Neutral Citation: [2015] IEHC 805

THE HIGH COURT

[2015 No. 16 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

W. B.

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 16th day of December, 2015.

1. The respondent is sought by Sweden for criminal prosecution on a single count of rape, pursuant to a European arrest warrant ("EAW") dated 16th December, 2014. The main issue in the case is whether Swedish pre-trial detention laws, to which the respondent will be subjected on surrender, place him at real risk of an egregious breach of his fundamental rights.

Background to the EAW

2. It is alleged that the respondent raped a woman in November 2012 in Stockholm County. The respondent is an Irish citizen who was working in Sweden at the time of the alleged offence. On affidavit, the respondent states that he left Sweden unaware that any criminal investigation was in being. In late 2013, he was contacted by the Gardaí about providing assistance to the Swedish investigation. He attended at a Garda station with his solicitor in January 2014. He provided a lengthy voluntary statement to the Gardaí at the time. A copy of that statement is exhibited in his affidavit. In brief, while he admits sexual contact with the complainant, he says the contact was at all times consensual.

Section 16 issues

Issues not raised in the Points of Objection

3. I am satisfied that the Minister for Foreign Affairs has, by the European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (S.I. No. 4 of 2004), designated Sweden as a Member State that has, under its national law, given effect to the Framework Decision of 13th June, 2002 on the European Arrest Warrant and surrender procedures between Member States ("the 2002 Framework Decision"). I am satisfied that the person who appears before me is the person in respect of whom the EAW has issued. I am satisfied that the EAW has been endorsed in accordance with s. 13 of the European Arrest Warrant Act, 2003, as amended, ("the Act of 2003") for execution. I am satisfied that s. 45 of the Act of 2003 is inapplicable to this warrant as it is a warrant for prosecution. I am satisfied that I am not required to refuse the surrender of the respondent pursuant to ss. 22, 23 or 24 of the Act of 2003.

4. I am also satisfied that the offence for which the respondent is sought is a list offence within the meaning of Article 2, para. 2 of the Framework Decision and that the applicable maximum penalty meets minimum gravity requirements. Therefore, his surrender is not prohibited by s. 38 of the Act of the 2003.

Point of Objection – Section 21A of the Act of 2003

5. The respondent raised an issue under s. 21A in his points of objection. This was not pursued at the oral hearing; nonetheless, I am required to satisfy myself that his surrender is not so prohibited. The point raised was that there were further enquiries to be conducted in the requesting state as part of the criminal investigation. In those circumstances, according to the point of objection, those ongoing enquiries amounted to evidence of the absence of an intention to put the respondent on trial. It was asserted that this was sufficient to rebut the presumption contained in s. 21A (2) of the Act of 2003.

6. Section 21A (2) provides "[w]here a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for, that offence in the issuing state, unless the contrary is proved."

7. The decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Olsson* [2011] 1 I.R. 384, which coincidentally concerned Sweden, confirmed that s. 21A requires cogent evidence that a decision has not been made to charge the person with and try him or her for the offence, before the court is required to refuse to surrender him or her. The reasoning in *Ollson* was re-iterated and applied in *Minister for Justice v. Bailey* [2012] 4 I.R. 1. These cases and also *Attorney General v. Pocevicius* [2015] IESC 59, (concerning the Extradition Act 1965), clarified that words such as investigation, used in another jurisdiction, may have to be interpreted and be given a particular meaning for the purpose of extradition/surrender cases quite distinct from that which might apply in a purely national context.

8. A preliminary decision has been taken by the Attunda District Court in Sweden to detain the respondent in relation to these charges. The written decision of that court has been exhibited by the respondent in the context of his argument concerning pre-trial release. That written decision was subsequently referred to, and relied upon, by the issuing judicial authority in correspondence. As the decision of the Attunda District Court is therefore before this Court, it has been considered as part of the totality of the evidence. There is nothing contained therein to rebut a presumption that a decision has been made to charge and try the respondent for these offences.

9. The respondent has laid no evidential basis other than to rely upon a statement that further enquiries are to be carried out in the issuing state. From the aforementioned decisions of the Supreme Court, it is established that mere reliance on the fact that investigations or enquiries are ongoing does not rebut the presumption contained in s. 21A (2). I therefore hold that his surrender is not prohibited on the grounds of s. 21A of the Act of 2003.

Point of Objection - Section 37 of the Act of 2003

A. Bail

10. As stated above, the respondent's main objection to his surrender is based on the following point of objection: "Notwithstanding the respondent's previous good character and his full cooperation with the criminal investigation in the requesting state, there is no prospect of bail for the respondent in the event of surrender. The absence of any realistic possibility of bail amounts, in the circumstances, to such a fundamental breach of Article 40.4.1 of the Constitution and of Article 5 of the European Convention on Human Rights ("ECHR") that the respondent's surrender ought to be refused."

The evidence

11. The respondent 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.

12. The respondent further stated 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.

13. The respondent averred that he was advised by his Swedish lawyer Mr. Setterlund that it was extremely unlikely that he would get bail in Sweden even if he surrendered voluntarily. He was shocked to hear that a detention order had already been made in the requesting state which he stated meant he will be remanded in custody if he returns to Sweden. He said that he was of good character with no previous convictions or warrants for failing to attend court. It would make no sense for him to flee the Swedish jurisdiction if he returned there, as another EAW would issue for him. His life and his family are in Ireland so, he stated, he could not run from the investigation.

14. The respondent's Swedish lawyer Mr. Setterlund also swore an affidavit in the case. Mr. Setterlund stated he was present at the detention hearing at Attunda District Court on 26th November, 2014 in the case of the respondent. The respondent was not present at that hearing. He said that at the hearing, the District Court decided to detain the respondent with probable cause on suspicion of rape.

15. Mr. Setterlund stated as follows: "[i]f [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 [be] remand[ed] in custody unless it is obvious that detention is unnecessary. There is no bail system in criminal cases in Sweden."

16. The central authority sent a request for comment on the affidavit of Mr. Setterlund to the Swedish issuing judicial authority. The issuing judicial authority replied "the answer to your question is that there is no bail system or an equivalent system in Sweden. The description Mr. [B.]'s public defence 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."

17. The solicitor for the respondent then swore an affidavit in which he exhibited a fact sheet prepared by Fair Trials International entitled Human Right to a Fair Trial, Arrested in Sweden (2015) and the report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("CPT") on Sweden, dated June 2009. The fact sheet will be referred to in more detail below but it was conceded at the hearing that the CPT report did not deal with the pre-trial detention system. That report, to the extent it may be relevant here, dealt with the placing of restrictions on remand prisoners.

18. Following receipt of the solicitor's affidavit, the central authority sent a further request asking for comment on that report. The central authority also sought further information as follows: "[w]hen a Swedish Court gives consideration to a person's continued detention does the Swedish Criminal Code of Procedure require a weighing of the detriment to the suspect and other interests as against the detention of the person, and/or does the Swedish Criminal Code potentially allow for a system of release subject to restrictions of travel and reporting to police which could be considered in the case [of] persons facing detention on foot of criminal charges."

19. The Swedish judicial authority replied on 20th October, 2015 with the following response to that question: "[y]es, Swedish law does require such a weighing. The Attunda District Court also stated in its decision, following the hearing on the 26 November 2014, that such a weighing has been made in this case. Swedish law does, potentially, allow the use of restrictions of travelling and reporting to the police instead of pre-trial detention."

20. The trial was listed for 22nd October, 2015. Counsel for the respondent requested an adjournment based on the late receipt of that information. At that point, I directed that the hearing should proceed unless it became clear that it was necessary to address the contents of that letter. During the course of her reply, counsel for the minister suggested that the court might get assistance from the letter. In light of that, but also due to the fact that I was of the view that the court might possibly obtain assistance from the case law of the Europe Court of Human Rights ("ECtHR") on the issue of pre-trial detention, I agreed to adjourn the matter.

21. On the adjourned date, the respondent relied upon an e-mail from Mr. Setterlund sent in response to the further information of 20th October 2015 from the issuing judicial authority. In this e-mail, which I accepted in evidence although not before the Court in the required format, Mr. Setterlund stated that:

> "[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."

Analysis of the Arguments

22. Counsel for the respondent emphasised that the factual background was relevant to this submission. While acknowledging that it

is not for this court to decide on guilt or innocence, he submitted that the strong assertion of innocence in this case was a relevant factor. He submitted that the circumstances of cooperation by his client with the investigation provided a factual platform in which to assert that the respondent's rights would be violated on surrender to Sweden.

23. Counsel submitted that the only interpretation that can be placed upon the Swedish legal system was that there is a presumption against liberty. He submitted that in those circumstances, not only was this a violation of Irish constitutional law, but it meets the criteria of an egregious breach of fundamental rights as required in the decision of *Minister for Justice Equality and Law Reform v. Brennan* [2007] 3 I.R. 732.

24. Reliance was placed upon the decision of the Attunda District Court. It is not without significance, however, that what counsel was inviting the court to do was to consider how the District Court had failed to engage with the submissions of Mr. Setterlund. That decision, including the synopsis of the arguments of prosecution and defence, runs to seven pages. Under that part of the record headed "Decision", the following is stated:

> *"Decision*
>
> *1. [W.B.] is to be detained.*
>
> *2. The prosecutor is to be given permission to make decisions concerning restrictions.*
>
> *Crime Allegation*
>
> *[W.B.] is on probable cause suspected of rape on the 17 November 2012 at Grindtorpsvägen in Täby.*
>
> *Probable cause for detention*
>
> *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 judgment, [W.B].'s failure to appear before the hearing of the day was not without significance.*
>
> *Probable Cause for Detention to Consider*
>
> *The causes for detention outweigh the disruption that this action means for [W.B.] or any other opposing interest."*

25. The decision also includes, under the heading "HOW TO APPEAL", a statement that the decision, inasmuch as it concerns detention and permission to impose restrictions, can be appealed to the Swedish Court of Appeals. The right to appeal is not time-limited.

26. Counsel for the respondent submitted it was plain from the disclosed facts that, on any fair system, the respondent would be considered for pre-trial release. Counsel submitted that if you focus on the facts, and assess the criteria to be applied, the detention order was made in circumstances where there was a plainly unfair weighing of interference with witnesses.

27. Counsel sought to rely on the Fair Trials International fact sheet as evidence of the Swedish situation regarding pre-trial release. That fact sheet stated, inter alia, as follows:

> *"(a) "How long can I be kept in prison before my trial starts?*
>
> *There is no legal maximum period for which you could be placed in prison before your trial starts, but most cases go to trial within a few months of the arrest.*
>
> *Sweden has been criticised for its excessive use of pre-trial detention.*
>
> *(b) Will I have to stay in prison until my trial starts?*
>
> *You may be detained until your trial is over. Individuals accused of an offence punishable by imprisonment of one year or more could be placed in detention if, given the nature of the offence, and various other factors, there is a reasonable risk that the person will:*
>
> *a. [f]lee, or otherwise evade legal proceedings or subsequent punishment;*
>
> *b. [i]nterfere with ongoing investigations by, for example, destroying evidence or intimidating witnesses; or*
>
> *c. [e]ngage in criminal activities.*
>
> *If you are being accused of an offence for which you will get at least two years in prison if convicted, you are likely to be detained, unless your detention is clearly unjustified."*

28. The above is the sole independent criticism of Swedish pre-trial detention law practice relied upon by the respondent. He does not point to an adverse finding or even criticism of the Swedish system from the ECtHR. In relation to the Fair Trials International fact sheet, I note that the criticism is in the passive voice, i.e. "Sweden has been criticised for its excessive use of pre-trial detention." No indication is given as to who has voiced these concerns and it is not even a clear endorsement of such criticism by Fair Trial International. There is no evidence of criticism from reputable sources such as International Human Rights Treaty monitoring bodies, Human Rights NGOs such as Amnesty International or Human Rights Watch, or U.S. State Department Reports. 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. I will, however, consider the other evidence before me and the submissions made to me.

29. Counsel for the respondent relied primarily on Attorney General v. P.O.C. [2007] 2 I.R. 421. In that case, one of the issues had been whether the bail regime in the state of Arizona, United States of America, either on its own or in the context of the delay in the proceedings, would amount to an infringement of the applicant's fundamental rights. It appears that the evidence in P.O.C. showed that the bail laws had recently changed in Arizona and that the alleged offences were now "non-bondable". That change meant that, while that respondent 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.

30. At para. 45 of that judgment, O'Sullivan J. concluded: *"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."* That paragraph is followed immediately by his statement as to the consideration as to what impact it has, if any, in the context of the respondent's application for the applicant's extradition. It appears that the judge went on then to consider the issue of fair trial in the context of the delay. Thus, it was in the context of the fairness of the respondent's proposed trial that the decision on bail was given.

31. The *P.O.C.* case was, however, unusual in that the judgment that the court had intended to deliver was delayed when further information relevant to the case was brought to the attention of the court. O'Sullivan J. thereafter added a postscript to his judgment. It is in that postscript that O'Sullivan J. referred to his *"earlier conclusions in relation to delay nor to my conclusions in relation to bail."*

32. Counsel for this respondent submitted that O'Sullivan J. decided that the bail regime in Arizona was, *per se*, a flagrant denial of his fundamental rights. Counsel for the applicant submitted that *P.O.C.* should not be read in that light. The issue in *P.O.C.* had been the delay and the bail regime and specific prejudice. In the view of the Court, that is correct. 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.

33. Moreover, the decision in *Minister for Justice Equality and Law Reform v. Brennan* was delivered subsequent to *P.O.C.*. It is the principles enunciated in Brennan which apply to a determination of whether the surrender of the respondent will violate his fundamental rights. In *Brennan*, the Supreme Court stated at para. 37, in answer to the argument that particular sentencing provisions in the United Kingdom ("U.K.") did not conform to principles of Irish law:

> *"The effect of such an argument is that an order for surrender under the Act of 2003, and indeed any order for extradition, ought to be refused if the manner in which a trial in the requesting state including the manner in which a penal sanction is imposed, does not conform to the exigencies of our Constitution as if such a trial or sentence were to take place in this country. That can hardly have been the intention of the Oireachtas when it adopted s. 37(1) of the Act of 2003 since it would inevitably have the effect of ensuring that most requests for surrender or extradition would have to be refused. And indeed if that were the intent of the Framework Decision, which the Act of 2003 implements, and other countries applied such a test from their own perspective, few, if any, would extradite to this country."*

The Supreme Court went on to say at para. 39-40:

> *"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.[….]*
>
> *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 pursuant to s. 37(2) of the Act."*

34. The above has recently been reaffirmed by the Supreme Court in *Minister for Justice and Equality v. Buckley* [2015] IESC 87. Therefore, 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. Thus, the hurdle the respondent must overcome, to demonstrate that his surrender is prohibited on a fundamental rights basis, is truly significant.

35. Further written and oral submissions were made to this Court by both parties on the adjourned hearing date of 5th November, 2015. Various decisions of the ECtHR, dealing with Article 5 of the ECHR, were placed before the Court. Particular reliance was placed upon the decisions 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) by the respondent. Counsel for the respondent submitted that there is little doubt that presumptions against bail and reverse-onus practices in the context of bail applications are contrary to the essence of Article 5.

36. In *Kudla*, the Grand Chamber of the ECtHR stated at para. 111:

> *"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."*

37. In *Ilijkov*, at issue was the Bulgarian law on bail, set out at para. 57 of the ECtHR judgment as follows:

1) Detention on remand shall be imposed [in cases where the charges concern] a serious wilful crime.

(2) In the cases falling under paragraph 1 [detention on remand] may not be imposed if there is no danger of the accused evading justice, obstructing the investigation, or committing further offences."

38. The ECtHR in Ilijkov commenced by confirming the principle set out in Kudla above. Following that confirmation, the ECtHR held:

79. As to the grounds for the continued detention, the domestic courts applied law and practice under which there was a presumption that detention on remand was necessary in cases where the sentence faced went beyond a certain threshold of severity (ten years' imprisonment according to the law as in force until June 1995 and five years' imprisonment thereafter).

80. The severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. The Court accepts that in view of the seriousness of the accusation against the applicant the authorities could justifiably consider that such an initial risk was established.

81. However, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand (see, as a recent authority, Jecius v. Lithuania, no. 34578/97, § 94, ECHR 2000-IX). That is particularly true in the present case where under the applicable domestic law and practice the characterisation in law of the facts - and thus the sentence faced by the applicant - was determined by the prosecution authorities without judicial control on the question whether or not the evidence supported reasonable suspicion that the accused had committed an offence attracting a sentence of the relevant length (see paragraphs 43, 44, 49, 53, 55 and 71 above).

82. The only other ground for the applicant's lengthy detention was the domestic courts' finding that there were no exceptional circumstances warranting release.

83. However, that finding was not based on an analysis of all pertinent facts. The authorities regarded the applicant's arguments that he had never been convicted, that he had a family and a stable way of life, and that after the passage of time any possible danger of collusion and absconding had receded, as irrelevant (see paragraphs 43-47, 49 and 53 above). They did so because by virtue of Article 152 of the Code of Criminal Procedure and the Supreme Court's practice the presumption under that provision was only rebuttable in very exceptional circumstances where even a hypothetical possibility of absconding, re-offending or collusion was excluded due to serious illness or other exceptional factors. It was moreover incumbent on the detained person to prove the existence of such exceptional circumstances, failing which he was bound to remain in detention on remand throughout the proceedings (see paragraphs 59 and 71 above).

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, 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."

39. Counsel for the minister submitted that the High Court decision in the case of *Minister for Justice v. Ollsen* [2008] IEHC 37 was also relevant in so far as it dealt with Swedish pre-trial detention laws. That issue was not pursued on appeal to the Supreme Court. The judgment of the Supreme Court dealt with other issues and has been referred to previously in this judgment (note that judgment was given under the spelling Olsson). In the course of argument in the High Court in *Ollsen*, it was submitted that there was no bail system in Sweden. The respondent, in my view correctly, does not seek to submit that there has to be an equivalence of our bail system which is a system of pre-trial release based upon entering what is, in effect, a monetary based agreement, i.e. a recognisance. There is, as has been pointed out in *Attorney General v. Pocevicius*, a difficulty in seeking to apply our understanding of certain legal terms to the legal systems of other States. 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.

40. In *Ollsen*, the High Court (Peart J.) held that there was a system of pre-trial release in Sweden. He noted that there was no case against Sweden at the ECtHR in which the regime had been subjected to criticism, much less an adverse finding. Peart J. held 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.

41. The respondent seeks 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. Counsel distinguished this case on the basis of the evidence of Swedish law available here and also on the basis of the evidence of the decision made in Sweden on bail for the respondent. In those cases, he submitted *Ollsen* cannot be relied upon.

Determination

42. There is a presumption in s. 4A of the Act of 2003, as amended, that Sweden will comply with the requirements of the 2002 Framework Decision. The Framework Decision expressly states that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. Article 6 provides, *inter alia*, that the European Union ("E.U.") shall respect fundamental rights as enshrined in the ECHR. The 2002 Framework Decision is

based upon a principle of mutual recognition of judgments in the field of criminal law and upon a high level of confidence between Member States. Recital 10 states that the implementation of the 2002 Framework Decision may be suspended only in the event of a serious and persistent breach by the Member States of the principles set out in Article 6(1) as determined by the Council.

43. The High Court must accord to Sweden a presumption that it will comply with obligations under Article 6 of the Treaty on European Union and with respect to obligations under the ECHR. That presumption is rebuttable. The burden rests on the respondent to adduce evidence that there are substantial grounds for believing that he is at real risk of being exposed to a flagrant denial of justice (see *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783 and *Attorney General v. Damache* [2015] IEHC 339.)

44. The facts of this case demonstrate that Sweden operates a system whereby pre-trial release from detention may be ordered. On the basis of the evidence before me, the legal regime in operation in Sweden means that 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. I accept that the additional information sent by the issuing judicial authority establishes that Swedish law requires a weighing up of the detriment to the suspect and other interests as against the detention of the person. Indeed, that provision of law was apparent from the ruling of the Attunda District Court which forms part of the papers before me. The ruling states, under the heading "Probable Cause for Detention to Consider", "[t]he causes for detention outweigh the disruption that this action means for [W.B.] or any other opposing interest".

45. I also note that the respondent's Swedish lawyer does not dispute the requirement for a weighing of interests in the recent e-mail he sent. I am also 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. In that regard, I would comment that, although the respondent exercised his right not to appear in Sweden at the hearing, his absence from that jurisdiction was perhaps not surprisingly noted by the Swedish court to be not without significance.

46. The respondent urges this court to find that a) the Swedish law amounts to a presumption against bail and b) that the decision of the Attunda District Court itself shows that there are deficiencies in the Swedish system amounting to a reversal of the onus onto the accused.

47. The respondent relied upon the views of the authors of 'Humans Rights and Criminal Justice' (Emmerson and Others, 3rd Ed. 2012, Sweet and Maxwell). The authors summarised the effect of the case-law on Article 5 in stating that there is a presumption in favour of release and continued detention can only be justified if there are specific indications of a genuine requirement of public interest which outweigh the rule of respect for individual liberty having regard to the presumption of innocence. In the view of the distinguished authors at p. 364:

> *"[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."*

48. Accepting that as an authoritative statement of the law, it can been seen from the case law of the ECtHR relied upon by the respondent, and referred to by the applicant, 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. For example, in *Labita, Kulka* and *Ilijkov*, the ECtHR commenced with a statement of the law to the effect 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. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty."*

49. Furthermore, the ECtHR has determined that *"[w]hether it is reasonable for an accused to remain in detention must be assessed in each case according to its specific features. 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."* (See, for example, para. 152 of *Labita* citing *W v. Switzerland* (26 January 1993, Series A no. 254-A, p. 15, § 30). In *Labita*, the case of *Contrada v. Italy* (app. no. 27143/95, 14 January 1997, Decisions and Reports 88-B, p. 112) is cited. In Contrada, the relevant Italian law provided that there was a rebuttable presumption that detention was required with regard to particularly serious offences (see para. 38 of the judgment). The ECtHR referred to that presumption in its decision without criticism, and indeed with implied approval, as it did not find any violation of Article 5.

50. Similarly, in *Ilijkov*, the Bulgarian legal provisions, which are in many ways similar to those at issue here, were not condemned as unlawful in and of themselves. On the contrary, in *Ilijkov*, it was the continued detention over a lengthy period and the failure to engage with the concrete facts that lead the ECtHR to find a breach of Article 5. Of particular significance is that the ECtHR in Ilijkov held, at para. 80, that *"the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending [and that] [t]he Court accept[ed] that in view of the seriousness of the accusation against [that] applicant, the authorities could justifiably consider that such an initial risk was established."*

51. In Sweden, the existence of probable cause that the person committed the serious offence is the basis for the deprivation of liberty applicable in the respondent's case. The seriousness of the offence includes the severity of sentence and is a relevant element in the assessment of the risk, amongst other matters, of absconding. Moreover, in Sweden probable cause is not a sole or automatic basis for determining the deprivation of liberty. The Swedish court must also consider whether it is obvious that such detention is unnecessary. There is nothing in the case law of the ECtHR that demonstrates that such a legal regime is, of itself, contrary to Article 5. If it is obvious that detention is unnecessary, the person must be released. It has also been established that there is a weighing of the detriment to the accused and the other interests as against the detention of the accused.

52. The reference to the presumption in favour of release by the authors of 'Human Rights and Criminal Justice' must be considered in light of the justification for continued detention where there are specific indications of a genuine requirement of public interest which outweigh the rule of respect for individual liberty, having regard to the presumption of innocence. 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.

53. The Swedish Criminal Code, from the evidence before the Court, 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. Nonetheless, from an examination of all the evidence, including various references in the decision of the Attunda District Court, I am satisfied that the risk of absconding or of interference with the investigation/evidence form the basis of the decision making process on behalf of a Swedish court considering pre-trial release. The reference to detention on probable cause of having committed a serious offence is therefore directed towards the assessment of those genuine requirements of public interest. Furthermore, the weighing up of interests is an assessment of the sufficiency requirement required under Article 5 ECHR.

54. In all those circumstances, I do not find 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 amounts to an evidential presumption that there is either a risk of flight or of interfering with evidence. That, however, is rebuttable and detention may not be ordered where it is unnecessary. Thus, the Swedish Criminal Code only provides for pre-trial detention where the reasons are relevant and sufficient.

55. Therefore, there is no basis for saying that the Swedish provisions are in violation of Article 5 rights. In those circumstances, no egregious breach has been established and the respondent is not at real risk of being subjected to a flagrant denial of justice.

The particular decision of the Attunda District Court
56. The respondent has also urged upon the Court that the decision of the Attunda District Court must be taken into account in assessing whether the respondent would be subjected to an egregious breach of his rights on surrender. In particular, much emphasis was placed upon the determination that this respondent would interfere with witnesses. This was a reference by the District Court that the detention of the person is necessary in light of the finding that there is a risk that the respondent will, through removal of evidence or in other ways, obstruct the investigation of the case. It is stated that the prosecutor's submission that there was a risk that he might try to affect witnesses, in particular his friend who was present "during the sojourn in Stockholm", was without foundation and no evidential basis was laid.

57. In reality, although counsel strongly urged the opposite, the submissions of counsel amounted to a request that this Court substitute its view for that of the Court in Sweden as to the necessity for pre-trial detention. The High Court has a duty to consider fundamental rights in the context of the operation of the system of surrender under the Act of 2003 (see s. 37 and also the decision of the Supreme Court in *Minister for Justice v. Strzelecki* [2015] IESC 15). As this court has found in *Minister for Justice and Equality v. Marjasz* [2012] IEHC 233 and *Minister for Justice v. Rostas* [2015] 1 I.L.R.M. 1, there is a non-statutory general presumption that where there has been a conviction, it has been as the result of a fair trial.

58. In *Marjasz*, the High Court (Edwards J.), with reference to the jurisdiction of the court to prohibit surrender on the basis that the underlying trial was unfair, stated at paras. 24-25: *"The Court would add, however, that this jurisdiction is likely to be exercised very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial, and where there is also evidence that all possible remedies / avenues of review / appeals in the issuing state have been tried without success and have been exhausted. It follows from what the Court has just said that in a conviction case the Court will, in general, be most reluctant to engage in any review of the trial process leading to the conviction on foot of which the warrant is based to determine whether it was fair and lawful. The default and starting position in all cases will be that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair and respected the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state."*

59. The principles set out in *Marjasz*, by extension, also apply to the High Court's jurisdiction to review a decision taken by a court in the issuing state in relation to pre-trial detention. 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.

Conclusion
60. In light of the foregoing, I conclude that Sweden has a system of pre-trial release (what in this jurisdiction is called and operated as a system of bail). The respondent has not discharged the onus that the system that operates in Sweden amounts to an egregious breach of fundamental rights. On the contrary, having heard evidence of the Swedish legal provisions I am satisfied that the system that operates in Sweden is compliant generally with the provisions of the ECHR. Furthermore, this respondent will be entitled to appeal the decision that has already been made as regards his pre-trial detention on surrender. I must proceed on the presumption that Sweden has respected the respondent's rights under Article 5 in its approach to the pre-trial detention issue in the previous hearing. Nothing on the papers gives rise to any necessity to make any further enquiry in that regard.

61. In summary, the respondent has not demonstrated substantial grounds for believing that there is a real risk of being subjected to a flagrant denial of justice with respect to pre-trial detention on surrender. I therefore reject this ground of objection to surrender.

B. Restrictions on Remand Prisoners
62. On affidavit, the respondent's solicitor raised an issue regarding the use of restrictions on remand prisoners. This was not raised in the point of objection and was not pursued in oral arguments. There is reference in the CPT reports to concerns regarding the use of these restrictions. The Swedish issuing judicial authority responded to the contents of the affidavit by saying that during 2015, guidelines were issued on the use of restrictions during pre-trial detention, which apparently have as a purpose to limit the use of these restrictions and to emphasize the importance of limiting the duration of detention and their prolonged use. In all the circumstances, the Court is not put on its enquiry any further and I am of the view that his surrender is not prohibited on this basis.

C. Article 8

63. The respondent raised an Article 8 point in his points of objection and on affidavit. It was not expanded upon in oral submissions. He has a young child and says it is disproportionate not to permit him to remain in the State pending the outcome of the investigation. The use of the word investigation belies the fact that this is a criminal prosecution. Furthermore, this is an allegation of a very serious criminal offence, i.e. rape. It is not clear that surrender for the purpose of prosecution for this alleged offence would amount to an interference with his right to respect for family and personal life but assuming it does constitute an interference, I am quite satisfied that the high public interest in the surrender of the respondent for the alleged offence of rape (in particular a relatively recent alleged offence) outweighs the interference with the personal and family life (and indeed the family rights of his child) of this particular respondent. There is nothing in the respondent's affidavit that demonstrates that the consequences to him or his family are over and above the consequences inherent in every surrender to face a criminal trial in another country. No particularly, not to mind exceptionally, injurious or harmful consequences to the respondent or his family have been established on the evidence. I therefore reject this point of objection.

Conclusion

64. The surrender of the respondent is not prohibited by any ground set out in the Act of 2003. I therefore may make an Order under s. 16 of the Act of 2003 surrendering him to such person as is duly authorised by the issuing state to receive him.