Neutral Citation Number: [2008] IEHC 37

THE HIGH COURT

Record Number: 2006 No. 166 Ext

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

AND
THOMAS OLLSEN

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 20th day of February 2008

1. The surrender of the respondent is sought by the Kingdom of Sweden pursuant to a European arrest warrant issued there on the 5th August 2006. This warrant was endorsed for execution by order of the High Court on the 19th December 2006, and the respondent was duly arrested here on foot of it on the 5th July 2007. As required by s. 13 of the European Arrest Warrant Act, 2003, as amended, he was brought before the Court following his arrest and was remanded from time to time pending the hearing of this application for an order of surrender under the provisions of s. 16 of the Act.

2. His surrender is sought, according to the applicant, so that he can be prosecuted in Sweden in respect of four offences. In respect of these offences, the issuing judicial authority has in paragraph (e) of the warrant ticked two categories of offences, namely 'arson' and 'organised or armed robbery' in order to indicate that the offences for which his surrender is sought are offences within the categories of offences referred to in Article 2.2 of the Framework Decision, and therefore offences in respect of which double criminality or correspondence does not need to be verified. Even if these boxes had not been ticked to so indicate, there is no doubt that the alleged acts of the respondent which are said to give rise to these four offences would, if done in this jurisdiction, have given rise to offences here. No issue has been raised in relation to double criminality/correspondence in the Points of Opposition filed and delivered on behalf of the respondent.

3. No issue has been raised in relation to the identity of the respondent, and the Court is in any event satisfied, as it must be, that the person who was arrested and brought before the Court following arrest on the 5th July 2007 is the person in respect of whom this European arrest warrant has been issued.

4. The respondent has raised a number of objections to the making of an order for his surrender, but subject to reaching conclusions on these objections, I am satisfied that there is no reason to refuse surrender under sections 21A, 22, 23 or 24 of the Act, and I am satisfied also that his surrender is not prohibited by the provisions of Part III of the Act, or the Framework decision.

Points of Objection

1. The Attorney General Scheme

5. Under this heading of objection the respondent submits that this State is in breach of one of its obligations under the Framework Decision, namely to provide the respondent with an adequate and fair means to pay the reasonable legal and other costs incurred in meeting the application for his surrender, and in this regard it is submitted that the provision or availability of the Attorney General Scheme ("the Scheme") as a means of discharging his legal costs is inadequate to meet that obligation. Accordingly it is submitted that this Court should not entertain the application for his surrender to the requesting state, because by virtue of the provisions of s. 10 of the Act a person may be surrendered only where the provisions of the Act are met, and where the State's obligations under the Framework Decision are complied with.

6. Derek Kenneally SC submits on behalf of the respondent that it is accepted by the applicant that the respondent is not a person of sufficient means to discharge his own legal costs, and that the applicant accordingly is obliged to provide him with legal representation which is adequate and fair; and that a breach of the 'equality of arms' principle arises where the respondent can have his legal costs discharged only under the Scheme, given its nature, namely an ex gratia scheme. Indeed the applicant has not sought to dispute that the applicant's means are insufficient to enable him to provide his own representation on this application.

7. It is submitted that the Scheme takes no account of the actual costs and other fees incurred by the respondent in his opposition to the order sought, since the level of fees discharged under the Scheme is based on the fees paid to the applicant's Counsel, and that it is in the nature of an ex gratia payment provided on the basis of expediency and at the absolute discretion of the Attorney General.

8. In this regard the respondent has stated that for the purpose of resisting this application for his surrender he has been required to obtain legal opinion and an affidavit from a Swedish lawyer in relation to Swedish law, without any guarantee that the cost of so doing will be met under the Scheme, and in circumstances where, by contrast, the applicant can obtain such opinions either at no cost at all or at a cost which will be met out of public funds. This is said to create an unfairness which breaches the principle of equality of arms, particularly in circumstances where the respondent's solicitor has sought an undertaking that his reasonable costs will be discharged and where the applicant has refused to provide such an undertaking. The respondent submits that he is unfairly disadvantaged as a result.

9. The respondent submits that this State is in breach of its obligations under Article 11.2 of the Framework Decision, as well as Article 6 of the European Convention on Human Rights ("the Convention"), and Articles 40.4.1 and 40.3.1-2 of Bunreacht na h-Eireann ("the Constitution").

10. Article 11.2 of the Framework Decision provides:

> "11.2. *A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.*" (my emphasis)

11. Section 13 (4) of the Act provides:

> *(4) A person arrested under a European arrest warrant shall, upon his or her arrest, be informed of his or her right to—*
>
> > *consent to his or her being surrendered to the issuing state under section 15, obtain, or be provided with, professional legal advice and representation, and where appropriate, obtain, or be provided with, the services of*

an interpreter. (my emphasis)

12. Mr Kenneally has referred also to the provisions of Article 6.3 of the Convention which, *inter alia*, provides that "everybody charged with a criminal offence has the *… minimum right … to have adequate time and facilities for the preparation of his defence [and] to defend himself in person or through legal Counsel of his or her choosing or, if he has not sufficient means to pay for legal assistance to be given it free when the interests of justice so require …*" (my emphasis)

13. The Scheme itself has been produced to the Court, and it is relevant to set out some of the contents of the document:

> *"6. The costs payable to the solicitor, and the fees payable to counsel are at most those which would be payable in a case governed by the Criminal Justice (Legal Aid) Regulations current for the time being, applied mutatis mutandis"*

14. It provides also that where the Court makes a recommendation for payment of costs and fees under the Scheme, "*the Attorney General is not bound by the recommendation of the Court*".

15. Mr Kenneally submits that such a discretionary basis of payment cannot be an adequate discharge by the State of its obligations pursuant to the Framework Decision, especially where a respondent has no remedy available to him/her if the Attorney General was to exercise his absolute discretion to refuse to make a payment even though the Court had made a recommendation in that regard.

16. He has referred to the judgment of Gannon J. in the High Court and that of O'Higgins CJ in the Supreme Court in *State (Healy) v. Donoghue* [1976] IR 325, and to the judgment of the European Court of Human Rights in *Airey v. Ireland*, 9th October 1979 regarding the State's obligation to provide legal aid in particular circumstances, and it is submitted the Scheme is not such a system of legal aid given its ex gratia and non-statutory nature.

17. It is submitted that payment under the Scheme is made only in respect of actual court time and takes no or no adequate account of time spent by Counsel and solicitor in the preparation of the case, and in this way a respondent is disadvantaged in a way which does not hamper the lawyers acting for the applicant, who has all the resources of the State at his disposal. It is submitted that the rate of such payments as are made falls far short of the economic cost that work. James MacGuill, the respondent's solicitor, has stated in an affidavit that it is his experience over many years of practice as a solicitor that the level of payment made under the Scheme falls far short of what would be assessed by the Taxing Master for the same work. He states at paragraph 9 of that affidavit:

> *"… It is a particularly pernicious aspect of the Attorney General's Scheme in that lawyers are forced into a position of either only carrying out work for which they will be paid, to the obvious detriment of their client, or discharging their professional obligations fully to their own economic cost."*

18. In support of these submissions the respondent has also filed an affidavit sworn by a Legal Costs Accountant, Cormac Breathnach. He avers to the fact that in another case (Aamond No.2) where the respondent successfully resisted an application for his surrender, costs were taxed pursuant to the order of the High Court, the respondent's solicitor's costs being taxed in the sum of €20,428.55 plus VAT, Senior Counsel's fees in the sum of €12,000 plus VAT, and Junior Counsel's fees in the sum of €10,333.33 plus VAT.

19. Mr Breathnach states that if senior counsel's fees were discharged under the Scheme, they would have been in the sum of just €4000, with the same sum being paid to the solicitor, and two thirds of that sum to junior counsel, thereby creating a considerable shortfall between what is paid under the Scheme and what was achieved under taxation. He considers the shortfall in such cases to be in the region of about 75%.

20. The solicitors acting for the respondent have corresponded with the Chief State Solicitor's office in relation to these concerns. The Chief State Solicitor has noted in that correspondence that the respondent has not sought to have his costs discharged under the Scheme, and has on a couple of occasions invited the respondent to do so, and has made the point that neither the Scheme nor the statutory Legal Aid Scheme are intended to provide taxed costs, but that payments under the Scheme can in certain cases include the cost of expert witnesses, though the point is made also that this has not arisen before in the context of a European arrest warrant.

21. The point is made in a letter dated 21st September 2007 that the recoverability of expert witness expenses will depend on the nature of the evidence and legal argument presented, and it is denied that payment under the Scheme is confined to court time only. It is stated in that letter also that the Scheme, if applied for, fulfils the State's obligations under the framework Decision and that it is adequate to afford the respondent the opportunity to contest the application for his surrender.

22. In the event that this Court considers this State not to be in breach of its obligations, then the respondent seeks a declaration that the Framework Decision and the Act are unconstitutional and in breach of the Convention.

23. Because the constitutionality of the Act and the Framework decision is raised by the respondent on this application, the Attorney General was put on notice of the application. In fact, Plenary proceedings are issued in order to address the constitutionality issue.

24. David Barniville SC has appeared on behalf of the Attorney General and it is convenient to deal with his submissions on this point before dealing with the other points of objection raised by the respondent. Shane Murphy SC for the applicant makes essentially the same submissions in relation to this point of objection.

25. Mr Barniville submits that the right of the respondent to a European arrest warrant to be provided with professional legal advice and representation arises only from the provisions of s. 13(4) of the Act by which the State has given effect to the right in that regard specified in Article 11.2 of the Framework Decision already referred to, and not from the Constitution. It is not a right, it is submitted, which is guaranteed under the Constitution or the Convention since a respondent is not engaged in the defence against a criminal charge, but simply meeting an application for his surrender from this State to another State. As such, the situation of a respondent is to be distinguished from an accused person facing charges.

26. In so far as the respondent has relied upon the judgments in *State (Healy) v. Donoghue* [supra] Mr Barniville submits that the principles derived therefrom are not simply transferable to a respondent under a European arrest warrant. However, he submits also that were the two situations to be considered analogous, it is nevertheless the situation that the right to legal aid is not to be seen as an open-ended right for any representation which the respondent might choose to have, and that it is accepted, even in relation to legal aid, that an accused may be assigned a solicitor from the 'legal aid panel', being solicitors who have thereby indicated that they are prepared to take on such cases, and be remunerated under the provisions of that scheme. In this regard, Mr Barniville has

referred to the judgment of Barr J. in *The State (Freeman) v. Connellan* [1986] IR. 433.

27. The Court was also referred to the judgment of Laffoy J. in *Carmody v. Minister for Justice* [2005] 2 ILRM. 1 in which the learned judge found that there was no breach of constitutional rights where only a solicitor was assigned, rather than solicitor and counsel. During the course of her judgment, Laffoy J. stated also that the fact that there may in terms of lawyers be a numerical imbalance or divergence of legal qualification between the prosecution team and the defence team, does not disadvantage the accused person to the extent that his constitutional guarantee to a fair trial is imperilled, unless it can be shown that the lawyer defending him cannot do so effectively.

28. Accordingly it is submitted that in the present case there ahs been no breach of any constitutional right.

29. In so far as the respondent objects to his surrender on the basis that certain rights under the Convention will be infringed, the applicant and the Attorney General submit in relation to this particular point of objection (i.e. the Attorney General Scheme) that it is clear that as far as Articles 3, 5 and 8 of the Convention are concerned, none is engaged in relation to provision of legal advice and representation. In so far as these Articles may be relevantly argued in relation to other points of objection, they are dealt with later in relation to same. In my view, it is unnecessary to dwell on those particular articles at the moment. They are not relevant to this issue under consideration.

30. But in relation to Article 6 of the Convention, Mr Barniville has submitted that the surrender procedure under a European arrest warrant does not equate to a trial for an offence, and that as such, Article 6 is not engaged. But, he submits, even if it were to be found to be so engaged, the minimum rights guarantee is met by the provision of legal assistance under the Scheme, and the right guaranteed is not to have provided to the respondent the same level of representation as the applicant, and that there are no mandatory levels of such assistance. He has referred to a number of judgments of the European Court of Human Rights in support of this submission. He refers also to the judgment of Murray CJ in *Attorney General v. Parke*, unreported, Supreme Court, 6th December 2004 wherein he stated that the inquiry by the Court in an extradition application is not adversarial in nature, but rather is '*sui generis'*, and not in the nature of a criminal trial.

31. In any event, Mr Barniville submits that the Scheme by reference to its own terms is a method of payment of reasonable legal fees for persons who cannot be considered able to pay for their own advice and representation, and that it is a reasonable payment in applications on foot a European arrest warrant, and the use of the Scheme in such applications cannot be seen to constitute a breach of minimum rights under Article 6 of the Convention, even if that Article is engaged in such applications at all. He submits that it is simply inappropriate and wrong to compare the level of fees gained upon taxation of costs with payment under the Scheme. I agree that such a comparison is irrelevant, even though I accept as a fact that in most if not all cases, the costs achieved on taxation will most likely exceed by a considerable margin those paid under the Scheme.

32. Mr Barniville points to the fact in any event that in the present case the respondent has declined to have his fees met under the Scheme, even though the applicant has considered that he meets the criteria for its application, and has invited the applicant to apply for a recommendation in that regard. He points also to the fact that the respondent has nonetheless had available to him the expert services of an experienced solicitor and both senior and junior counsel, and clearly has suffered no disadvantage. He submits that in such circumstances the respondent lacks '*locus standi*' to raise the issue on this application.

33. I prefer not to reach conclusions on this point merely on the *locus standi* point.

34. However, it seems to me that there may well be merit in that point, and that a respondent to an application to surrender would have to show not simply that he had no means of obtaining and paying for his own legal costs, but also establish that he had been unable to obtain the services of a solicitor who was prepared to take the case on the basis of being remunerated under the Scheme. Such a respondent would necessarily stand before the Court with no lawyer to represent him, and the Court might in such circumstances be obliged to delay the hearing of the application for his surrender until such time as that legal advice and representation was provided. But that is entirely different from saying that the State is in breach of its obligations because the lawyers who have been engaged, on whatever basis, are unhappy with the level of their remuneration under the Scheme.

35. I am fully cognizant of what is probably the reality in the present case, and that a deliberate decision was taken at the outset by the present solicitor and counsel not to seek to have their fees discharged under the Scheme, lest by so doing the respondent would indeed be found to lack locus standi, or at least that their arguments and submissions might be considered to be weaker.

36. I am presuming, and I suggest safely so, that by not seeking a recommendation for the Scheme in circumstances where if they done so it would certainly have been granted, the respondent's lawyers are preferring to run the risk that they will not recover any costs in relation to this case should none of the points of objection succeed, and so that this point can be the more easily argued.

37. The Court cannot blind itself to the fact that for many years now lawyers have found the Scheme unsatisfactory both in terms of the level of remuneration thereunder, its discretionary and non-statutory nature, and the speed, or perhaps more correctly the lack of it, by which payment is actually received. But while there may be disquiet in relation to the way the Scheme operates, the fact is that every day of the week lawyers appear before the High Court on applications such as Habeas Corpus, Bail, EAW applications, and judicial review, and those Counsel are always instructed by solicitors. In other words there appears to be no shortage of lawyers in both branches of the profession who are prepared to act for clients on the basis of remuneration under the Scheme, in spite of what they perceive as its shortcomings. Until that situation ceases it appears to me that the Scheme works in the sense that it ensures that persons who have an entitlement to legal representation before a Court, whether in a criminal matter or otherwise, and a matter such as the present case, are professionally represented. Indeed in the very large number, perhaps over a hundred, of EAW cases which I have dealt with since 1st January 2004, when the Act first came into effect, I have not known a case in which at the very earliest stage following arrest a respondent has been unable to obtain, or even had difficulty obtaining the services of a solicitor with experience in this area of work, and on all occasions also Counsel have been retained. I can think of no such case.

38. It seems to me that if lawyers wish to have the Scheme improved or even replaced, there are channels available within which that objective can be argued for, and possibly advanced, but this Court is not the appropriate forum in which to advance that cause on the basis that a respondent's constitutional and Convention rights are infringed by the level of fees payable under the Scheme, and by attempting to establish that the State is in breach of its Framework Decision obligations, or its constitutional and Convention obligations.

39. However, having said that much I will retu8rn to some of the issues raised.

40. In my view, a respondent has no absolute right under either the Constitution or the Convention to the services of the solicitor and

counsel of his choice, or simply of a solicitor of his choice. As it happens in this case, the respondent has the lawyers of his choice. He has been at no disadvantage whatsoever in having his objections raised and argued fully. In my view the basis of that retainer is of no relevance.

41. The State's obligation under the Framework Decision, as reflected in and given effect to by s. 13(4) is to ensure that on the hearing of the application for surrender the respondent has either had the opportunity to obtain professional legal advice, or where he cannot afford so to do, be provided with such advice and representation. The applicant and the Attorney General are in my view correct when they submit that the right of the respondent in this regard derives not from the Constitution or the Convention, but from the State's obligations under the Framework Decision. Even if this was not the case, and the right arises under the Constitution, I am satisfied that the availability of the Scheme is a sufficient of any such obligation, since it can be seen to provide successfully a means by which relevant impecunious litigants can have representation before the Court. Different considerations would arise if for whatever reason the Scheme did not secure that representation. Lawyers from both branches of the profession are free to choose not to take a case on the basis of that form and level of remuneration. But there is no evidence that such a choice is made by so many that it has become ineffective as a means of achieving legal representation in cases to which the Scheme applies for those entitled to it.

42. As far as Article 6 of the Convention is alleged to be breached by the State by the application of the Scheme, I should for the sake of completeness refer to the judgment of the European Court of Human Rights in *Mamatkulov v. Turkey*, ECHR, 4th February 2005 which was referred to in argument before me. In that case, the extradition of the applicant was sought from Turkey to Uzbekistan, and it was argued, inter alia, on behalf of Mr Mamatkulov that the extradition application heard in Turkey was an unfair hearing and in violation of the applicant's rights under Article 6 of the Convention. The facts of the case are of course completely different to the present case, but it is important to note that in its judgment, the Grand Chamber, in finding no such violation, stated at paras 82-83:

> *"The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6.1 of the Convention …… Consequently, Article 6.1 of the Convention is not applicable in the instant case."*

43. This Court is obliged to have regard to the jurisprudence of that Court, and I am satisfied therefore, even though I have reached conclusions in any event on the merits of the issue raised, that the respondent is not entitled to rely upon the rights guaranteed in Article 6 for the purpose of raising objection to an order for his surrender.

2. Warrant has been issued for the purpose of continuing an investigation in Sweden, and not for the purpose of prosecuting the respondent for the offences in question

44. Before addressing the applicant's submissions under this point of objection, I should refer to the fact that in the opening paragraph of the warrant the prescribed text for the warrant has been followed exactly by stating that the surrender of the respondent is requested "*for the purpose of conducting a criminal prosecution….*"

45. Relevant also are the provisions of s. 21A of the Act, as amended, namely:

> *21A.-(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state. (my emphasis)*
>
> *(2) Where 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." (my emphasis)*

46. It is this presumption which the applicant seeks to rebut by reference to an affidavit as to Swedish law sworn by a Swedish lawyer, Hans Ostberg. He is the respondent's lawyer in Sweden who has been appointed by the Swedish court to represent him in relation to these alleged charges.

47. The thrust of this affidavit is that the prosecutor in Sweden has not as yet made any decision to prosecute the respondent, and that his surrender is sought in reality so that a process of investigation and interrogation of the respondent can continue in order to reach a point when it can then be decided whether or not a decision to prosecute him should be made.

48. Mr Ostberg states that in September 2007 he had a telephone conversation with the prosecutor responsible for preparing the prosecution case against the respondent, namely Ann-Christine Maderud, and that as a result of that conversation the situation is that the status of the respondent at the moment is that "*the respondent is on probable cause suspected of committing serious crimes and the court has decided that the respondent should be taken into custody*". He goes on to state that he is satisfied that the respondent's surrender is not being sought for the purpose of standing trial, and that no decision has yet been made that he should stand trial. Rather, he states, the surrender is sought "*only for the purpose of a continuing investigation and not for the purpose of the respondent being charged with or standing trial in respect of any offence…*".

49. Ms. Maderud has sworn a replying affidavit in relation to what Mr Ostberg has stated. She states that under Swedish law a pre-trial investigation is initiated to find out who is reasonably suspected of the crime and if there is sufficient evidence to prosecute him. That pre-trial investigation is initiated by the police, and as soon as a person is "reasonably suspected of the crime" the prosecutor takes over the case where a serious crime is involved, as in this case. She goes on to explain that "*it is the prosecutor's duty to prosecute everyone who is suspected of having committed a crime, on the prosecutor's judgment that there is enough evidence to allow the court to find the suspect guilty*".

50. She then states that on the 2nd August 2006 the District court found the respondent to be suspected "on probable cause" of the offences in question, and ordered his arrest since he was not in court on that date, although he was legally represented at the court by a colleague of Mr Ostberg who on the previous day had been assigned as the respondent's public defender free of charge. She states that on 29th August 2006 Mr Ostberg, who is in the same law firm as that colleague, was assigned to replace him, and Mr Ostberg has since continued to represent him.

51. At paragraph 5 of her affidavit she explains further the procedure under Swedish law as follows:

> *"The next step in the procedure requires the presence of the accused. Under Swedish law the investigation process can*

only be formally concluded when the accused is present. The accused must be presented with the information obtained in the investigation and given an opportunity to reply to same. However no formal charges can be laid until the conclusion of the investigation as the prosecutor is legally incapable of arriving at a final decision to prosecute until they meet the accused and hear his objections and perhaps obtain additional evidence. This is an essential part of the process and is designed to protect the accused's rights. While there is an intention to prosecute on the basis of the available evidence, the requested person has at all material times been abroad and has not been available to be interviewed and the procedure cannot be finalised in his absence. The respondent's surrender is therefore sought for the purpose of conducting a criminal prosecution in respect of the above serious offences, although by Swedish law a final decision to prosecute can only be taken if the above procedure is followed and the respondent's rights protected ……". (my emphasis)

52. At a later stage she states that the Kingdom of Sweden only issues European arrest warrants for the purpose of either conducting a criminal prosecution or executing a custodial sentence or detention order, and that the European arrest warrant (i.e. in the present case) is issued for the former purpose.

53. It is on these facts that Mr Kenneally submits that the position is clear, namely that as of the present time the decision has not been made, in the words of s. 21A of the Act, as amended, "*to charge the person with, and try him or her for, that offence in the issuing state*", and that the presumption contained in s. 21A (2) has been rebutted.

54. Mr Kenneally has also referred to a letter dated 21st September 2007 from the Chief State Solicitor's office, received by the respondent's solicitors, wherein it is stated that in relation to these concerns raised by the respondent as to the purpose of the warrant clarification has been sought, but had not been received as of the date of that letter. That letter confirmed that "*if the request is not one for a trial that you and the Court will be informed that the application will not be proceeded with.*"

55. In Mr Kenneally's submission the affidavit of Ms. Maderud has confirmed the position in the respondent's favour. He points to the fact that no further confirmation was received from the Chief State Solicitor's office in the form of the letter promised, and that this fact also confirms that the position is as submitted by the respondent in spite of the contents of Ms. Maderud's affidavit, namely that his surrender is sought only so that he can be further questioned.

56. Shane Murphy SC for the applicant has submitted that the affidavit of Ms Maderud makes it clear that the Swedish prosecutor intends to prosecute the respondent if he is surrendered, and that the only reason why the final decision has not been made in that regard is that Swedish law prevents that decision until such time as the respondent is physically present before the Court there. He points to the fact that Ms. Maderud has stated that it is intended that he shall be prosecuted, and in that regard he refers to the provisions of s. 10 of the Act which provides:

10.— Where a judicial authority in an issuing state duly issues a European arrest warrant in respect of a person—

(a) against whom that state intends to bring proceedings for an offence to which the European arrest warrant relates, or

(b) …

(c) …

(d) …

that person shall, subject to and in accordance with the provisions of this Act and the Framework Decision, be arrested and surrendered to the issuing state. " (my emphasis)

57. He submits that in the light of Ms. Maderud's affidavit the presumption in s. 21A(2) of the Act has not been rebutted, and urges the Court that in line with the well known Pupino decision of the European Court of Justice requiring a conforming interpretation to be given to the provisions of the Act, this Court should be satisfied that the position of the respondent under the law of Sweden is that the prosecutor there intends to prosecute the respondent, and that he will face a trial if surrendered.

58. In my view the opening paragraph of the warrant makes it clear first of all that the surrender is sought for the purpose of conducting a prosecution. It says so directly, and the fact that this paragraph is part of a prescribed text for the warrant cannot be regarded as being simply formulaic. This Court is entitled to presume, based on the mutual trust and confidence which underpins the arrangements for the European arrest warrant under the Framework Decision, that the issuing judicial authority in Sweden would not issue such a warrant in bad faith and for reasons other than the reasons provided for in the Framework Decision. The presumption contained in s. 21A (2) of the Act must be seen as based on that mutual trust and confidence, and in my view has not been rebutted simply be means of the averments made by Mr Ostberg in his affidavit.

59. It is also the fact that it is inevitable, in fact it is one of the very reasons for the introduction of a uniform system of surrender between Member States in order to simplify the process and remove the previous complexities which existed in relation to extradition, that the criminal procedures of various Member States will be different in many respects. It is unnecessary that this Court should examine in minute detail the criminal procedures in the Kingdom of Sweden. The system there is very different to that which pertains here. But Ms. Maderud has in my view made it clear that under the laws of Sweden the respondent is a person in respect of whom that state intends to commence a prosecution for the offences in question. That clarification or explanation was not necessary, given the opening paragraph of the warrant to which I have already referred but I can understand why the applicant sought additional information in order to put the matter beyond the doubt raised in the respondent's mind. It has made it clear that the respondent while in Sweden before his departure to this jurisdiction was a person who had been found to be a suspect with probable cause. Here we might describe that person as being one against whom the prosecution was of the view that there was a *prima facie* case. The fact that under the law of Sweden the charge cannot be actually laid in a formal sense until he is returned to be present at the Court cannot under the Framework Decision be interpreted as meaning that a decision to prosecute and try him for the offences has not been made. It is not open at this stage for the respondent to say that he is only sought so that he can be questioned as part of the investigation. It is clear that the process has advanced well beyond that point, and to the point that he will, subject to being afforded his rights to object when again before the District court, be prosecuted and tried for these offences. To find otherwise would be to ignore the reality which has been made clear in that affidavit.

60. In my view, even ignoring the presumption in s. 21A(2), the position has been established so that the Court can be satisfied that

a decision to prosecute the respondent and to try him has been made by the issuing authority. There remains only the formality of giving effect to that decision after the respondent has been surrendered and brought back before the District Court in Sweden so that the decision can be put into effect in accordance with the criminal procedure rules applicable there. It would run counter to the intention and purpose of the Framework Decision, as given effect to her by the Act, if this Court was to refuse to order his surrender.

3. The vagueness of the warrant in relation to its purpose is a bar to surrender
61. This point of objection raises no issue which I have not dealt with in the preceding point of objection, and I need add nothing further in relation to it.

4. No possibility of bail under the laws of Sweden should the respondent be surrendered
62. The respondent submits that given the fact that the law of Sweden contains no provision for what is known in this jurisdiction as 'bail' there are reasonable grounds for believing that his constitutional right to liberty will be breached if surrendered to Sweden, and that accordingly his surrender is prohibited by the provisions of s. 37 of the Act.

63. The factual basis for this point of objection is contained in the said affidavit of Mr Ostberg already referred to. In that affidavit, he states that he has acted for numerous defendants who have been held in custody for substantial periods of time without ever being charged or put on trial in Sweden. He says also that the law in Sweden does not permit the admission of a person suspected of or charged with criminal offences to bail, and that bail as it is known here does not exist in that country.

64. He states that in Sweden it is permissible that a person be held in custody for a period of unlimited duration. Later in that affidavit he states that there will be a court hearing every two weeks in relation to the detention of the detainee, and that on each occasion the prosecutor must present facts to the court as to why an investigation has not yet concluded. He states however that it is his experience as a lawyer that where a person is accused of serious crimes the prosecutor is routinely given the right to continue the investigation and interrogation of the detainee, and that it is not unusual for such investigations can take between two and four months.

65. Ms. Maderud responds to these averments in her affidavit to which I have already referred in another context. Ms. Maderud refers to the fact that Sweden is a party to the European Convention on Human Rights and Fundamental Freedoms, and that the Swedish court's consideration as to whether a person's continued detention is justified will consider whether that detention is proportional. She quotes a relevant provision of the Criminal Code of Procedure which stipulates that detention may occur only "*if the reason for detention outweighs the intrusion or other detriment to the suspect or some other opposing interest*".

66. She accepts that there no "bail system" as known in this jurisdiction, but that the Swedish system of release subject to travel restrictions and the obligation on the accused person to report to the police, is a similar system to 'bail', except that there are no financial conditions attached.

67. She states that this system conforms to the requirements of the Convention, and that there have been no decisions of the European Court of Human rights which have criticised this system. She states also that the system of release in Sweden is that the person concerned is released "*merely on his promise to comply with conditions*", and that no bail monies are required. It would appear also that the criteria used by the court in determining whether the accused should be released are whether there is a risk of flight, a risk that evidence might be destroyed, or that the accused might commit further crimes.

68. On behalf of the applicant, Mr Murphy has submitted that Mr Kenneally has looked only at the worst possible scenario for the respondent as far as the likelihood of detention is concerned, and that as Ms. Maderud has stated, there is the possibility that the respondent could be released under the law which she has explained, if the court considers that relevant criteria are met. He submits that the system for pre-trial release can be equated to 'bail' here except that no financial conditions are imposed as they are here.

69. I am completely satisfied that there is no basis for the respondent's contention that if surrendered he will not be entitled at least to apply for pre-trial release, and that his surrender therefore ought to be refused under s. 37 of the Act. It will be necessarily for the court in Sweden to determine his entitlement to such release and any conditions which may be appropriately applied. It is clear that under Swedish law there is the possibility for pre-trial release subject to appropriate conditions. In fact in as much as there is no possibility for the court there to impose financial conditions to that release, the regime there can be seen as being less stringent than the bail regime with which we are familiar here, and under which persons may still remain in custody in circumstances where, although considered suitable for bail release, the financial aspect of those conditions cannot be met.

70. The Court has been referred to no case against Sweden at the European Court of Human Rights in which the regime in Sweden has been subjected to criticism, much less an adverse finding. In any event, it is a fact that Sweden has been designated for the purpose of s. 3 of the Act as being a country with which this State will operate the surrender arrangements under the European arrest warrant. That implies that this State recognises that the relevant criminal justice procedures conform to, at the very least, the minimum standards required by the Convention.

71. This ground of objection must therefore fail.

5. If surrendered the respondent will be held in custody and incommunicado for an indefinite period of time
72. This ground of objection must also fail. It was suggested by reference to Mr Ostberg's affidavit that if held in custody pending his trial in Sweden the respondent may under the law of Sweden be held incommunicado while the investigation process continues for an indefinite period, and that accordingly he could be denied contact with family members and friends. It is submitted that such conditions constitute a breach of Article 8 of the Convention which guarantees that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*".

73. What is put forward by Mr Ostberg is a mere possibility in the sense that there appears to be a law which permits the court to direct that a person be held incommunicado. Ms. Maderud states in reply that the Court will decide whether the prosecutor is permitted to limit the accused's possibilities to communicate with other persons, and instances that he may be restricted as to what newspapers he can read, whether he may watch television, communicate by letter or use the telephone. But she goes on to state that prosecutors frequently allow accused persons to meet with family members and friends in the presence of police, but with a condition that he does not discuss the alleged crime, but that there is strict court control in relation to the accused's rights.

74. The respondent has not satisfied the Court that there is reason to believe that his constitutional or Convention rights will be breached in this regard if he is surrendered. While pre-trial procedures in Sweden are clearly different to what exists here, there is no evidence to establish in any way that minimum standards of rights' protection are not met. He has put forward an exaggerated spectre, divorced from reality, of someone who will be held in custody indefinitely for interrogation and incommunicado without even

the possibility of bail, while an open-ended investigation continues. There is no basis for such an extreme suggestion on the evidence before this court.

75. His surrender is not prohibited by anything submitted on this point of objection.

76. I am satisfied that the Court is required to make the order sought and I will so order.