s.37(1)(b). The appellant relies heavily on the test, characterised by O'Donnell J in *Balmer* as a "relative test", enunciated by Murray C.J. in the Supreme Court in *Minister for Justice Equality and Law Reform v. Brennan* [2007] 3 IR 732 and recently re-iterated with approval in *Minister for Justice Equality and Law Reform v. Buckley* [2015] IESC 87. However, as O'Donnell J explains in *Balmer*:

> *"Irish constitutional law (and therefore s.37(1)(b) of the EAW Act) distinguishes between events occurring abroad and those occurring here, not merely because they do occur abroad, and therefore, are observed rather than controlled by Irish law: it is also, and more importantly, because, particularly in the field of criminal law, they are controlled by the law of a foreign sovereign state. In this case, the execution of a sentence lawfully imposed, the trial of an offence contrary to law, and the*

enactment of laws providing for definitions of offences, punishments and administration of sentences, are all fundamental and central attributes of sovereignty. The comity of courts is not merely a matter of politeness between lawyers, or an end in itself: it is an aspect of the relationship between sovereign states. An essential corollary of sovereignty is the equality of states, expressed in the 14th century maxim "non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium" (For it is not for one city to make the law upon another, for an equal has no power over an equal) Brownlie's Principles of Public International Law, 8th Ed (Oxford, 2012), at p. 448. Article 5 of the Constitution asserts, in words that were by no means rhetorical in 1937, that Ireland is a sovereign, independent state. By Article 1 of the Constitution, the nation affirms its sovereign right to determine its relations with other nations. The conduct of external relations of the State raises separate constitutional issues, and requires a wider constitutional focus than the question of whether a certain procedure would be permissible within the jurisdiction.

44 Article 29 of the Constitution outlines that Ireland affirms its "devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality". This statement encapsulates a key principle applicable to the circumstances of this case. Cooperation implies some give and take. It also focuses attention on reciprocity, and the equality of sovereign states. The making of an extradition treaty, adherence to a convention on extradition, the implementation of a framework decision, and adherence to international decisions in areas of family law may all raise issues when surrender or return is sought. It is also necessary to appreciate that those issues arise under the same instrument which permits Ireland to seek the surrender of suspects for trial of offences alleged to have occurred in Ireland in respect of which Ireland has jurisdiction, or for the return of individuals to the jurisdiction of the Irish courts. It is not, therefore, a case of the Irish Constitution controlling events abroad (in which case the only question would be whether the acts alleged amount to a breach of the Constitution); it is, as already observed, rather that the Irish court is observing events abroad. Moreover, those events are observed through the lens of Article 29, requiring friendly cooperation, and Articles 1 and 5, which, in asserting sovereignty, require the respect of the sovereignty of other countries. The events, with which we are concerned here, are not private transactions between individuals. They are, by definition, the application of the criminal law within the territory of a sovereign state (in most cases to, and in respect of, its own citizens), or the execution of sentences imposed by their courts. These are key attributes of sovereignty of foreign friendly states, whose sovereignty we are bound by the Constitution to respect, in the same way as we expect respect for matters within our own jurisdiction. This is why, in my view, it is correct to speak of s.37 of the EAW Act as applying only to matters of "egregious" breach of fundamental principles of the Constitution or when something is so proximate a consequence of the court's order and so offensive to the Constitution as to require a refusal of surrender or return. It may be that the concept of friendly cooperation may also permit or require steps to be taken which would not have been taken in an earlier age, and not merely because the provisions of the Irish Constitution have been altered, but also because the area and content of international cooperation has extended. Such cooperation is, however, not unlimited. It is, for example, by the terms of the Constitution itself subject to justice and morality. There are also examples of limitations on this principle by consent, or international agreement or otherwise. It neither necessary nor desirable

> *to explore these circumstances here, since they were not adverted to in argument. It is enough to identify the focus of the analysis for the purpose of s.37, which, in my view, explains the application of the Brennan approach.*
>
> *45 This suggests that this area cannot be subject to absolute bright line rules, and further, that progress should be careful and incremental, and in contested cases, should involve close consideration of the relevant facts."*

70. The High Court judge in the present case engaged in a close consideration of the relevant facts in evidence before her. She was not, however, entitled to go behind the facts as found by the Attunda District Court. The evidence established that Sweden does have a system of pre-trial release. However, considerations such as the inherent risk of flight and interference with witnesses in the case of a person charged with a serious offence are afforded a different weighting in that system to that which our courts might afford them. That represents a legitimate exercise of sovereignty by the Swedes. As O'Donnell J put it, at para 38 of his judgment in *Balmer*:

> *"It is not possible to justify the imposition of our choices in this regard on others, or to condemn their choices, simply on the basis that we all adhere to some general principles which are not in dispute. This is particularly so in the case of a right expressed or developed in a singular way in the constitutional jurisprudence of one country. By definition, the right is not universally recognised. Universal applicability cannot be the basis for its application to other countries.*

71. It seems to me, echoing Murray C.J.'s remarks in *Brennan*, that the mere fact that Swedish law attaches different weight to the considerations in question, and in that regard is perhaps even radically different to Irish law, does not automatically mean that their system is fundamentally defective and that a refusal of surrender is required to protect the appellant's rights. I consider that it is also not without significance that the law in Ireland on pre-trial detention has not remained static and that it has been changed significantly since *O'Callaghan's* case, admittedly by constitutional referendum, and that bail may now be denied even in this jurisdiction on other grounds including the risk of the commission of other serious offences. It is difficult in the circumstances for the appellant to tenably contend that the Swedish system departs "*so markedly from the scheme and order envisaged by the Constitution"* (per O'Donnell J in *Nottinghamshire County Council v. B and Others* [2011] IESC 48 (unreported, Supreme Court, 15th December, 2011)) as to require refusal of surrender.

72. The appellant's contention that the Swedish system de-facto involves a presumption against liberty is perhaps, at first glance, potentially his strongest point. However, I agree with the High Court judge that the reality is more nuanced and that in truth there is no such presumption. It may be the case that very cogent and compelling evidence requires to be produced by an accused in Sweden in order to persuade a Court that detention is unnecessary, having regard to the weighting that is afforded in that jurisdiction to what they regard as the inherent risks of flight and of interference with witnesses that may arise where there is a reasonable suspicion that a person has committed a serious offence. However, that is not the same thing as saying that the necessity for detention is presumed to be obvious. There is no presumption of necessity for detention, in the sense of an inference recognised by law which stands until the contrary is proved. Evidence of risk is still required to be adduced by the applicant for a pre-trial detention order in every case and the court is obliged to conduct a weighing of the competing interests. However, because great weight tends to be attached to the inherent risks of flight and of interference with witnesses that may be perceived to arise where there is a reasonable suspicion that a person has committed a serious offence, for all practical intents and purposes a person who seeks to resist pre-trial detention will be required adduce evidence of even greater weight for placement on the other side of the

notional scales. The High Court judge was therefore right in characterising the Swedish rule as operating to place a high evidential burden on a person who is reasonably suspected of a serious offence and who desires to be allowed to remain at liberty.

73. I am satisfied in the circumstances that the High Court judge was also correct in dismissing the case based on s.37(1)(b) of the Act of 2003 as amended.

74. I would therefore answer the question referred to this Court by the High Court in the negative.

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