THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 110

Record No. 2016 No. 254

Birmingham J.
Irvine J.
Hogan J.

BETWEEN

M.McK.

APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 25th day of April 2018

1. Where a Minister is permitted by statute to operate a particular scheme or arrangement on a discretionary basis, is he or she obliged to continue to operate that scheme even though it has been shown to present difficulties in the past and is likely to continue to do so in the future if it is so operated? That, in essence, is the question presented on this appeal from the decision of the High Court (Humphreys J.) refusing the applicant leave to apply for judicial review: see *M.McK. v. Minister for Justice and Equality* [2016] IEHC 208.

2. The background to the present appeal is as follows: the applicant (Mr. M.) is an Irish national who has been living in the United Kingdom since 1995. In August 2009 he was convicted in the U.K. of a series of very grave sexual offences against his daughter and step-daughter. In December 2009 Mr. M. received a sentence of what was described in the UK legislation (s. 225 of the (UK) Criminal Justice Act 2003) as an "indeterminate sentence for public protection" ("IPP"). This IPP was to last for an initial tariff period of eight years, subject to review by the UK parole authorities. The sentencing judge took the view that a 16 year sentence was the appropriate minimum sentence, subject to the appropriate (and under UK law, automatic) 50% statutory remission. It appears that IPP sentences are no longer imposed following legislative change in the UK in 2012 (Legal Aid, Sentencing and Punishment of Offenders Act 2012).

3. It needs to be said at the outset that the IPP sentence imposed in the present case is quite unknown in Irish law and it is not easy to see how a sentence of this nature can readily be adapted or even understood by reference to the traditional Irish sentencing regime. These difficulties are at the heart of the present appeal.

4. In November 2011 Mr. M. applied for a formal transfer to this State under the Transfer of Sentenced Persons Act 1995-1997 ("the 1995 Act"). No decision was apparently made by the Minister for Justice in respect of that original application and the applicant subsequently commenced mandamus proceedings seeking to compel the Minister to make such a decision. Those proceedings were compromised and struck out by agreement on the basis that a decision would be made.

5. The Minister ultimately made a decision refusing the application for a transfer under the 1995 Act on 16th December 29015. In the present proceedings the applicant seeks to quash that decision by way of judicial review proceedings. Having directed that the Minister be put on notice of the application for leave, Humphreys J. ultimately held that the applicant had not made out arguable grounds such as would warrant the grant of leave for the purposes of the test articulated by the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374 at 377-378. The applicant has now appealed to this Court and this Court heard that renewed application for leave on notice to the Minister.

The reasons for the Minister's decision to refuse to consent to a transfer under the 1995 Act

6. The letter of the 16th December 2015 set out the Minister's decision to refuse to grant the application in some detail. While it is acknowledged the difficulties which Mr. M. and his family will face by reason of the fact that his detention in the U.K. meant he was separated from his family in Ireland, two fundamental reasons were nonetheless advanced as to why the transfer request was to be refused.

7. First, the Minister observed that the sentence of indefinite imprisonment for public protection was unknown to Irish law, and. therefore, transfer would require an application to the High Court to adapt the sentence. She further observed that the:

> "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."

8. The second fundamental reason advanced by the Minister was that "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.

The judgment of the High Court

9. In the High Court Mr. M. sought to challenge the Minister's decision on the grounds (i) that the Minister had in essence fettered her own discretion and (ii) had wrongly taken upon herself the task of predicting or assessing how an Irish court might view for equivalence purposes the nature of the IPP sentence. Humphreys J. held that the scheme provided by the 1995 Act was discretionary in nature and that the Minister could not be faulted for concluding that the transposition of the IPP sentence into Irish law was itself likely to be problematic. On this latter point Humphreys J. observed:

"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 Article 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 [counsel for the Minister] 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 [counsel for the applicant] 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 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."

10. It may be convenient to consider each of these arguments in turn.

Whether the Minister's powers to consent to a transfer under the 1995 Act are discretionary in nature

11. Section (3) of the 1995 Act provides that "the Minister may consent to a request" for a transfer of a sentenced person into the State if he is satisfied that a number of requirements have been fulfilled. Where the Minister consents, he is then required to apply to the High Court ("..he or she shall apply to the High Court…") under s. 7 of the 1995 Act for a warrant authorising the bringing of the person into the State. Ord. 128, r. 2(1) provides that any such application shall be made ex parte.

12. Pursuant to s. 7(5) and (6) of the 1995 Act (as amended by s. 1 of the 1997 Act), 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".

13. As Humphreys J. recognised, the very language of the 1995 Act is such that it is clear that the Minister's key function is a discretionary one. One merely has to compare the discretionary language of s. 6(3)("may") in relation to the acceptance of the transfer request with the mandatory language of s. 7(1)("shall") in relation to the Minister's obligation to apply to the High Court once a decision to accept a transfer request has been made. It is, in any event, clear from the case-law on the construction of s. 6(3) that the Minister enjoys a discretion as to whether to consent to an application for transfer into the State: see *Nascimento v. Minister for Justice, Equality and Law Reform* [2011] 1 I.R. 1, 27-28 per Dunne J. and *Butcher v. Minister for Justice and Equality* [2012] 4 I.R. 401, 414 per O'Malley J.

14. In any event, the entire context of the 1995 Act also strongly re-inforces the conclusion that the scheme was intended to be a discretionary one. The control of prisons and prison administration generally are clearly executive functions: see, *e.g., Re Gallagher's Application* [1991] 1 I.R. 31. The decision to accept a transfer back is so clearly dependent on issues such as prison security and the availability of prison places that it would be surprising if the Oireachtas ever intended to oblige the Minister to accept every such request, even if the requirements of the 1995 Act were all otherwise satisfied. As the 1995 Act contains no such language, there is a further reason for concluding that the operation of the scheme created by the 1995 Act is itself entirely contingent in each case on the Minister's consent.

Was the Minister's view as to the likely adapted nature of the sentence unreasonable or otherwise invalid?

15. Central, nevertheless, to the applicant's case is that the Minister erred in forming a view as to the likely nature of the sentence as it might or might not be ultimately adapted by the High Court and that this view was one which was either unreasonable in law or was one where irrelevant considerations were taken into account. The starting point here, however, must be, first, that the entire structure and operation of the 1995 Act has itself been shown to be quite problematic in practice and, second, that following the rather significant changes in UK sentencing law and practice introduced in that jurisdiction following the changes brought about in 2003, the adaptation of UK sentences for the purposes of s. 7(1) of the 1995 Act has proved to be complex and difficult.

16. As to the difficulties inherent in the scheme and operation of the 1995 Act, it is perhaps sufficient to quote the words of Humphreys J.:

".. 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 ….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 Article 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.

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 Article 40 proceedings."

17. To this one might simply add that the 1995 Act appears to have been drafted in a simpler age and the Oireachtas did not really seem to contemplate or envisage that with divergences in national sentencing laws and practices manifesting themselves over time the determination of to what a foreign sentence corresponded in Irish law could prove to be a complex matter quite unsuited for a purely formal and uncontested order to be made *ex parte* by the High Court without any notice to the transferred prisoner.

18. As for the second question, it is clear that the operation of the IPP sentences in this jurisdiction (and, for that matter, other post-2003 Act UK sentences) has proved to be highly problematic. A few examples may be given. In *Minister for Justice v. Kelly* [2013] IESC 54 the Supreme Court refused to make an order for the surrender of the respondent to the UK under the provisions of the European Arrest Warrant Act 2003 in order to serve out the balance of an IPP sentence in view of the fact that the ECHR had held that such sentences were contrary to the provisions of the personal liberty provisions contained in Article 5 ECHR.

19. A further complication which has come to light since the UK 2003 Act 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. The differences between the two systems 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 after 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.

20. The significance in the context of the 1995 Act of these differences between the two sentencing regimes was first explored by the Supreme Court in *Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42, [2014] 2 I.R. 732. 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.

21. Faced with these difficulties it was thus necessary for the Supreme Court to have regard to what Murray J. described ([2014] 2 I.R. 732, 745 as "an objective assessment of its duration and legal nature". In light of this analysis the Supreme Court concluded that, for the purposes of Irish law, the sentence 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.

22. The final example is provided by the Supreme Court's decision in *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37, [2016] 3 I.R. 619. In that case the main applicant was a member of an illegal organisation. In 2001 he and two colleagues 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 the 5th July 2001, and in late August 2001, he was extradited from Slovakia to the United Kingdom.

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

24. In 2006 the High Court issued a warrant pursuant to s. 7 of the 1995 Act providing for the transfer of the applicant to this State from the United Kingdom and detaining him in Portlaoise Prison. In the wake of the decision in Sweeney the applicant commenced Article 40 proceedings in which he contended that he has being detained unlawfully. The s. 7 warrant recorded a sentence of 28 years, but he contended that the UK sentence was one which ought to have been more properly "adapted" for the purposes of s. 7(5) of the 1995 Act at the time of the original application to the High Court (and that s. 7 warrant could not subsequently be "varied" under s. 9 of the 1995 Act for this purpose) and that the appropriate corresponding sentence should have been one of 18 years and nine months (to reflect the post-2003 UK changes). A majority of the Supreme Court ultimately agreed with these propositions and the High Court decision to direct the release of the applicant was upheld.

25. It is, perhaps, sufficient to say in the light of this trilogy of Supreme Court decisions that the present operation of the 1995 Act has proved itself to be hugely problematic and quite possibly in need of reform and change. One might add that the Minister was understandably cautious as to what the consequence what might be in Irish law if the UK IPP sentence fell to be adapted by the High Court under s. 7(5) of the 1995 Act. It would certainly be difficult to gainsay the Minister's conclusion that the IPP sentence would be likely to correspond to a sentence of 8 years' imprisonment in this State was unreasonable or even incorrect. Given the entirely foreign nature of the IPP sentence so far as Irish law is concerned, it seems likely in the wake of *Sweeney* and *O'Farrell* that the sentence imposed on Mr. M. in 2009 was likely to be adapted to one of 8 years' imprisonment, with the possibility of standard 25% remission as provided for by the provisions of our Prison Rules 2007 on top of that figure.

26. Any other conclusion as to the likely manner in which the sentence might be adapted by the High Court in the event of an application for that purpose under s. 7(5) of the 1995 Act would almost certainly have to be rejected as a potential aggravation of the duration of the sentence which had been imposed by the UK court, contrary to s. 7(6)(a) of the 1995 Act.

Conclusions

27. All of this is to say that the Minister was understandably reluctant to operate a statutory scheme which had in the recent past proved itself to be frail and problematic, not least in the case of UK IPP sentences. It is true that the Minister could not by executive action seek to effect a repeal or quasi-repeal of legislation enacted by the Oireachtas, since this would be directly contrary to Article 15.2.1 of the Constitution: see, *e.g., NHV v. Minister for Justice* [2017] IESC 35, [2017] 2 I.L.R.M. 105, 111 *per* O'Donnell J. and Casey, "Under-Explored Corners: Inherent Executive Power in the Irish Constitutional Order" (2017) *40 D.U.L.J.* 1, 28-31. As Henchy J. said in *The State (Sheehan) v. Government of Ireland* [1987] I.R. 550, 551, "it would be unconstitutional for the Government to achieve by their prolonged inactivity the virtual repeal of the section." By analogy, therefore, with what was said in *Sheehan*, the Minister was accordingly obliged to consider each application for a transfer under the 1995 Act on their own merits.

28. But this is what the Minister, in the final analysis, ultimately did. She considered the application and then gave detailed reasons for that refusal. These reasons, which centre on the difficulties posed by the nature of the applicant's IPP sentence, are for the reasons set out in this judgment are clearly *bona fide*, factually sustainable and are not unreasonable. In these circumstances, it cannot be said that the applicant has established any arguable grounds within the meaning of the *G.* test such as would warrant the grant of leave to apply for judicial review.

29. I would accordingly affirm the decision of Humphreys J. and dismiss the appeal.