



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 341

Record No: CA 2020/85

**Birmingham P.
Edwards J.
Ní Raifeartaigh J.**

THE MINISTER FOR JUSTICE & EQUALITY

RESPONDENT

V

CIARAN MAGUIRE

APPELLANT

Judgment of the Court delivered 4th December, 2020 by Mr. Justice Edwards

Introduction

1. This appeal is against the judgment and order of the High Court (Binchy J.) dated the 14th of February 2020, pursuant to s.16 of the European Arrest Warrant Act 2003 ("the Act of 2003") (as amended) directing that the appellant be surrendered to such person as was duly authorised to receive him on behalf of the United Kingdom of Great Britain and Northern Ireland ("the UK"), following the appellant's arrest on foot of a European Arrest Warrant issued by a judicial authority in Northern Ireland, namely a District Judge of Belfast Magistrates' Court sitting at Laganside Court, Belfast, for the purpose of securing his rendition to Northern Ireland so that he might be prosecuted for the crimes of attempted murder and unlawful and malicious possession and control of an explosive substance with intent to endanger life, contrary to s.3(1)(b) of the Explosive Substances Act 1883 ("the Act of 1883").

The European Arrest Warrant

2. The UK seeks the rendition of the appellant, an Irish citizen, on foot of a European Arrest Warrant dated the 10th of March 2017 in respect of offences of attempted murder and unlawful and malicious possession and control of an explosive substance with intent to endanger life allegedly committed by him on the 18th of June 2015.
3. The issuing state has invoked paragraph 2 of Article 2 of the Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/J.H.A.), O.J. L190/1 of 18.7.2002 ("the Framework Decision") and has ticked the box in Part (e). I of the warrant relating to "murder, grievous bodily injury". Accordingly, correspondence did not have to be demonstrated in the surrender proceedings in respect of the attempted murder charge. Moreover, while correspondence was required to be shown in respect of the offence of possession of an explosive substance with intent to endanger life, contrary to s. 3(1)(b) of the Act of 1883 (as substituted in the UK by the Criminal Jurisdiction Act 1975), it was accepted on behalf of

the requested person that in circumstances where, in so far as specification of the ingredients of the offence is concerned, essentially the same statutory provision applies in both jurisdictions on the island of Ireland, correspondence could readily be demonstrated with the relevant offence under Irish law, namely s.3(b) of the Explosive Substances Act 1883, as substituted by s.4 of the Criminal Law (Jurisdiction) Act, 1976.

4. The circumstances of the alleged offence as described in Part (e) of the warrant are that:

"On 18th June 2015 at approximately 0245 hrs., [M.Y.], a serving police officer, awoke at [her home address] County Londonderry and looked out her bedroom window. She saw a male in the driveway, on the ground, at the driver's door of her husband [R.Y.]'s Ford Mondeo car. He appeared to be working at something underneath the car. [R.Y.] is also serving police officer. She knocked at the window causing the male to flee and she then called 999. CCTV footage showed the figure at the driver's side of the car and also a dark coloured car on the roadway, very slowly passing their driveway and moving in the direction of the exit to the [named] Estate. At the scene police confirmed the presence of a suspicious device underneath the Ford Mondeo car. It was on the ground, unattached to the vehicle. An Ammunition Technical Officer confirmed that it was an Improvised Explosive Device (IED) and rendered it safe. Police traveling to the scene at [a named location] observed two vehicles traveling in convoy at high speed away from the direction of [the named location] going citywards. Officers attempting to set up a vehicle checkpoint at Foyle Bridge, Londonderry observed two vehicles crossing the bridge, both bearing Republic of Ireland registration plates. One was described as silver and the other as a dark Volkswagen saloon or a black or dark navy Volkswagen Passat. Police systems were checked in the vehicles crossing the Ford range were identified as a black Volkswagen Passat vehicle registration mark (VRM) 07 D 7897 and a grey Toyota Corolla VRM 06 WW 1870. The details were passed to An Garda Síochána ("AGS"). On receipt of this information to Gardaí left Ballyshannon in the direction of Lifford. When driving through the village of Killygordon, 15 Km from Lifford, they observed a black Volkswagen Passat VRM 07 D 7897, on its own, travelling in the opposite direction. Gardaí turned their patrol vehicle, activated their blue lights and located the vehicle again. The Passat overtook the stationary vehicle at red traffic lights and increased its speed in an attempt to evade Gardaí but eventually came to a stop approximately 2 ½ miles from where it was first sighted. This was at approximately 0352 hours, just over one hour after the sighting by [M.Y.]. The vehicle had 3 male occupants who refused to confirm their identity. All 3 were arrested on suspicion of membership of an illegal organization. The driver of the Passat was later identified as Kieran Maguire, the front seat passenger as Sean McVeigh and the rear seat passenger was Sean Farrell. Kieran Maguire was taken to Letterkenny Garda Station. His clothing was seized, photographs, fingerprints and buccal swabs were taken. AGS interviewed Kieran Maguire after caution. He was subsequently released without charge. AGS found 6 gloves, later identified as 3 matching pairs, on the road along which the Passat had travelled. The gloves recovered included a pair of black/grey

"marigold" type gloves. Both the Volkswagen Passat and Toyota Corolla were identified as having been stolen and both bore false VRM's. The car mats from both vehicles were forensically examined for explosives residue. A low amount of RDX, an explosive compound, was found on the passenger front foot well mats and other locations in the vehicles. Forensic examination of the DNA profile recovered from one of the "marigold" type gloves was a low level profile and matched Kieran Maguire's DNA profile. Further, and a medium quantity of RDX was detected on this same glove and a low quantity of RDX was detected on the matching glove of this pair. RDX was also detected on a pair of "Next" jeans and "Wrangler" hooded coat seized from Maguire. A decision by the Public Prosecution Service to prosecute Kieran Maguire for the offences described at 1. Above was taken on 15 November 2016."

The Proceedings Before the High Court

5. The appellant, as was his entitlement, contested before the High Court the application of the Minister to surrender him, and was unsuccessful. Surrender was opposed on several grounds. First, the Minister (as applicant) was put on full proof that the EAW was compliant with the Act of 2003 (as amended) and with the *Council Framework Decision, of the 13th of June 2002, on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA) ("the Framework Decision") as amended. In that regard the High Court found that the warrant, and the arrest on foot of it, was in full legal and technical compliance with those instruments. Save for substantive objections (discussed below) that were advanced based on s. 37(1)(b) of the Act of 2003 (as amended); compliance issues are not otherwise being re-canvassed on this appeal and do not require to be revisited.

The S.37(1)(b) Objections

6. Section 37 of the Act of 2003 provides (inter alia):

"(1) A person shall not be surrendered under this Act if—

- (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies)."

The reader should note that the qualification in parenthesis has no application in the context of this case.

7. There were three main facets to the objection based on s.37(1)(b). The appellant objected to his surrender on the basis that it would be in breach of his constitutional rights guaranteed by article 38 and article 40 of the Constitution of Ireland (Bunreacht Na hÉireann). Specifically, he complained that:

- (i.) evidence taken in violation of his constitutional rights would be tendered against him at his trial, and

- (ii.) that if surrendered to Northern Ireland he would not enjoy the constitutional protection of his life, liberty and health as guaranteed under the Constitution, and all
- (iii.) that if tried for the offences described in the EAW, he will be required to give evidence in his own defence, failing which an adverse inference may be drawn by the court based on his failure to give such evidence in circumstances where the court is satisfied that the prosecution case against him is sufficiently strong to require an answer from him. This objection arises out of Articles 3 and 4 of the Criminal Evidence (Northern Ireland) Order 1988 ("the 1988 Order")

8. The High Court for the purpose of addressing the s.37(1) issue had sought additional information from the issuing judicial authority, asking :

"Is it open to a trial court in the Issuing State (Northern Ireland) to draw inferences pursuant to article 3 and/or article 4 of the Criminal Evidence (Northern Ireland) order 1998 in connection with interviews outside the territory of the Issuing State (Northern Ireland), specifically those conducted in Milford and Letterkenny Garda stations with the two respondents?"

9. This request was responded to in a letter on behalf of the issuing judicial authority, from District Judge Fiona Bagnall, dated the 120th of January 2020. For the purpose of answering the request she interpreted the High Court's query as asking, in effect, two questions:-

- 1) Is it open to a trial court in the Issuing State (Northern Ireland) to draw inferences pursuant to Article 3 and/or Article 4 of The Criminal Evidence (Northern Ireland) Order 1988 in connection with interviews outside of the territory of the Issuing State (Northern Ireland). Specifically, those conducted in Milford and Letterkenny Garda Stations with the two respondents?
- 2) Is it open to a trial court in Northern Ireland to draw inferences pursuant to Article 4 of The Criminal Evidence (Northern Ireland) Order 1988 in connection with interviews outside the territory of the issuing state, specifically those conducted in Milford and Letterkenny Garda Stations with the two respondents?

10. In reply to question 1, District Judge Bagnall stated:-

"In an interview conducted in Northern Ireland, the suspect is cautioned in accordance with Article 3 of the Criminal Evidence (NI) Order 1988 as follows: 'You do not have to say anything but I must caution you if you do not mention when questioned something which you later rely on in court it may harm your defence. If you do say anything it may be given in evidence.'` In the circumstances of this case, where the Garda interviews have been conducted without the caution under Article 3 being administered, the prosecution would not ask the court to draw

inferences pursuant to Article 3 of the 1988 Order and it is not considered an adverse inference could be drawn by the trial court of its own volition."

11. In answer to the second question posed, District Judge Bagnall replied as follows:-

"It is open to a court to draw an adverse inference under Article 4 of the 1988 Order if either accused does not give evidence on his own behalf at trial. However this is an entirely separate matter to their decision not to answer questions during Garda interview. Their position adopted at interview is not relevant to the inference that can be drawn under Article 4. It should be noted that the ECHR in Murray v. U.K. has found that the provisions of the 1988 Order did not constitute a violation of Article 6 (1) of the Convention."

12. Two affidavits, the latter responding to this additional information, were filed in the High Court on behalf of the appellant, from a Northern Ireland Barrister, Mr Sean Devine B.L. These were sworn on the 4th of December 2019 and on the 29th of January 2020, respectively, and set out Mr Devine's view as to relevant the Northern Ireland laws, i.e., the 1988 Order.

13. He stated, *inter alia*, in his first affidavit:-

"In my opinion, having regard to the various statutory provisions relating to the drawing of inferences from failure to answer questions, it is unlikely that the prosecution would succeed in persuading a trial judge to draw adverse inferences from the failure of Mr. Farrell to answer questions during Garda interview. Regarding the jurisdiction of the trial judge to draw an adverse inference from the silence of the accused at trial, it is highly likely, in my opinion, that any trial judge in Northern Ireland would accede to an application by the Crown to draw such inferences, based on the evidence adduced at trial other than his failure to answer questions asked by Gardaí. However, I cannot say, as a matter of law, that the trial judge would not be entitled to take into account the opportunity Mr. Farrell had to offer explanations to Gardaí, which said opportunity was declined by him. Indeed, the Crown will be likely to invite the Court to look at 'all of the circumstances' when deciding whether to draw such inferences (and the extent of those inferences) and that could include his decision not to respond to Gardaí questioning."

14. In relation to the adverse inferences which may be drawn under Article 4 of the 1988 Order, Mr. Devine further averred:-

"The judge must tell the jury that the burden of proof remains upon the prosecution throughout and that the defendant is entitled to remain silent. An inference from failure to give evidence cannot on its own prove guilt. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Importantly, and perhaps surprisingly, the judge should not go further and say that the case is not strong and they should therefore be less ready to draw an inference against him. The rationale being that this would involve

the judge making an assessment at the strength of the prosecution case which would pre-empt the jury's role."

15. In his second affidavit, Mr. Devine addresses the additional information provided by District Judge Bagnall. As pointed out by the High Court judge in his judgment at paragraph 42 thereof, in relation to Article 3 of the 1988 Order Mr Devine averred that while he does not take issue with the response given by District Judge Bagnall, nonetheless he believes *"that the Crown will have a wide discretion as to how it puts its case and it is highly likely that they will place before the Court a detailed exposition of Mr. Farrell's known movements and activities in the time immediately after the events that form the subject of the charges in this case."*

16. At paras. 14 and 15 of his second affidavit he avers:-

"14. I say that the explanations from the parties about the fact that the interviews took place in Milford Garda station and that, for example, no reliance is placed upon those interviews as the 'incorrect' warning was given (i.e. a warning which would not trigger the use of Article 3) could or would probably lead to judicial questions concerning the wording of the warning that was given.

15. I say that the precise impact of this is difficult to quantify but I believe that any impact could only be detrimental to an accused, even in the absence of a statutory adverse inference under Article 3. I say further that this is especially so within the context of trial proceedings in Northern Ireland, where practitioners and Courts are conditioned to the fact that silence during interview can have very significant and harmful effects upon an accused's defence at trial, due to the existence of the 1988 Order for such a long time. I say that any trial Court in Northern Ireland would expect the defence to be keen to adduce an exculpatory account, if given during interview, and so the absence of such an account would inevitably lead to a presumption that the accused remained silent. In my opinion, this could only accrue to the detriment of the accused."

17. Then, at para. 17 of his second affidavit he avers:-

"I say that the UK response dated 10th January 2020, composed with the kind assistance of the PPSNI, is couched in suitably and appropriately qualified terms. That is, it states that "it is considered that" the trial court could not, of its own motion, take silence in the Garda Station into account in deciding the nature of the adverse inference from silence in the trial. I would tend to agree with this proposition, subject to the discussion above in terms of the fact that the existence of these interviews will inevitably be a significant degree of focus upon Mr. Farrell's arrest and detention for a period of time which was consistent with him being interviewed by police. Under normal circumstances, these interviews would, at the very least, be referred to."

18. The High Court judge rejected each of the complaints set out at paragraph 7 above, giving detailed reasons for doing so from paragraphs 53 to 78 inclusive of his judgment (in the conjoined cases of *Minister for Justice & Equality v Ciaran Maguire* and *Minister for Justice & Equality v Sean Paul Farrell* [2020] IEHC 77). His conclusions in that regard, and his reasons, are summarised in seven points set out at paragraph 79 of the said judgment, as follows:

"79. *Drawing all of the above together, the following is established:-*

- 1) *The right to silence in this jurisdiction is recognised under the Constitution and is accorded protection accordingly. It is not, however, unqualified, and may be abridged in a manner that is proportionate to the objectives.*
- 2) *While there are certain statutory provisions in this jurisdiction that qualify or abridge the right to silence, there is no equivalent to Articles 3 and 4 of the 1988 Order. To that extent, it is possible that the respondents, if they exercise their right to silence at trial in Northern Ireland, may suffer a prejudice that they would not suffer if they were put on trial in this jurisdiction.*
- 3) *That however, does not necessarily constitute a violation of their constitutional rights. The protection afforded by Article 38 of the Constitution does not extend beyond the boundaries of the State, unless the matters complained of would give rise to an egregious violation of the constitutional right asserted.*
- 4) *Articles 3 and 4 of the 1988 Order do not violate Article 6 of the European Convention on Human Rights. While the rights protected by the Convention and the Constitution are not identical, in this fundamental respect they are unlikely to be very much different.*
- 5) *There is no evidence that the manner in which Articles 3 and 4 are invoked in Northern Ireland is such that would give rise to any cause for concern that the constitutional rights of the respondents are likely to be violated egregiously, or in contravention of the principles enunciated in *Rock*. On the contrary, the application of Article 4 of the 1988 Order in *R v. McVeigh* demonstrates the application of the safeguards necessary to avoid such an outcome.*
- 6) *There is a statutory presumption that an issuing state will comply with the requirements of the Framework Decision which, at Article 1.3, requires Member States to respect the fundamental rights and principles enshrined in Article 6 of the Treaty on European Union. Moreover, there is a duty on this Court, pursuant to the terms of the Framework Decision to have trust and confidence in the issuing Member State that the respondents' fundamental rights will be respected.*

- 7) *It follows from all of this that the arguments of the respondents that their surrender to Northern Ireland will give rise to an egregious violation of their constitutional rights must be rejected. Since all other objections to their surrender have also been rejected, the Court must order the surrender of the respondents pursuant to s. 16 of the Act of 2003. For the avoidance of any doubt, I should add that I have been fully satisfied that there has been full compliance with the Act of 2003 as regards the form and content of the EAWs."*

The S.16 (11) Certificate.

19. The High Court certified that its decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Court of Appeal. The point certified was:

"Whether the following facts give rise to an egregious breach of the respondent [now the appellant]'s constitutional rights and should ground a refusal to surrender him: it is likely that the trial court in the requesting state shall draw an adverse inference in support of a conviction arising from the refusal by the respondent to give evidence in his trial, in circumstances where the respondent had been detained for questioning by Gardaí in respect of the facts underlying the said prosecution, and the respondent remained silent in interview and was not warned during that interview as to the risk of such an adverse inference being drawn against him in his trial."

The Grounds of Appeal

20. It is arguably the case, although the point has never been definitively addressed by this Court, and we do not do so now, that once a point of appeal has been certified, an appellant is not confined to arguing the certified point alone. Proponents of this view would argue that an appeal based upon a certificate is a full appeal during which other points legitimately arising may also be relied upon. Presumably proceeding on that basis the Notice of Appeal filed in this matter listed fifteen discrete grounds of complaint, extending significantly beyond the certified question.
21. Be that as it may, it has since been confirmed to us by counsel for the appellant, at the opening of the appeal hearing, that the appeal is ultimately to be confined to the question certified. We are grateful for that indication in circumstances where it considerably narrows the issues on this appeal.

Submissions

22. It was submitted on behalf of the appellant in both written and oral submissions that if the appellant is surrendered his constitutional right to silence and his right to be informed of that right will be breached. Moreover, he faces a fundamental unfairness in circumstances where he was not warned or cautioned appropriately during his detention at Letterkenny Garda Station in June 2015. He was not told that under Northern Ireland law if he had failed to mention when questioned something which he later relied upon in court that adverse inferences could be drawn against him. He was further not told or warned that should he be prosecuted in Northern Ireland, he would not enjoy a right to

silence at his trial and/or that a failure to give evidence in his trial in that jurisdiction could be used to support a conviction.

23. It was submitted that the right to silence is a constitutional right that derives from the personal rights guaranteed in Article 40 of the Constitution, and the guarantee contained in Article 38.1 of the Constitution that no person will be tried on any criminal charge save in due course of law. We were referred to *Heaney -v- Ireland* [1994] 3 IR 593 in which the right to silence was confirmed to be a corollary of the right to free speech guaranteed in Article 40.6.1 of the Constitution. It was further urged upon us that the right to silence and the associated right to be informed of that right were identified in *The People (Director of Public Prosecutions) -v- Quilligan & O'Reilly (No 3)* [1986] IR 495 as being important protections, the existence of which, alongside other protections also identified and listed, had allowed the Supreme Court to be satisfied as to the constitutionality of s. 30 of the Offences Against the State Act, 1939.
24. We were further referred to the observation of the Supreme Court, per Keane C.J., in *The People (Director of Public Prosecutions) -v- Finnerty* [1999] 4 IR 364, that the right of the suspect in custody to remain silent:

"... is also a constitutional right and the provisions of the 1984 Act must be construed accordingly."
25. It was further submitted that there is nothing hypothetical about the appellant's submission because the Court has the benefit of the judgment of the Northern Ireland Crown Court delivered in the case of *R -v- McVeigh* [2019] NICC 8 wherein, a third party, Seán McVeigh was convicted by a non-jury court of the same offences as those for which the appellant's surrender is sought and was sentenced to 25-years imprisonment. We are referred to the fact that in making his determination of guilt the judge had express regard to the fact that Mr. McVeigh did not provide any explanation for his presence at a particular location and also to his failure to give evidence in the trial. These factors had permitted the drawing of inferences by the court adverse to Mr. McVeigh upon the invitation of the prosecution.
26. It was argued that to surrender the appellant to face trial in Northern Ireland would breach his constitutional rights to silence and to a trial in due course of law in circumstances where he had neither been appropriately cautioned in Letterkenny Garda station, nor warned that he would not have a right to silence at trial in Northern Ireland, and where the evidence before the High Court as executing judicial authority was that as a matter of Northern Irish law he will not enjoy a right to silence at his trial and that a failure on his part to give evidence in his trial in that jurisdiction could be used to support a conviction.
27. The appellant has contended that not only will his trial in Northern Ireland not meet the minimum standards of fairness required under the Constitution of Ireland, but that he has already been subjected to a fundamental unfairness extending to a breach of his constitutional rights by the State in this jurisdiction, in the context of the failure to warn

him that he would not enjoy the same right to silence at a trial in Northern Ireland as he would be constitutionally entitled to in this jurisdiction. It is suggested that the appellant's position may be further aggravated by the risk that the trial judge, in deciding to draw an adverse inference in the event that he does not give evidence in the trial, could take into account the fact that the appellant declined to provide explanations in Garda interviews. It was urged upon us that in such a circumstance his rights will not be respected at trial in Northern Ireland and because, by reason of Articles 3 and 4 of the 1988 Order an adverse inference can be drawn if he does not give evidence, he will be obliged to give evidence in his defence or be faced with an inference that his failure to give evidence is indicative of his guilt which could be used to support other circumstantial evidence adduced against him, the bulk of which also derives from this jurisdiction.

28. The appellant maintains that that this is an egregious breach of the type and nature that precedent and authority indicates can and should ground a refusal to surrender.
29. We were referred to *Minister for Justice & Equality v Balmer* [2017] 3 I.R. 562 as authority for the proposition that a court applying s.37(1)(b) of the Act of 2003 is required to consider whether the putative unconstitutionality of a requesting member state's legal system is so egregious as to amount to a fundamental defect in that legal system, or departs so markedly from the scheme and order envisaged by the Constitution as to require that court to refuse to surrender a person under a European arrest warrant, either for trial, where conviction would lead to such a regime being imposed, or to serve a sentence imposed and managed under that regime.
30. It was submitted that such an egregious breach of constitutional rights will occur in the trial process for which the appellant's surrender is sought. Unless he gives evidence in his own defence, his silence will be taken as indicative of his guilt in circumstances where he was not warned in that regard during Garda interviews. It has been urged upon us that were such a situation to arise it would be completely contrary to and incompatible with the appellant's presumption of innocence and reflect a marked deviation from how fair trial rights are understood and protected in this jurisdiction. In summary the case is that because the appellant was not warned or advised as to the radically different rules of evidence and trial procedures that apply in Northern Ireland while he was being questioned in Letterkenny Garda Station, his surrender would result in him being subjected to a process that falls so short of the constitutional fairness guaranteed by Constitution of Ireland that it can only be described as "egregious".
31. It was submitted that the High Court judge erred in law in his conclusion that the obligation to have trust and confidence in the judiciary of Northern Ireland somehow leads to the conclusion that no such adverse inferences will be drawn. The appellant says that the trust and confidence implicit in the EAW scheme does not extend to an expectation that other jurisdictions will vindicate constitutional rights.
32. Further, it was also contended that the High Court had erred in its interpretation and application of the decision in *Minister for Justice -v- Buckley* [2015] 3 IR 619. In the *Buckley* case, which was concerned with (i) whether the right to a fair trial guaranteed by

Article 38 of the Constitution had application beyond the national territory such as might allow a respondent to rely on an apprehended breach of that article to resist his surrender and (ii) whether having regard to evidential rules applicable in the issuing state for the prosecution of conspiracy offences, the surrender of the respondent amounted to a breach of s. 37 of the Act of 2003, the Supreme Court had held, *inter alia*, that differences in the rules of evidence between states were insufficient to raise a question of refusal to surrender, and such differences alone did not lead to the necessary conclusion that there was a breach of fundamental rights in the requesting state. At paragraph 28 of his judgment in the Supreme Court O'Donnell J had said:

"[28] I would, therefore, summarise matters this way. First, the case advanced by the respondent is hypothetical, in that its actual or likely impact on the respondent is unclear, and certainly not capable of being characterised as a defect in the system of justice of the requesting state. Second, even if, hypothetically, ss. 74 and 75 of the Act of 1984 are not in accordance with the values found in Article 38, it is immaterial, if the respondent cannot show that what would be at issue would be, or is likely to be, an "egregious" departure amounting to a denial of fundamental or human rights (per Murray C.J in Brennan [2007] IESC 21, [2007] 3 IR 732 at para. 40, p. 744). There would have to be significantly more: a real and substantive defect in the system of justice, where fundamental rights were likely to be placed at risk, or actually denied. As Murray C.J pointed out in Brennan, rules of evidence "may differ" between states, and that alone does not at all lead to the necessary conclusion that there is a breach of fundamental rights in the requesting state. Finally, and again as held in Minister for Justice v. Brennan [2007] IESC 21 and Nottinghamshire County Council v. KB [2011] IESC 48, [2013] 4 IR 662, the reach of Article 38, save in exceptional circumstances, goes no farther than the boundaries of the State. There is nothing in Article 38 to suggest anything beyond that. What is in question, then, is the lawfulness of the surrender of the respondent in this jurisdiction. I would, therefore, answer the first question in the negative."

33. In paragraph 71 of his judgment in the present case the High Court judge, case, having quoted paragraph 28 of the judgment of O'Donnell J in the *Buckley* case in the previous paragraph, observed that "*[i]t follows that it is necessary to consider whether or not Articles 3 and 4 of the 1988 Order are likely to give rise to an egregious departure amounting to a denial of the respondents' fundamental or human rights.*"
34. Whilst the appellant accepts, based on the *Buckley* case, that the rules of evidence can differ in the two jurisdictions, he maintains that the High Court failed to have sufficient regard to the fact that the evidence was gleaned in this jurisdiction.
35. Further, the appellant says, whereas the High Court correctly noted that the constitutional right to silence is not unqualified, and that it may be abridged in appropriate circumstances, the High Court erred in concluding that any such abridgement can properly occur by reason of a foreign legal instrument or procedure. It is suggested that any abridgement of a constitutional right must be proportionate and in accordance with

the constitutional norms of this State. In that regard it was submitted that the High Court failed to properly gauge and to protect the constitutional rights of the appellant that are in issue here; and, whereas the protection afforded by Article 38 of the Constitution may not extend beyond the boundaries of the State, then if so that only serves to reinforce the appellant's contention that a proper constitutional pre-surrender vetting must occur in this jurisdiction in relation to the material likely to be adduced at any trial in the issuing state and concerning the procedures, systems and rules of evidence likely to be deployed at any such trial.

36. It was submitted that in its assessment the High Court fell into significant error in not having proper regard to the evidence adduced on behalf of the appellant by an Northern Ireland barrister, Mr. Devine, and erred in not accepting it on the basis that:

"[i]t follows that if this court were to accept Mr. Devine's opinion on the issue, it would be failing to accord to the authorities in Northern Ireland, and in particular to the judiciary in that jurisdiction, the trust and confidence which this court is obliged to accord to those institutions pursuant to the express terms of the Framework Decision, and s.4A of the act of 2003 which provides 'it shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown.'"

37. It was submitted that the High Court failed to have regard to the fact that the s.4A presumption is rebuttable and that in the circumstances the High Court had failed to determine the case in accordance with the evidence.
38. Counsel for the appellant has argued that the right to be presumed innocent includes the right to remain silent at trial and says that that fundamental constitutional right is not confined to the boundaries of the State. Accordingly, he submitted, Article 4 of the 1988 Order will likely result in an egregious breach of the appellant's constitutional rights, such as that referred to by Murray C.J. in *Minister for Justice, Equality & Law Reform -v- Brennan* [2007] 3 IR 732 and by O'Donnell J. in *Minister for Justice & Equality -v- Balmer* [2016] IESC 25. Moreover, he suggested, there are substantial grounds for believing that there is a real risk that the constitutional rights of the Appellant will be violated at trial in Northern Ireland, such as to meet the test for refusal of an application for surrender, as identified *inter alia* in *Minister for Justice, Equality and Law Reform -v- Rettinger* [2010] IESC 45, and in *Minister for Justice and Equality -v- Celmar* [2019] IESC 80. It was urged upon us that context is key and, as recognised by Murray C.J. in his judgement in the *Brennan* case:-

"[40] That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights ..."

39. It was submitted that just because in *Murray v. the United Kingdom* (30 EHRR CD 57), the ECtHR found that the Criminal Evidence (Northern Ireland) Order did not breach Article 6 of the European Convention on Human Rights does not serve to insulate the provision from a contention that it is in breach of the Constitution. Counsel suggested that Article 6 ECHR and Article 38.1 of the Constitution are not synonymous. He submitted that the encroachments upon the appellant's right to silence to date, and as contemplated by the 1988 Order if he were to be surrendered to Northern Ireland, goes so far beyond the bounds of what is permissible under the Constitution that the certified question should be answered in the affirmative and his surrender should be refused.
40. In reply it was submitted on behalf of the Minister that the High Court had been correct to reject the appellant's arguments. It was suggested that, in reality, the appellant's contentions were based on an incredible hypothesis, namely that the Gardaí in Letterkenny Garda station should have warned the appellant that adverse inference might be drawn against him if he failed to give evidence in his trial in another jurisdiction.
41. It was said that this had been correctly rejected by the High Court on the evidence before it, including the additional information provided by the Northern Irish authorities. Furthermore the clear jurisprudence of the superior courts was to the effect that differences in legal procedures between our state and an issuing state will not give rise to situation whereby surrender should be refused unless such differences amount to "a *flagrant denial of justice*" in the manner explained in the cases of *Minister for Justice & Equality -v- Brennan* [2007] 3 IR 732; *Minister for Justice & Equality -v- Buckley* [2015] 3 IR 619; *Minister for Justice & Equality -v- Balmer* [2016] IESC 25; and *Minister for Justice & Equality -v- Celmar* [2019] IESC 80.

Discussion and Decision

42. We are not persuaded by the appellant's arguments and find no error in the approach or decision of the High Court judge.
43. The High Court judge observed, correctly in our view, that there was no obligation on the Gardaí to provide the appellant with any caution other than the caution that they were obliged to provide in this jurisdiction.
44. As regards what may happen in the event of the appellant being surrendered, as was pointed out by the High Court judge the right to silence or not to incriminate one's self, which we accept does enjoy constitutional status, is not an unqualified right and, even in this jurisdiction, it may be abridged by statute. Having made that observation, the High Court judge went on to say (at paragraph 68) of his judgment:

"Throughout the European Union, Member States operate different procedures at trial. The fact that procedures will vary from one Member State to another is no bar to surrender. If it were otherwise, the entire system of surrender provided for in the Framework Decision, as implemented in the Act of 2003 in this jurisdiction, would collapse. This was recognised in Minister for Justice v. Brennan [2007] 3 IR 732. In those proceedings, which were concerned with an argument that provisions

in United Kingdom law imposing a mandatory minimum sentence, which did not take into account the particular circumstances of the respondent in those proceedings, violated his rights under the Constitution. At paras. 35- 40 of his judgment, Murray C.J. stated as follows:-

"[35] There is no doubt that the operation of the process for surrender as envisaged by the Act of 2003, as amended, is subject to scrutiny as to whether in any particular case it conforms with constitutional norms and in particular due process so that, for example, the respondent in such an application has an opportunity to be duly heard in the proceedings. [36] However the argument of the respondent goes much further. He has contended that the sentencing provisions of the issuing State, in this case the United Kingdom, did not conform to the principles of Irish law, as constitutionally guaranteed, governing the sentencing of persons to imprisonment on conviction before our Courts for a criminal offence. [37] 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. [38] Indeed it may be said that generally extradition has always been subject to a proviso that an order for extradition, as with any order, should not be made if it would constitute a contravention of a provision of the Constitution. I am not aware of any authority for the principle that the extradition or surrender of a person to a foreign country would contravene the Constitution simply because their legal system and system of trial differed from ours as envisaged by the Constitution. [39] The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which would wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not, in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting State he or she would not be tried before a jury. The exceptions which we

have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country. [40] That is not by any means to say that a Court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting State where a refusal of an application for surrender may be necessary to protect such rights..."

45. The High Court judge then went on to reference the Supreme Court's decisions in *Minister for Justice & Equality v Balmer* [2016] IESC 25 and *Minister for Justice and Equality v Buckley* [2015] 3 IR 619, on which particular reliance had been placed by the appellant's counsel, and accepted that "[i]t follows that it is necessary to consider whether or not Articles 3 and 4 of the 1988 Order are likely to give rise to an egregious departure amounting to a denial of the respondents' fundamental or human rights.". We do not incidentally accept that there is any evidence in the judgment of the High Court to suggest that the *Buckley* decision was misinterpreted in some way or misapplied. The sole basis upon which it was referred to and relied upon by the High Court judge was as providing support, in conjunction with the decisions in *Brennan* and in *Balmer*, for his conclusion that it would be appropriate in the light of the arguments being made to assess whether or not Articles 3 and 4 of the 1988 Order were likely to give rise to an egregious departure amounting to a denial of the respondents' fundamental or human rights. This was an unimpeachable conclusion and indeed the assessment that he considered necessary was in effect one that the appellant had looked for. The High Court judge's reference to the *Buckley* case had nothing to do with any issue concerning the gathering of evidence, or with whether controversial evidence was gathered in this jurisdiction or in another jurisdiction. The authority was quoted by the High Court judge in the context of the claim that the possibility of an adverse inference being drawn at a trial in Northern Ireland from the appellant's failure to give evidence at trial, were he to fail to do so, represents an egregious defect in the system of justice in that jurisdiction such as might lead to a flagrant denial of justice in the appellant's case.
46. The High Court judgment notes that in *John Murray v. The United Kingdom* (30 EHRR CD 57) the European Court of Human Rights had considered, *inter alia*, whether or not Articles 3 and 4 of the 1988 violated Article 6 of the ECHR, and had concluded that in the particular circumstances of the case it did not. The High Court judge further referred to the written decision of His Honor Judge Fowler QC in Mr. McVeigh's case as exemplifying how Articles 3 and 4 of the 1988 Order might also be applied in Mr. Maguire's case. In that context the High Court judge further noted the submission on behalf of the appellant to the effect that the drawing of inferences from the failure of an accused to give evidence at his own trial goes beyond the bounds of what is permissible under the Constitution and that that, taken together with the fact that the appellant received no warning, when questioned by the Gardaí, that such inferences would likely be drawn if the

appellant were to be placed on trial in Northern Ireland and failed to give evidence, would constitute an egregious violation of the respondents constitutional rights.

47. Having noted this submission the trial judge continued (at paragraphs 77 and 78):

[77] In considering whether or not Articles 3 and 4 of the 1988 Order will give rise to an egregious violation of the constitutional rights of the respondents, it is useful to refer to the observations of the Supreme Court in the case of Rock v. Ireland [1997] 3 IR 484 in its consideration of the constitutionality of the legislation impugned in those proceedings. At page 501 of the judgement, Hamilton C.J. stated:-

"It is the opinion of this Court that, in enacting ss. 18 and 19 of the Act of 1984, the legislature was seeking to balance the individual's right to avoid self-incrimination with the right and duty of the State to defend and protect the life, person and property of all its citizens. In this situation, the function of the Court is not to decide whether a perfect balance has been achieved, but merely to decide whether, in restricting individual constitutional rights, the legislature have acted within the range of what is permissible. In this instance, this Court finds they have done so, and must accordingly uphold the constitutional validity of the impugned statutory provisions. While it is true that ss. 18 and 19 could lead to an accused being convicted of a serious offence in circumstances where he or she might otherwise have been acquitted, there are two important, limiting factors at work. Firstly, an inference cannot form the basis for a conviction in the absence of other evidence. As the learned trial judge pointed out:—

'...there is no doubt a strengthening of the State's case but in no sense is it final and in neither event is the accused required to exculpate himself.'

Secondly, only such inferences "as appear proper" can be drawn: that is to say, an inference adverse to the accused can only be drawn where the court deems it proper to do so. If it does not, then neither judge nor jury will be permitted to draw such inference."

[78.] On the basis of these safeguards, the Supreme Court in Rock considered the impugned provisions to be constitutional. Substantially the same safeguards are to be found in Article 4 of the 1988 Order. Although it is not expressly stated in Article 4 that, before Article 4 is triggered the prosecution must have established that the defendant has a case to answer, on the respondents' own case this is a requirement. These safeguards were relied upon by the ECtHR in its conclusion that Article 4 of the 1988 Order did not violate Article 6 of the Convention. If those safeguards were sufficient for the Supreme Court to conclude that the impugned provisions in Rock did not give rise to a violation of the plaintiff's constitutional

rights in that case, then it is difficult to see how Article 4 of the 1988 Order can be said to give rise to an egregious violation of the respondents' constitutional rights."

48. It was on the basis of all of that that the High Court judge had felt able to draw the conclusions which he drew in paragraph 79 of his judgment, and which we have quoted in full at paragraph 18 above. We are satisfied that the High Court judge's analysis of the law was impeccable, and that his conclusion was correct.
49. Finally, we reject the suggestion that the High Court judge failed to have regard to the fact that the s.4A presumption is rebuttable and that in the circumstances the High Court had failed to determine the case in accordance with the evidence. On the contrary it is clear to us that in arriving at his decision the High Court judge had considered all of the evidence with scrupulous care, including the affidavit of Mr. Devine BL, and although he does not say so expressly in his judgment we consider that it is implicit that he regarded the evidence adduced as being of insufficient cogency to rebut the s.4A presumption. We see no basis to interfere with his implicit conclusion in that regard.
50. The appeal is accordingly dismissed and effect should be given without delay to the High Court's order surrendering the appellant.
51. Although the appellant has already been informed of these matters in the High Court, for the avoidance of any doubt he is reminded yet again of his right to make a complaint under Article 40.4.2 ° of the Constitution at any time before his or her surrender to the issuing state.
52. This Court further re-iterates the direction of the High Court judge, pursuant to s. 4(c) of the Act of 2003 as amended, that the appellant is again to be brought before the High Court:
 - (i) if he or she is not surrendered before the expiration of the time for surrender under subsection (3A), as soon as practicable after that expiration, or
 - (ii) if it appears to the Central Authority in the State that, because of circumstances beyond the control of the State or the issuing state concerned, that person will not be surrendered on the expiration referred to in subparagraph (i), before that expiration.