NEUTRAL CITATION NUMBER [2012] IEHC 347

THE HIGH COURT

Record No. 2011 1121 JR

Between

CLIVE BUTCHER

Applicant

And

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Ms. Justice Iseult O'Malley delivered the 30th July, 2012

Introduction

1. This case concerns the operation of the provisions of the Transfer of Sentenced Prisoners Act, 1995 and 1997. The purpose of these Acts is to implement the Council of Europe Convention on the Transfer of Sentenced Persons. In brief, the objective is to provide a mechanism whereby persons who are nationals of another member state and who are convicted of offences in this State can be transferred to serve the sentence in their own country.

Facts of the case

2. The applicant is a British national in his late forties. On the 17th December, 2008, within this State, he killed one Rebecca Hoban. He was charged with murder but after trial was acquitted on that count and found guilty of manslaughter. On the 26th April, 2010 he was sentenced to six and a half years imprisonment, to date from the 19th December, 2008. There was no appeal against that sentence by either the applicant or the Director of Public Prosecutions. Applying current rates of remission he will be entitled to release on or around the 1st November, 2013.

3. On the 21st September, 2010 the applicant sought to be transferred to the United Kingdom to serve the remainder of his sentence pursuant to the provisions of the Transfer of Sentenced Prisoners Act, 1995 and 1997.

4. The application form is a one-page document containing the following headings: Name, Date of Birth, Sentence, Prison, Nationality, Desired Location of Transfer (City/State) Reasons for Interest in Transfer, and Name and Address of Next of Kin in the Desired Location. The prisoner must confirm that the sentence is final and that there is no appeal outstanding. The form must be signed and dated. Finally, there is a note stating that documentation in support of the application "i.e. copy Birth Certificate, passport details etc" may be submitted with the form.

5. Under the heading "Reasons for Interest in Transfer" the applicant wrote "To enable visit etc from elderley (sic) mother and family. Note: as requested in May 2010." It should perhaps be noted that these two sentences take up three of the four lines provided under this heading. His mother's address is given, in Colchester in Essex. The desired location of transfer is Norwich. The application form has a date-stamp on it indicating that it was received by the Prisons Policy Division of the respondent's Department on the 24th September, 2010.

6. From the correspondence exhibited by the respondent it would seem that his officials forwarded information relating to the transfer request to the National Offender Management Service of the Ministry of Justice in the United Kingdom by letter dated the 14th January, 2011. That agency replied on the 8th February, 2011. In relevant part the reply reads as follows:

> "The Secretary of State for Justice is willing to agree to the transfer of Mr Butcher and I enclose a Declaration formally requesting his transfer under the Convention.
>
> I confirm that the United Kingdom will apply the "continued enforcement" procedure in accordance with Article 9 (1) (a) of the Convention. We will continue to enforce a sentence of 6 years 6 months imprisonment.
>
> However, under British Law, Mr Butcher will be automatically released at the half-way point of the balance of the sentence remaining at the date of the transfer. The balance of the sentence is calculated by deducting from the total number of days in the sentence, the number of days actually served prior to transfer, any remission earned, and any remand time/pre-trial detention credited by the Sentencing State.

7. A statement of information for the applicant was also enclosed. This makes it clear that release in these circumstances is on licence and under supervision and does not, therefore, mean that the sentence has expired. It was also explained that while every effort would be made to locate the applicant close to his family this could not be guaranteed. There were also various documents to be signed by the applicant in relation to his consent and travel arrangements. These were signed by him on the 24th February, 2011.

8. There is no evidence that anything further happened until the 28th June. By letter of that date the respondent wrote as follows:

> Dear Mr. Butcher
>
> I am directed by the Minister for Justice and Equality to refer to your request for transfer to UK under the Council of Europe Convention on the Transfer of Sentenced Persons.
>
> I am to inform you that the UK authorities provided information regarding the continued enforcement of your sentence in that jurisdiction. The Minister, having carefully considered the contents of your application, the serious nature of your offence and the reduction in time you would serve in the UK, has decided to refuse your application for transfer.

9. The letter goes on to note that the Convention does not confer an automatic right to be transferred nor does it confer an

obligation on any state to comply with a transfer request.

10. On the 31st August, 2011 the applicant's solicitor wrote to the respondent in relation to the refusal. It was argued on his behalf that the applicant fulfilled the criteria for transfer and yet had been refused. The letter goes on

> "Frankly, we find this decision quite baffling given the apparent over crowding situation in Irish prisons, our client's wish to serve his time in the U.K. and the willingness of the U.K. to accept him. You are no doubt aware that our client has no relatives in this jurisdiction and his elderly mother resides in the U.K.
>
> Whereas in your letter you have outlined all the matters considered by the Minister and have indicated the result of that consideration, you have not communicated a reason for the ultimate decision taken by the Minister not to facilitate the transfer. We believe our client is entitled to be informed of the reason for the decision and we ask that you furnish us with same within the next ten days so that we can advise whether there are further avenues that can be pursued on behalf of our client."

11. In response, by letter dated the 6th September, 2011, it was stated that

> "As outlined in the decision letter sent to the applicant, it was concluded after careful consideration of the serious nature of the crime and the reduction in the amount of time Mr Butcher would serve in a British prison that a refusal decision was appropriate in this case."

The proceedings

12. Leave to apply for judicial review was granted on the 21st November, 2011 and the matter came on for hearing on the 20th July, 2012. The applicant seeks an order of certiorari quashing the decision; a declaration that the refusal reflects the application of incorrect criteria, flies in the face of reason and common sense; is contrary to the spirit and intent of the Scheme for the Transfer of Sentenced Persons; is contrary to the Convention on Human Rights and is contrary to law. An order of mandamus is also sought, directing re-consideration of the application.

13. It is claimed that the respondent fettered his discretion, denied the applicant a fair and impartial hearing, determined the application on the basis of personal or irrelevant considerations and failed to have regard to the applicant's rights under the European Convention on Human Rights and in particular Article 8 thereof.

14. The Statement of Opposition denies all claims made by the applicant. It further pleads that the respondent has a wide discretion in the exercise of his powers in such applications; that the correct criteria were applied; that the decision is only reviewable if his powers were exercised in a capricious, arbitrary or unjust way or if it was fundamentally at variance with reason and common sense or was so unreasonable that no reasonable authority could ever have reached it. It is pleaded that the respondent is entitled to take into acount the remission regime in the United Kingdom and the fact that it would shorten the applicant's sentence. It is claimed that the evidence put forward by the applicant was tenuous and not sufficient to engage a consideration of Article 8 - without prejudice to this contention it is pleaded that some restriction of the applicant's rights under Article 8 is a necessary and inevitable consequence of imprisonment in the particular circumstances of the applicant. The respondent also claims that the applicant has failed to adduce any evidence that his transfer would result in his having any contact with his family, particularly since the United Kingdom authorities do not guarantee that he will be located near his family.

15. There is a further specific plea that if the refusal does interfere with the Applicant's family life under Article 8, such interference is permissible in accordance with Article 8(2) as it had as its aim the prevention of disorder or crime insofar as it sought to uphol the sentence imposed by the domestic courts.

16. Very little information has been added by the affidavits to what is outlined above. The Applicant has deposed that his mother is aged 87 (as of the date of swearing his affidavit) and that he would love to be near her so that she could visit him. He says that he believes that this would benfit his own and his family life. There is no further information in relation to his personal or family circumstances. The Respondent is even less forthcoming. The affidavit filed on his behalf is sworn by a Principal Solicitor from the Office of the Chief State Solicitor, rather than by an official from the Department. It simply gives a brief history of the case and exhibits the correspondence. The deponent does not appear to be in a position to say what material was before the Respondent and what factors he considered before reaching his decision. There is no evidence of any inquiry made on behalf of the Respondent in relation to the offence committed by the Applicant, his personal or family circumstances, his progress in custody here or any other factor relevant to the objectives of the Convention. This is in sharp contrast to the two previous cases to have come before the High Court, which are considered below.

17. There is no evidence from either party as to a transfer request being made by the applicant in May, 2010.

18. One additional fact may be considered as established. Counsel for the Applicant appeared for him in the criminal trial and sentence hearing. While there is no transcript of that hearing, counsel confirms that he probably did submit to the trial judge that the Applicant's nationality was a matter to be taken into account in mitigation of sentence - indeed, as he says, it would have been remiss of him not to. Equally, it may be assumed that the trial judge did take it into account, having regard to the jurisprudence of the Court of Criminal Appeal. It is accepted that a prison sentence is harder for a foreign national with no ties to the State and no likelihood of family visits. In the circumstances the sentence of six and a half years is a significant one within the general range of manslaughter sentences and must be taken to reflect a serious offence.

19. Ultimately the argument centred on Article 8 of the Convention and whether the respondent's decision gave sufficient respect to the applicant's right to a family life.

The legislation

20. Section 4 of the Transfer of Sentenced Persons Act, 1995 provides in relevant part as follows:

> 4.- (1) Aperson on whom a sentence has been imposed in the State who wishes to be transferred out of the State to another Convention state, in order to serve the sentence or the balance of the sentence so imposed, may apply in writing to the Minister for such a transfer.
>
> (2) ...

(3) Subject to *subsection* (4) of this section, the Minister may grant an application under *subsection (1)* of this section, if the Minister is satisfied that the following requirements have been fulfilled:

(a) that the sentenced person concerned is, for the puposes of the Convention, regarded by the administering state as a national of that state;

(b) that the order under which the sentence concerned was imposed on the sentenced person is final;

(c) that, at the time of the receipt of the application, the sentenced person had at least 6 months of the sentence concerned to serve or the sentence was of indeterminate length;

(d) that the sentenced person...consents in writing to the transfer;

(e) that the acts or omissions constituting the offence concerned would, if done or made in the administering state, constitute an offence under the law of that state; and

(f) the administering state agrees to the transfer.

21. Section 10 (2) of the Act obliges the Minister, where practicable and where th interests of justice do not preclude so doing, to specify the grounds for his or her decision where the application is refused.

Section 10A of the Act, as inserted by s.2 of the Transfer of Sentenced Persons (Amendment) Act, 1997 provides that, as far as practicable, the Minister is to ake a decision within 6 months of the application.

Section 10B provides that pending a decision on an application the Minister shall keep the applicant informed at regular intervals of the progress of the application.

The Convention on the Transfer of Sentenced Persons
22. The preamble to the Convention recites that the members of the Council of Europe are desirous of further developing international co-operation in the field of criminal law and consider that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons. It goes on to say that these objectives require that foreigners who are deprived of their liberty as a result of a criminal offence should be given an opportunity to serve their sentences within their own society and that this is best achieved by having them transferred to their own countries.

The Convention is not in itself part of Irish law.

Article 8 of the European Convention on Human Rights
23. Article 8 provides in relevant part:

1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in acordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic wel-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The law
24. There are only two judgments so far in relation to this legislation, *Nash v Minister for Justice, Equality and Law Reform* [2004] 3 IR 296 and *Nascimento v Minister for Justice, Equality and Law Reform* [2011] 1 IR 1. The former is a decision of Kearns J in 2004 and the latter is a decision of Dunne J in 2007, upheld in an ex tempore judgment by the Supreme Court on the 6th October, 2010.

25. In *Nash*, the applicant was a British national who was serving two life sentences for murders in this State. His application for transfer was rejected on the basis that he was a suspect in two other murders into which a garda investigation was ongoing. A transfer would have had the effect that re-interviewing him would have been difficult and extradition effectively impossible, in the event that further evidence came to light. The Applicant claimed that the refusal was irrational in circumstances where it appeared that the Director of Public Prosecutions had decided not to charge him with the murders. In refusing him relief, Kearns J said of the Act that it was

> "properly to be seen as creating a statutory right in favour of a person in the applicant's position to make an application for transfer to another jurisdiction and to expect that the respondent, in considering that application, will do so reasonably and within the spirit and intent of the Act. Once the respondent does that and exercises his discretion in a manner which is not unreasonable in the sense of being irrational, or without material to sustain same, then that decision should not be set aside except for compelling reasons."

26. Kearns J also observed that a position adopted on a particular issue may at one point in time be reasonable, but at a later point may by passage of time become unreasonable, or even irrational.

27. It is worth noting that in Nash's case, the Minister had before him when making his decision reports from An Garda Siochana, the prison authorities and the probation and welfare service.

28. In *Nascimento*, the applicant was a Portuguese national serving a life sentence for murder. His transfer application was rejected because Portuguese law did not provide for a life sentence and if transferred he would instead have become liable to a sentence of 25 years. The period of time that he would actually serve would have been between a minimum of 16 years 8 months and a maximum of 20 years. The view of the respondent was that this was not appropriate given the gravity of the crime.

29. There is no reference to *Nash* in the report and indeed part of the argument concerned the contention that the word "may" in s.4 (3) should be read as "shall" so that where the statutory criteria set out above were met, the respondent had no option but to consent. In the event Dunne J came to the same conclusion as Kearns J, holding that the Act conferred a discretionary power. She further held that where the administering state did not have an equivalent sentence, the respondent was obliged to consider the actual time likely to be served by the applicant in this jurisdiction and whether the sentence as converted in the administering state was appropriate. The decision of the respondent was not irrational having regard to the facts of the case, which had been described

by the trial judge as "one of the most vicious, brutal and callous" killing that he had ever encountered.

30. Again, it is worth noting that in making his decision in *Nascimento's* case the respondent had before him a transcript of the sentence hearing (although there was no appeal in that case), a report on the circumstances of the murder, a report from the Prison Policy division, internal memoranda and a report from the probation and welfare service, all of which were placed before the court.

31. Much of the debate in both *Nash* and *Nascimento* concerned the argument that where administrative decisions affecting fundamental rights were under challenge, the court should apply a higher standard of review such as the "anxious scrutiny" test (propounded in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 W.L.R. 840). The judgments in both cases pre-date the decision of the Supreme Court in *Meadows v Minister for Justice*, [2010] 2 I.R. 701 which essentially held that the test as set out in *Keegan v Stardust Tribunal and 0'Keeffe v An Bord Pleanala* [1993] 1 I.R. 39 was sufficiently flexible, but it is relevant that in both the finding of the court was that no issue of fundamental human rights arose in relation to transfer applications under the Act. The context of that finding is important. In *Nash*, Kearns J commented that

> "Indeed, the court is quite satisfied that no issue of fundamental human rights arises in the instant case. The applicant is serving two life sentences for two different murders in respect of which he was convicted after a trial in the Central Criminal Court and in respect of which no appeal was brought. It has not been suggested that any issue of fundamental rights or constitutional rights would arise in any situation where the applicant was required to serve out his sentence in one location rather than another in this jurisdiction."

32. In *Nascimento*, the question of a prisoner's right of access to his family was specifically raised as human rights issue which, it was argued, took the case out of the normal realm of judicial review. In rejecting that approach and applying the standard set out in *O'Keeffe*, Dunne J accepted the argument by the respondent that even if the higher test could apply in this jurisdiction, it was not relevant to a case where the applicant was suffering a lawful imprisonment and his rights, such as access to his family, were necessarily curtailed.

33. Counsel for the applicant in the instant case points out that *Nash* and *Nascimento* were both decided before the judgment of the European Court of Human Rights in *Dickson v UK* in December 2007. That case involved a prisoner serving a life sentence for murder who had married a woman he met through a prison pen-pal system. He applied for permission for himself and his wife to use artificial insemination. Such a facility was available in UK prisons but it was the policy of the Home Secretary to make it available only in exceptional circumstances. Permission was refused on a number of grounds and judicial review proceedings were unsuccessful, partly on the basis that it was a deliberate and lawful policy that deprivation of liberty should ordinarily deprive the prisoner of the opportunity to beget children.

34. In its consideration of the relevant general principles, the Court commenced with its own decision in *Hirst v UK (No2)* (2006) 42 EHRR 849. In paragraph 69 of that judgment the court had referred to a number of cases illustrating the principle that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Art. 5 of the Convention. That prisoners have a right to respect for family life pursuant to Art. 8 had been established in *Ploski v Poland* [2003] Prison Law Reports and *X v UK*, Commission Decision of 8 October 1982. Any restrictions on the right required to be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment.

35. The Court in *Dickson* characterised Art. 8 as being primarily a negative undertaking, compelling the State to abstain from arbitrary interference with the individual's private and family life. It went on to hold, however, that there may be positive obligations inherent in an effective respect for private and family life.

> "These obligations may involve the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests" (Par.70)

36. In finding in favour of the applicant the Court held that the Home Secretary's policy set so high a threshold that it did not allow a balancing of the competing private and public interests or a proportionality test and failed to take adequate account of the interests of the applicants in a matter of vital importance to them.

37. In the recent case of *Trosin v Ukraine* (23rd February 2012, Appn. No.39758/05) the complaint related to allegedly inadequate and overly restricted family visits to a convicted prisoner. The Government conceded that there was an interference with Art. 8 rights but argued that it had been lawful and pursued the legitimate aim of ensuring security and safety in prison and preventing crimes. At paragraph 39 the Court said:

> "The Court reiterates that detention or any other measure depriving a person of his liberty entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him, in maintaining contact with his close family. Such restrictions as limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Art. 8 but are not, by themselves, in breach of that provision. Nevertheless, any restriction of that kind must be applied "in accordance with the law", must pursue one or more of the legitimate aims listed in paragraph 2 and, in addition, must be justified as being "necessary in a democratic society" (see *Moiseyev v Russia*, No. 62936/00 9 October 2008).

38. In that case, the Court found that the visiting restrictions were lawful, as being based on the relevant statutory provisions and also found that they pursued a legitimate aim. However, in considering whether the restrictions were "necessary in a democratic society" it found that, as the domestic law applied the same regime to all prisoners in that category, there was no mechanism to determine whether the limitations were necessary in a particular case. The State had not developed a proportionality assessment to enable the authorities to balance the competing private and public interests. Looking at the facts of the case, the Court found no evidence in relation to the applicant to justify the restrictions.

The decision

39. It is clear that the power in question is indeed a discretionary one and the fact that an applicant meets the statutory criteria, as this applicant does, does not per se entitle him or her to be transferred. It is also clear that the *Keegan* and *O'Keeffe* standards as

analysed in *Meadows* are appropriate to the examination of a decision affecting fundamental rights.

40. In my view the developments in the jurisprudence of the Court of Human Rights in this area are sufficient to ground a finding that a request by a prisoner for transfer to his home country on the grounds of access to his family is capable of engaging Article 8 rights. The consequence of that is that a decision to refuse such a request is an interference with the right to a family life requiring to be justified according to the Convention criteria.

41. Where decisions encroach on rights it is the duty of the decision-maker to take account of and to give due consideration to those rights. Where an applicant says that the decision is unreasonable the court must examine it to ensure that the decision-maker has complied with that duty. In considering the reasonableness of a decision the court will look at the proportionality of its impact on the right in question- see *Meadows*, referred to above.

42. In this case the respondent has not stated, either to the applicant or to his solicitor, or by way of affidavit, whether he gave consideration to the applicant's family rights and if so how he balanced them against the public interest identified by him in upholding the full term of the sentence imposed by the Irish Court. (For the avoidance of doubt it should be said that this is a legitimate policy concern.) The Statement of Opposition specifically pleads that the evidence placed before the respondent in the application for transfer was tenuous and not sufficient to engage a consideration by the respondent of Article 8. This leads almost inevitably to an inference that consideration was not given to this aspect. That in turn, quite apart from Convention considerations, leads to the conclusion that the decision was not made "within the spirit and intent of the Act".

43. It is indeed true that the information given in the application form was scant- however, the form itself does not allow space for much more. There is no suggestion on the face of the form that, for example, it could be accompanied by a letter setting out the applicant's circumstances in more detail. The only reference to additional material is in relation to official documents such as birth certificates and passports. Since it is likely that prisoners in the position of the applicant will be filling out the form without the assistance of a lawyer it is important that they be given the chance to make their case properly. In any event, it would have been open to the respondent to ask for more information if he felt that what was provided was insufficient. In my view the fact that the sole ground put forward by the applicant for the transfer was to be closer to his mother was enough to put the respondent on notice that family rights were being invoked.

44. It is also true that the applicant cannot prove to the respondent that a transfer will result in closer contact with his family since the UK authorities cannot guarantee that he will be placed near them. In my view all that needs to be said about that is that, presumably, the "best efforts" of the UK authorities are more likely to put him in proximity to Essex than the Irish authorities.

45. In the circumstances I do not find it necessary to make a finding as to whether the ultimate decision was reasonable or not since it seems clear that in making it the respondent did not take account, or sufficient account, of a relevant consideration. I will simply comment that on the state of the evidence in this case, in contrast to *Nash* and *Nascimento* there is no way of knowing whether the respondent's assessment is well-founded or not. Nor is it appropriate to embark upon an examination of the suggested justification for the interference with Article 8 rights -the prevention of crime and disorder - when there is no evidence that the respondent had Article 8 in mind.

46. At the request of the parties I will hear them before making any final order.