Neutral Citation: [2014] IEHC 420

THE HIGH COURT

[2014 No. 1062 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

FINTAN PAUL O'FARRELL

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON (NO. 2)

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 11th day of September, 2014

1. This judgment is supplementary to the judgment which I have already delivered in this matter, *O'Farrell v. Governor of Portlaoise Prison* [2014] IEHC 416 ("the first judgment"). The factual and legal background to this application is complex and is more fully set out in the first judgment. One may, however, endeavour to summarise essential facts and legal issues in compressed form as follows.

2. The applicant, Mr. O'Farrell, is a member of an illegal organisation styling itself the "Irish Republican Army". In 2001, he and two colleagues (and, indeed, fellow applicants in related Article 40.4.2 proceedings) endeavoured to purchase weapons in Slovakia for that organisation from persons whom they believed were agents from the Iraqi Government. They were, in fact, undercover British agents. The applicant was arrested on 5th July, 2001, and in late August 2001, he was extradited from Slovakia to the United Kingdom.

3. In May 2002, the applicant ultimately pleaded guilty to a series of offences before Woolwich Crown Court. He received a sentence a sentence of 30 years' imprisonment from the presiding judge, Astill J., which sentence was backdated to 5th July, 2001, the date on which he went into custody in Slovakia.

4. The applicant appealed the severity of that sentence to the Court of Appeal of England and Wales (Criminal Division). On 15th July, 2005, that Court set aside the original terms of 30 years' imprisonment and substituted a sentence of 28 years' imprisonment. There is no doubt but that the sentence as so varied constituted a final order of the courts of England and Wales.

5. On 28th July, 2006, this Court issued a warrant pursuant to s. 7 of the Transfer of Sentenced Persons Acts 1995-1997 ("the 1995 Act") providing for the transfer of the applicant to this State from the United Kingdom and detaining him in Portlaoise Prison. The terms of this warrant convey, in rather unambiguous terms, the impression that the applicant's sentence was one of 28 years' imprisonment commencing on 7th May, 2002. It is acknowledged that the s. 7 warrant incorrectly recites 7th May, 2002, as the commencement date for the sentence. The warrant should instead have given 5th July, 2001, as the commencement date.

6. A further complication which has come to light since the transfer of the applicant to this State is that there is, in fact, a significant difference between the sentencing regimes in England and Wales, on the one hand, and Ireland on the other. In essence, the difference is this: in England and Wales, offenders are entitled to *automatic release* after either one-third or, in the case of sentences imposed after April 2005, one-half of that sentence. In Ireland, however, prisoners are required to serve their full sentence, subject only to an entitlement (which in certain circumstances may only be discretionary), to earn remission of that sentence through good behaviour. The standard remission provided by Rule 59(1) of the Prison Rules 2007 (S.I. No. 252 of 2007) is that of 25% of the sentence. As I explained in the first judgment, the difference could be summed up by saying that the British system of *automatic release by way of legal entitlement* after service of two-thirds (or, in the case of a conviction April 2005, one-half) of the sentence goes to the *legal nature* of the sentence imposed by the judicial branch of the sentencing State, whereas the Irish system of remission (which is normally one-quarter) is fundamentally a matter going to the question of the *administration* of the sentence by the executive of the receiving State.

7. The significance of these differences between the two sentencing regimes was fully explored by the Supreme Court in *Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42. In *Sweeney*, the applicant had received a sentence of 16 years following his conviction by the English courts for serious drugs offences in December 2006, i.e., after the provisions of the UK 2003 Act had taken effect. Following his transfer to Ireland under the 1995 Act, the issue arose as to what constituted the sentence (or, to use the terminology of s. 1(1) of the 1995 Act, the period of "deprivation of liberty") for the purposes of the 1995 Act.

8. It was common case that both the Strasbourg Convention on the Transfer of Sentenced Persons (1983)(which formed the background to the enactment of the 1995 Act), and the 1995 Act itself, envisaged that the legal effect of the sentence was to be governed by the law of the sentencing State (in this case, England and Wales). It was also clear, however, that as Clarke J. put it (at para. 3.2), "sentence administration and enforcement is for the host country". It was, nevertheless, necessary for the Irish courts to have regard to what Murray J. described (at para. 37) as "an objective assessment of its duration and legal nature."

9. In the light of this analysis, the Supreme Court concluded that, for the purposes of Irish law, the sentence of 16 years imposed by the English courts must be regarded as one of 8 years' duration. As the eight-year sentence in that case had, however, already expired, it followed that the applicant was entitled to be released. The actual order of the Supreme Court of 18th July, 2014, recites that the actual warrant of imprisonment was to be quashed by way of *certiorari*, and the Court further declared that the applicant should be released forthwith from detention.

10. In the first judgment, I held the effect of *Sweeney* was that the recital in the s. 7 warrant to the effect that the duration of the sentence imposed was one of 28 years was defective and could not stand. I took the further view, however, that, having regard to the nature of the errors, the interests of the sentencing State and the otherwise very full description of the offences contained in the warrants, it would be appropriate that the Minister should have the opportunity, should she thought it appropriate to do so, to

apply to this Court under s. 9(1)(b) of the 1995 Act to have the terms of the existing s. 7 warrant varied so that the duration of the sentence was correctly recorded and the defective warrant amended. I adjourned the present Article 40.4.2 proceedings pending the outcome of this application which the Minister has now made to this Court.

11. In that first judgment I expressed no view as whether the Court could or should exercise this power of variation so as to correct the warrant. I did, however, observe that if the warrant could not be corrected, then this Court would have no option but to direct the release of the applicant, as in that situation, the respondent would not be able to demonstrate the existence of a valid warrant justifying the detention.

The difference between the power to adapt and the power to vary

12. It will be seen, therefore, that much depends on the true distinction between the power to adapt a sentence, on the one hand (s. 7(5)), and the power to vary the terms of a warrant (s. 9), on the other. It is clear from the language of s. 9(2) of the 1995 Act that the power to vary a s. 7 warrant may be exercised by this Court "if it considers it appropriate to do so in order that effect may be given to the provisions of the [Strasbourg] Convention".

13. The distinction between the power to adapt and the power to vary might be regarded as a rather subtle and slender one. It is, however, one which has been carefully drawn by the Oireachtas itself, and the distinction lies at the heart of the 1995 Act.

14. What, then, is the distinction between the power to adapt and the power to vary? The former implies a power to modify, or even transform the nature of the sentence at issue. It is perhaps noteworthy, for example, that s. 12 of the Adaptation of Enactments Act 1922 ("the 1922 Act") gave the Government the general power to adapt or modify existing legislation so as to ensure that that legislation enacted by the United Kingdom Parliament prior to 6th December, 1922, had full force and effect in what was then to become the Irish Free State. It is true that the power to adapt includes a power to vary, but the power to adapt is more far-reaching and transformative in its proper exercise than a mere power to vary. The adaptation of enactments procedure provided for by the 1922 Act accordingly enabled the Government to make orders which rendered legislation which was heretofore designed as applying to the entirety of the (former) United Kingdom as being applicable (as thus adapted) solely to this State. This did something somewhat more than merely "vary" the terms of the pre-1922 legislation, as it enabled the underlying character of the legislation to be modified so that it could apply (as so adapted) as if it were an item of autochthonous legislation enacted solely for this State.

15. Against that background, therefore, we may examine whether the defects exhibited in the present s. 7 warrant can be cured by means of a variation order under section 9.

The Date of the Commencement of the Sentence

16. It is agreed that the warrant incorrectly records the date on which the sentence was due to commence *i.e.* it gives that date as 7th May, 2002, rather than 5th July, 2001. In my view, this error can properly be corrected by means of the making of a variation order under s. 9(1) of the 2005 Act. Such a corrective order is somewhat akin to the making of an order under the slip rule (O. 28, r. 11) and the nature of the change can properly be regarded as being appropriate to a variation order. The making of such an order can, moreover, be said to be giving effect to the provisions of the Strasbourg Convention within the meaning of s. 9(2), because it enables the duration of the sentence actually imposed by the sentencing state to be accurately reflected in the s. 7 warrant.

17. I will, accordingly, make an order pursuant to s. 9(1)(b) varying the s. 7 warrant in order to reflect the correct commencement date of the sentence.

The Nature of the Sentence imposed by the Courts of England and Wales

18. It seems clear that the sentence actually imposed by the Woolwich Crown Court has no direct counterpart in our law, since - as the Supreme Court made clear in Sweeney - we have no equivalent legislation which provides for the automatic release of the prisoner following the expiration of a fixed period of that sentence. As I observed in the first judgment:

> "…a further consequence of *Sweeney* is that the English sentence should in fact more properly have been "adapted" under s. 7(5) of the 1995 Act. I find myself coerced to that conclusion because it seems necessarily implicit in *Sweeney* that the continued enforcement option envisaged by Article 9(1) and Article 10(1) of the Strasbourg Convention (as reflected in s. 7(4) of the 1995 Act) is no longer appropriate in the case at least of sentences *of this kind* imposed by the courts of England and Wales having regard to the manner in which those sentences provide, not for remission as such, but rather for automatic release following the service of an appropriate portion of the nominate sentence imposed."

19. Counsel for the Minister, Mr. Gillane S.C., contended that the s. 7 warrant describing the sentence could be "varied" by means of a s. 9 order so that, reflecting the nature of the English legislation as interpreted in *Sweeney*, the duration of the sentence imposed by the sentencing State would then be changed from one of 28 years to that of 18 years and 8 months. But, as counsel for the applicant, Mr. O'Higgins S.C., countered, this would give the (false) impression that the sentencing court had actually imposed a sentence of that duration, *i.e.,* of 18 years and 8 months. This is not what occurred at all: rather, what is necessary is that the sentence must be appropriately adapted so that the nature of the English sentence can be modified in order to reflect the true equivalent sentence as might have been imposed by a court in this State.

20. In these circumstances, I find myself driven to the conclusion that the English sentence, accordingly, requires to be adapted by means of an order under s. 7(5) of the 1995 Act (the text of which is set out below). Unless the terms "adapt" and "vary" were to be treated as interchangeable by the court – something which would effectively elide and collapse the distinction so carefully drawn by the Oireachtas in the 1995 Act itself – the necessary modification of the English sentence positively requires the making of an adaptation order, so that it can be transformed into an equivalent sentence for the purposes of Irish law. This cannot be done by means of the making of a variation order under s. 9(1), as that power does not extend to the essential modification of the sentence imposed which would be required in turn to effect such a modification of the s. 7 warrant. Put another way, the power to vary cannot be exercised as a substitute for the power to adapt.

21. It is also necessary to note that s. 3 of the Explosive Substance Act 1883 (as substituted by s. 4 of the Criminal Law (Jurisdiction) Act 1976 and as further amended) provides that the maximum sentence which can be imposed for conspiracy to cause an explosion is twenty years. As the corresponding offence in England and Wales allows for the higher penalty of life imprisonment, it also follows that the 28 year sentence required to be adapted on this account as well, since the nominal sentence of 28 years imposed by the English courts (i.e., ignoring the automatic release after service of two thirds of sentence) is greater than the maximum sentence available in Ireland in respect of this offence.

22. Here it must be observed that s. 7(6)(a) of the 1995 Act (as amended) provides that the adapted sentence cannot exceed the maximum penalty prescribed in our law in respect of the corresponding offence, but it is, perhaps, striking that s. 9 (dealing with the

power to vary) contains no corresponding protection of this kind. This in itself is a further clear indication from the actual text of the statute that where (as here) the sentence imposed by the foreign court is greater than the maximum penalty prescribed by our law in respect of the corresponding offence, an adaptation order under s. 7(5) is required. The Oireachtas must be taken in this context to have assumed that a foreign sentence which provides for a period of imprisonment which is greater than the maximum penalty available under Irish law for the corresponding offence required to be adapted under s. 7(5). Why else would s. 7(6)(a) contain a prohibition of this nature governing the making of an adaptation order if the Oireachtas had also thought that a change of this kind could be achieved by the making of a variation order under s. 9(1)?

23. It will be seen, therefore, that, upon reading the 1995 Act as a whole and, particularly, comparing the terms of s. 7(5) and s. 7(6) on the one hand with that of s. 9(1) on the other, one is coerced to the conclusion that a change of this kind which modifies the nature of the foreign sentence requires the making of an adaptation order and is not something which can be dealt with by means of a variation order under s. 9(1).

Can the Court now make an order "adapting" the English sentence under section 7(5) of the 1995 Act?
24. The power to adapt a sentence is now contained in s. 7(5) of the 1995 Act (as inserted by s. 1 of the Transfer of Sentenced Persons (Amendment) Act 1997):

> "(5) (a) On an application to the High Court under subsection (1) of this section, if the sentence concerned imposed by the sentencing state concerned is by its legal nature incompatible with the law of the State, the Court may adapt the legal nature of the sentence to that of a sentence prescribed by the law of the State for an offence similar to the offence for which the sentence was imposed.
>
> (b) The Minister may, in his or her absolute discretion if he or she thinks it appropriate to do so, include in an application to the High Court under subsection (1) of this section an application that the Court adapt the duration of the sentence concerned imposed by the sentencing state concerned to that of a sentence prescribed by the law of the State for an offence similar to the offence for which the sentence was imposed and, if the Minister does so and the sentence concerned imposed by the sentencing state concerned is by its duration incompatible with the law of the State, the Court may adapt the duration of that sentence as aforesaid.
>
> (6) (a) The legal nature of a sentence adapted under paragraph (a) of subsection (5) of this section shall, as far as practicable, correspond to the legal nature of the sentence concerned imposed by the sentencing state concerned and shall not, in any event, either—
>
> (i) aggravate it, or
>
> (ii) exceed the maximum penalty prescribed by the law of the State for a similar offence.
>
> (b) The duration of a sentence adapted under paragraph (b) of subsection (5) of this section shall, as far as practicable, correspond to the duration of the sentence concerned imposed by the sentencing state concerned and shall not, in any event, either—
>
> (i) aggravate it, or
>
> (ii) exceed the maximum penalty prescribed by the law of the State for a similar offence."

25. This section needs to be read in conjunction with s. 7(1) of the 1995 Act, which provides:

> "Where the Minister consents to a request for a transfer under s. 6 of the Act, he or she shall apply to the High Court for the issue of a warrant authorising the bringing of the sentenced person into the State from a place outside the State and the taking of the person to, and his or her detention in custody at, such place or places in the State as may be specified in the warrant."

26. It is clear from the language of s. 7(1) that an application for the transfer order has to be made before the prisoner is physically transferred into the State. It follows, inexorably, from the opening language of s. 7(5)(a) ("on an application to the High Court under subsection (1) of this section….") that the power to adapt can only be exercised at this juncture and, specifically, that this power of adaptation cannot be exercised at any later stage.

27. It follows, therefore, that this Court now simply lacks any jurisdiction at this point to make the appropriate adaptation order under s. 7(5) of the 1995 Act (as amended). This, in turn, means that the s.7 warrant offered by the respondent to justify the detention of the applicant transpires to be irremediably defective, and, unfortunately, lies beyond the capacity of this Court to correct or cure.

28. This has the further implication that the s.7 warrant remains manifestly defective in one highly material particular, namely, the nature and duration of the sentence imposed. In the light of *Sweeney*, the English sentence is obviously incompatible with Irish law and requires to be adapted by this Court for that sentence to be effective in this State. All of this, in turn, leads ineluctably to the conclusion that the respondent cannot satisfactorily demonstrate that the detention of the applicant is in accordance with law, given the existence of a defective warrant which lies beyond the capacity or jurisdiction of this Court to rectify at this juncture. This jurisdiction is lacking because the power to adapt foreign sentence is a matter of substantive law requiring statutory vesture and in respect of which the Court has no inherent jurisdiction.

29. The situation can be summed up by saying that the English sentence in question is ineffective in law unless it has been adapted by this Court under s. 7(5) of the 1995 Act. The Court has not, however, been given the statutory power to make the necessary adaptation order after the transfer of the sentenced person has taken effect. In the absence of such a statutory power to adapt post the making of a transfer order, the Court is helpless to effect the curative action which would be necessary to remedy the defective warrant in respect of which the applicant is presently held by the respondent.

30. As a result of this it necessarily follows that the current detention of the applicant cannot be shown to be lawful as a valid warrant cannot be produced to justify the detention.

Conclusions

31. In these circumstances, the Court is left with no alternative but to direct the release of the applicant in accordance with Article 40.4.2 of the Constitution.