Neutral Citation: [2016] IEHC 208

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 131 J.R.]

BETWEEN

M. McK.

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of April, 2016

1. The applicant was born in 1972 and is currently 43 years of age. He states that he went to the United Kingdom from Ireland on 5th May, 1995.

2. In the U.K. he was charged with having, on various dates between 2001 and 2004, committed a range of sexual acts against his daughter and stepdaughter, being anal rape, indecent assault, indecency with a child, and inciting a child under thirteen to engage in sexual activity, namely oral sex.

3. He was duly convicted on all counts on 5th August, 2009.

4. On 4th December, 2009 he was sentenced to a term of life imprisonment by way of an indeterminate sentence for public protection with a minimum of 8 years on count 6 (one of the rape counts) and 6 years concurrently on the other counts. The 8 years was arrived at by the learned sentencing judge being of the view that 16 years was the appropriate minimum, to be subjected to a 50% discount for remission. This was in the context where remission does not apply to the minimum term to be served within a sentence of indeterminate detention for public protection. The applicant was also disqualified from working with children and subjected to sex-offender registration requirements.

5. He made an informal request in October, 2010 for transfer to this country to serve his sentence here. This was followed by a formal application by the U.K. Ministry of Justice on 8th September, 2011, and by the applicant himself in November, 2011.

6. On 6th July, 2012, a deportation order was made against him, by consent, by the U.K. authorities, which, assuming it continues in force, would have the effect of requiring him to come to Ireland on his release from the sentence of indefinite detention.

7. On 11th May, 2015, he instituted a first set of judicial review proceedings [2015 No. 238 J.R.] with a view to obtaining mandamus against the Minister requiring her to make a decision on the request for a transfer. These proceedings were compromised and struck out by agreement on the basis that a decision would be made.

8. Following this, the Minister issued a letter refusing the application dated 16th December, 2015. Against that refusal he now brings the present application seeking leave to apply for certiorari. I directed that the application be made on notice and have heard from Mr. Michael Lynn, S.C. (with Mr. Alan Brady, B.L.) for the applicant and Mr. Robert Barron, S.C. and Ms. Siobhán Ní Chúlacháin, B.L. (who also addressed the court), for the respondent.

The test for leave in G. v. D.P.P.

9. In *G. v. D.P.P.* [1994] 1 I.R. 374 at 377 to 378, Finlay C.J. set out the criteria for the grant of an ex parte application for leave. As developed by subsequent changes to the rules of court, and subsequent caselaw, the criteria can be summarised as follows:

(i) That the applicant *"has a sufficient interest in the matter to which the application relates"* (p. 377);

(ii) That *"an arguable case in law can be made that the applicant is entitled to the relief which he seeks"* (p. 378) on the basis of facts averred to, albeit that the court can also have regard at least to uncontradicted evidence adduced by a respondent who has been put on notice of the application. Of course in particular circumstances a higher threshold applies, such as where legislation requires substantial grounds, or where the grant of leave would itself be likely to determine the event (*Agrama v. Minister for Justice and Equality* [2016] IECA 72 (22nd February, 2016) per Birmingham J. at para. 32);

(iii) That the application has been made within the appropriate time limit or that the Court is satisfied that it should extend the time limit in accordance with the applicable rules of court or legislation;

(iv) That *"the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure"* (p. 378);

(v) That there are no other grounds to warrant refusal of leave. *"These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application"* (p. 378).

10. In the present case, the real issue is whether an arguable case has been made out.

The requirements of arguability
11. A claim is not arguable if it is clearly wrong; for example if it is *"based on a fundamental misconception" (Agrama v. Minister for Justice and Equality* [2016] IECA 72 per Birmingham J. at para. 33, see also para. 36). Furthermore it is not arguable if the point involved has already been decided in another case adversely to the position now being argued for, and the applicant does not demonstrate any clear basis as to why the previous decision ought to be departed from. Otherwise there would simply be no end to the litigation of stale points. Of course the door is open to an applicant to show that the law should move on since any earlier decision but a clear basis to do so must be shown.

12. A claim is not arguable merely because its consideration requires an amount, even a considerable amount, of debate and consideration by the court: by way of example see the very detailed judgments of Peart J. refusing leave in *Duffy v. Clare County Council* [2013] IEHC 51 (8th February, 212); and *Kelly v. Flanagan* [2014] IEHC 378 (26th June, 2014). An applicant does not establish substantial or even arguable grounds merely by weight of papers or number of grounds pleaded, or merely by virtue of the quantity of submissions, affidavits and time required to deal with the matter: see my judgment in *O'Mahony Developments v. An Bord Pleanala* [2015] IEHC 757 (27th November, 2015) at para. 50; *R. v Local Government Commission for England ex p. North Yorkshire County Council* (unreported, High Court (Queen's Bench Division), 11th March, 1994) (per Laws J.); and *R. v. London Docklands Development Corporation ex p. Frost* [1997] 73 P. & C.R. 199, per Keene J. at 204: *"The approach of 'never mind the quality, feel the width' has no application in these proceedings".*

What are the key reasons for the refusal?
13. The letter of 16th December, 2015, setting out the refusal decision is in a reasonable lengthy narrative form, setting out reasons over more than two pages.

14. It acknowledges that *"the difficulties that your client has faced and will continue to face in light of his separation from his family are weighty factors in favour of the Minister consenting to his transfer".*

15. Mr. Lynn, in a very able argument on behalf of the applicant, accepts that there are essentially two reasons set out in this letter:-

(i) The sentence of indefinite imprisonment for public protection is unknown to Irish law, and therefore, transfer would require an application to the High Court to adapt the sentence. In those circumstances, *"[t]he only sentence that could be imposed without it appearing to involve an aggravation of the duration of the sentence would be an eight year sentence. That would be significantly less than the sixteen year period which the trial judge in the United Kingdom considered to be the appropriate period had he imposed a determinate sentence".* This is in the context where transfer to Ireland would be for a determinate sentence but custody in the U.K. would be dependent on persuading a parole board he was not a danger to the public, even after the expiry of the 8 year period.

(ii) In addition to that difficulty, "it would not be consistent with the promotion of social rehabilitation to transfer your client to Ireland in circumstances in which he denies the offence". This denial would be considered to *be "a very negative factor in attempts to rehabilitate him",* and would make it unlikely that he would be considered suitable to be held in Arbour Hill Prison, the national centre of excellence for rehabilitating sexual offenders.

16. These appear to be the core reasons as set out in the letter. There are a number of other points made, but these do not seem to me to even arguably go to the core of the decision, such as the lack of clarity as to whether his daughter makes visits, and the point that the elements of release on licence and prohibition from working with children could not apply in this jurisdiction. If the applicant stays in custody in the U.K. and is eventually released there, he is free to return to Ireland at that point (indeed he is required to do so under the deportation order), so the suggestion that the public interest is less well served at that point by the non-enforceability of those conditions does not seem hugely weighty, as they will probably be unenforceable anyway if he is back in Ireland. These are not core reasons.

Is acceptance of a transfer a matter of discretion even if the statutory conditions are fulfilled?

17. Section 6(3) of the Transfer of Sentenced Persons Act 1995 provides that *"the Minister may consent to a request"* for a transfer of a sentenced person into the State if she is satisfied that a number of requirements have been fulfilled.

18. Following such a consent, the Minister is required to apply to the High Court under s. 7 of the Act for a warrant authorising the bringing of the person into the State. Pursuant to s. 7(5) and (6) of the 1995 Act, as amended by s. 1 of the Transfer of Sentenced Persons (Amendment) Act 1997, the High Court is given jurisdiction in the case of a sentence which is "by its legal nature incompatible with the law of the State" to "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".

19. The Council of Europe explanatory report to the Convention on the Transfer of Sentenced Persons of 21st March, 1993, which the 1995 Act implements, provides that *"[t]he Convention … does not contain an obligation on Contracting States to comply with a request for transfer; for that reason it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal…".*

20. The existence of a discretion is clear from the English words used, but such clarity is reinforced if that be necessary, by comparing the language of s. 6(3) (*"the Minister may",* reflecting the term *"may"* in art. 2 of the Convention) with that of s. 7(1) *("the Minister…shall").*

21. What is clear, however, from the caselaw on s. 6(3) is that the Minister enjoys a discretion as to whether to consent to an application for transfer into the State (Butcher v. Minister for Justice and Equality [2012] 4 I.R. 401 per O'Malley J. at 414 (para. 39); *Nascimento v. Minister for Justice, Equality and Law Reform* [2011] 1 I.R. 1 per Dunne J. at 27 to 28 as upheld by the Supreme Court, ex tempore, 6th October, 2006 (see at p. 46)). She is not obliged to consent to such an application even if the listed requirements have been met.

Is the ministerial view as to the appropriate sentence to be treated as a finding of law?

22. Mr. Lynn submits in essence that the Minister has (arguably) made a finding of law, that that finding of law is arguably incorrect, and that review of such a finding is a matter for the court, without the necessity to defer to the Minister's assessment (relying for the latter proposition on *Farrell v. Attorney General* [1998] 1 I.R. 203 per Keane J. at 224 to 225).

23. It must be said that the scheme of the Act is on one view highly problematic. It requires the Minister first to form a view as to

the appropriate adaptation, then to make an application to the court (under s. 7(1)), which under the rules of court is ex parte (see Rules of the Superior Courts 1986 O. 128, r. 2 inserted by the Rules of the Superior Courts (Transfer of Sentenced Persons) 2007 (S.I. No. 417 of 2007)), which court may then take a different view from the Minister's as to the appropriate adaptation (under s. 7(5) as amended by the 1997 Act), but which application in any event being ex parte would not seem to create a res judicata that binds the prisoner in subsequent proceedings. The existing system therefore allows the transferred prisoner to apply under Art. 40 of the Constitution on the day of his or her arrival in the State or at any time thereafter on the basis that the correct adapted sentence was not imposed, and fight that issue all the way to an appellate court which might take a different view to the High Court deciding the ex parte application.

24. At one level it seems questionable whether it is wise to even attempt to operate such a fundamentally flawed system pending a review and if necessary legislative amendment and clarification. There is no obligation to operate it because the Minister's entitlement to approve a transfer is discretionary, and a discretionary refusal on the grounds that the Act requires review, clarification or amendment would be manifestly reasonable in the circumstances. At a minimum, if the system is to be continued to be operated, one would have thought that all such applications under s. 7 should be made on notice so that if the applicant has an issue with the adaptation he or she can ventilate it at that point and be bound by the result, subject to appeal in the s. 7 proceedings. That would in my view conclusively determine the issue for the purposes of subsequent Art. 40 proceedings.

25. In any event given the scheme of the Act as set out above it seems to me that the Minister is not making a finding at all (still less a finding of law) when she forms a position as to the likely adapted sentence. All she is doing is expressing a view. The appropriate test for review is therefore essentially that of reasonableness rather than a non-deferential standard where the judicial review court would form its own view as to the likely adapted sentence.

26. This approach comports with the decision of Kearns J. in Nash v. Minister for Justice [2004] 3 I.R. 296 at 310 to 311 where he stated that the Minister must act *"reasonably and within the spirit and intent of the Act. Once the [Minister] 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".*

27. Thus the complaint that the Minister did not make *"any finding that the applicant does not meet the criteria set out in s. 6(3)"* (applicant's submissions para. 10) is misconceived because the Minister is entitled in her discretion to decline to approve a transfer on any reasonable basis that commends itself to her even if the criteria set out in s. 6(3) are met. In the light of the foregoing, including the decisions in Butcher, Nascimento and Nash, it is not arguable to submit, as the applicant appears to do in written submissions at para. 13 and 24, that the fact that ministerial discretion is mentioned in s. 7(5)(b) means that it does not permeate the decision-making process overall. Those decisions are not doubted in the applicant's written submissions and no arguable grounds have been shown to revisit them.

Is the Minister arguably wrong to have formed any view at all on the likely adapted sentence?

28. Mr. Lynn complains that the Minister has taken it upon herself to come to a conclusion on adaptation, whereas this is reserved to the High Court (Ground 2(c)). This is not an arguable point, because the Minister has not done that. Obviously the Minister must be entitled to take a view on what the likely sentence as adapted would be, and the suggestion that it would be eight years is not unreasonable, a matter to which I will return. Whether the judicial process would so conclude would ultimately have to be decided by the High Court in the context of s. 7 or of Art. 40. That the Minister has taken a view on it is not an arguable ground for judicial review in itself.

Is the Minister arguably wrong in her view of the appropriate adapted sentence?

29. As regards the difficulty in adapting the sentence, Mr. Lynn submits that the Minister was wrong in stating that the only corresponding sentence that could be put in place by the High Court would be a sentence of eight years' imprisonment.

30. According to the British authorities, an indeterminate sentence for public protection is a sentence of life imprisonment (see letter dated 8th September, 2011 from Ministry of Justice to the Prisons and Probation Policy Division of the respondent's Department). That might suggest that the appropriate adapted sentence would be a sentence of life imprisonment, although the applicant was not quite making an admission in this regard and more based the application on the argument that a longer determinate sentence would have been equivalent to the 8 year minimum. The fact that the applicant was canvassing at least 3 possible corresponding sentences demonstrates (if such be needed) an anxiety to keep his options open in this regard, which necessarily involves a reservation of an entitlement to change the ground rules through a subsequent Art. 40 application if transferred here. The three possibilities discussed were as follows:

(i) a life sentence;

(ii) a sentence of 10 years and 8 months; or

(iii) a sentence of 8 years (which the applicant rejects).

31. As regards the first option, Mr. Barron relies on the High Court decision in *Minister for Justice and Equality v. Nolan* [2012] IEHC 249 (per Edwards J., 24th May, 2012), upheld as to the ECHR aspect in *Minister for Justice and Equality v. Kelly* [2013] IESC 54 (per Denham C.J., (Murray and MacMenamin JJ. concurring), 10th December, 2013), which holds that an indefinite sentence for public protection is not compatible with Irish law. That authority seems hard to immediately reconcile with the notion that the indefinite sentence for public protection can be equated with a life sentence.

32. As regards the second option, Mr. Lynn suggests that a sentence of ten years and eight months would be the equivalent to eight years without remission, because applying the Irish 25% remission rate to a sentence of ten years and eight months would yield the same result as applying the English 50% remission rate to a sentence of sixteen years.

33. In *Sweeney v. Governor of Loughan House* [2014] IESC 42 (3rd July, 2014), Clarke J. distinguished between the differing effects of a sentence of 16 years, half of which was to be served in the community, and 16 years subject to usual remission. The first sentence is deemed to be a sentence of 8 years; the second is longer. That decision requires paying very close attention to the legal nature of the sentence as imposed in the transmitting state and in that regard it seems to me that the applicant's argument is based on a false premise, namely that the 8 year minimum in the U.K. equates to 10 years and 8 months here. The applicant could, after all, be released after 8 years where he is, and he has no absolute guarantee of full remission if returned to Ireland. Therefore a sentence of 10 years and 8 months seems to be at least a possible aggravation of the sentence.

34. If the only other options canvassed fall away, one is left with the Minister's conclusion that the appropriate sentence would be 8 years. No arguable grounds have been shown to support the argument that this was unreasonable. Even if some other possibility is arguable (which has not been established) that does not even arguably have the consequence that the Minister's decision is unreasonable.

Is the decision to refuse the application because of the applicant's denial of guilt arguably unreasonable?

35. However, there is a second independent decision for refusing the transfer, namely the applicant's continued denial of guilt. Given the discretion vested in the Minister under s. 6, there does not appear to me to be an arguable basis to say that she could not lawfully have refused the application on this ground.

36. Mr. Lynn criticises the findings in relation to release on licence and working with children but I do not read those as going to the core of the decision, even arguably so, and even if they were erroneous.

37. He submits that the applicant is ineligible for sex offender rehabilitation in the U.K., and that therefore, a similar ineligibility as regards rehabilitation in this country is not a reason to refuse transfer. While the first part of that proposition may be correct, the conclusion does not flow from that premise. Even if the applicant would not, while continuing to deny guilt, be in a position to avail of rehabilitation in the U.K., that does not mean that the English sentence is not such as to strongly encourage him to do what is required to rehabilitate himself. The reason for that is that it is an indefinite sentence, and therefore the applicant is dependent on the English Parole Board for release after the minimum period specified by the court. That in itself is a significant incentive. Mr. Lynn criticises as unreasonable the Minister's finding, set out in the decision letter, that *"the United Kingdom sentence ensures that your client would engage in appropriate rehabilitative activities whilst in prison there in order to promote his opportunities for release by the Parole Board on the expiration of the minimum eight year period of his sentence. In circumstances in which he continues to deny the offence, it is considered that this could not occur effectively in Ireland and consequently the aim of social rehabilitation would be impeded by his transfer to this jurisdiction".*

38. Far from being arguably unreasonable, it seems to me that this analysis is manifestly correct. The English sentence provides a degree of incentive to acknowledge his guilt and to rehabilitate himself that is simply not available, on any view, by an adapted determinate sentence in this country. The applicant's case is simply based on the misconception that a determinate sentence here is at least as protective of the community as an indefinite sentence in the UK. This is a manifestly mistaken proposition. The English sentence maximises the potential for public protection in a way that an adapted determinate sentence simply could not. On that basis, the Minister's decision under this heading is neither arguably irrational nor arguably unlawful, nor is it arguably based on an error of fact or law.

39. If the challenge to the second reason for the decision, relating to the loss of rehabilitative effect, fails, then even if I am wrong in saying that there is no infirmity with the analysis of the first reason, relating to the appropriate adapted sentence, the overall decision would have to stand because it is supported by at least one valid, independent and free-standing reason.

Is the decision arguably invalid by reason of speculation as to visiting arrangements or the approach taken regarding post-release conditions?

40. Mr. Lynn also complains that the Minister relied on speculation as to whether the applicant's daughter chooses to visit him or as to her motivation in this regard. I do not see any arguable illegality in the Minister's discussion of this point but in any event it clearly does not go to the core of the refusal decision. On that basis, the overall decision is not arguably invalid even if there is any infirmity in this discussion.

41. As regards the approach taken to post-release conditions, this again is not a core point and the same conclusion applies.

42. The applicant relies on the doctrine against taking irrelevant matters into consideration (*P&F Sharpe Ltd v. Dublin City and County Manager* [1989] I.R. 701 per Finlay C.J. (Hamilton P., Walsh, Griffin and Hederman JJ. concurring)) at 717 to 718). But even if there was an infirmity in this regard, which I do not accept, not every minor slip is capable, even arguably, of invalidating the outcome if it does not go to the core of the decision: *T.M. v. Refugee Appeals Tribunal* [2012] IEHC 284 (17th July, 2012, per McDermott J. at paras. 4.5 and 4.6); *N.E. v. Refugee Appeals Tribunal* [2015] IEHC 8 (14th January, 2015, per Noonan J. at para 21: "the error was not a core finding of fact"); *S.A. v. Refugee Appeals Tribunal* [2009] IEHC 383 (28th July, 2009, per McCarthy J. at para. 25: *"look at the decision in the round"); E.S. v. Refugee Appeals Tribunal* [2014] IEHC 374 (22nd August, 2014, per Mac Eochaidh J. at para. 18: a decision which involved rejecting two of three reasons offered by the tribunal but upholding the decision on the basis that the one surviving reason was, in the court's view "sufficiently robust to overcome the applicant's complaints"); I.R. v. Minister for Justice, Equality and Law Reform [2009] IEHC 353 (24th July, 2009, per Cooke J. at para. 11.7: *"[a] mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts"*); *D.M. v. Nicolson* [2004] 7 JIC 1402 (per Peart J.: a refusal of a leave application on the grounds that the decision "read as a whole" was valid); *M.D.A. v. Refugee Appeals Tribunal* [2009] IEHC 328 (20th July, 2009, per Irvine J. at para 31: where leave was refused in relation to an alleged infirmity where *"the core complaint made by the applicant is fully recorded").*

43. Judicial review is not an exercise where an electron microscope can be applied to every detail of the decision in the hope of locating something which can be improved upon. If the core of the decision is sound in law, some minor slip at the periphery of the discussion does not even arguably invalidate it. To adopt such an extreme view would put a premium on paring reasons back to the bare minimum, to the disadvantage of citizens who benefit from more discursive engagement with State authorities across the field of public administration.

44. In the present case, even assuming in favour of the applicant that these peripheral matters were in law irrelevant (an assumption which I consider to be incorrect in view of the existing law to the effect that a decision to accept a transfer is discretionary and therefore can be based on whatever lawful considerations appeal to the Minister), those matters are far removed from the core reasons and do not affect them, even on the basis of arguability.

45. The suggestion which appeared to be made that the Minister failed to consider the adaptation of the legal nature of the sentence is not arguable as this clearly figures in substance in her consideration.

Conclusion

46. It follows from the foregoing that despite Mr. Lynn's skilled efforts, the applicant has failed to make out an arguable case to challenge the Minister's decision, because the propositions he has put forward are either inconsistent with existing decided authority or are clearly wrong, or if I am incorrect about that, because at least one of the central pillars of the challenged decision is sufficient

to sustain the refusal overall, and the applicant has not shown that both of those pillars are arguably wrong.

47. I would finally return to the point that one of the difficulties in the case is that the legislation provides that the Minister's consent is to be given before it is definitively determined, in a manner that cannot be revisited inter partes, what the appropriate adaptation should be. This is unsatisfactory because the consent may be dependent on a view as to the terms of that adapted sentence. Nor is there specific provision for the parties to definitively agree, or even be party to a process whereby it is determined, what the adapted sentence should be in a manner to which an applicant could be held. That process may turn out to be something as simple as putting the prisoner on notice of the s. 7 application. While this applicant has canvassed various possibilities before me, that is all he has done and such action does not really stop him from making alternative contentions once the Minister's consent is in his back pocket, and from then declaring open season on the legality of his detention.

48. This is entirely separate from the issue of whether there is an absence of provision to amend the adaptation after the warrant has been issued (see the decision in *O'Farrell v. Governor of Portlaoise Prison (No. 2)* [2014] IEHC 420 (11th September, 2014, per Hogan J.)) which is the subject of a Supreme Court appeal as a result of an Art. 64.3.3° application in *O'Farrell v. Governor of Portlaoise Prison* [2015] IESCDET 10) and obviously I am not to be taken as expressing a view on that issue.

Order

49. For the foregoing reasons, I will order:-

> (i) That the order under s. 45 of the Courts (Supplemental Provisions) Act 1961, restricting the reporting of the identity of any non-professional persons in the proceedings continue on a permanent basis; and
>
> (ii) that the application be dismissed.