

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 270JR]

BETWEEN

VINCENT SWEENEY

Applicant

AND

THE GOVERNOR OF LOUGHLAN HOUSE OPEN CENTRE, THE MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

Respondent

JUDGMENT of Mr. Justice Keane delivered on the 7th day of February 2014

Introduction

1. The net question presented in these proceedings is whether the continued imprisonment of the applicant in this jurisdiction after the 29th March 2014 is *ultra vires* the Transfer of Sentenced Persons Acts, 1995 and 1997 ("the Acts"), or contrary to the principles contained in the 1983 Council of Europe Convention on the Transfer of Sentenced Persons ("the Transfer Convention"), to which instrument the Acts are intended to give domestic effect, or in breach of the requirements of Articles 34.1, 38.1 or 40.4.1 of the Constitution of Ireland.

Background

2. The applicant is detained in Loughan House Open Centre, Blacklion, County Cavan, on foot of a High Court committal warrant issued on the 22nd October 2008, pursuant to section 7 of the Acts. That warrant recites on its face that the applicant is to serve a sentence imposed in the United Kingdom of "16 years imprisonment with 252 days on remand taken into consideration", which sentence commenced on the 7th December 2006.

3. The committal warrant further recites that the crimes for which the applicant was sentenced would, if committed within the State, constitute offences within the State, to wit: two counts of unlawful importation of a controlled drug contrary to the Misuse of Drugs Regulations, 1988 made under section 5 of the Misuse of Drugs Act 1977 and contrary to section 15A, section 21(2) and section 27(10) of the Misuse of Drugs Act 1977, as amended.

4. The circumstances of the applicant's prosecution, conviction and sentence in the United Kingdom are not in dispute for the purpose of the present proceedings. He was arrested at the Eastern Docks in Dover, Kent, south-east England on the 28th March 2006 in connection with the attempted importation into the U.K. of 25kg of heroin and 600kgs of cannabis with an aggregate street value of £2.5 million, which drugs were found at that location concealed in a false compartment within a horsebox. When interviewed, the applicant afforded no co-operation or assistance and made no admissions. He was charged with two counts of the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to section 170(2) of the UK Customs and Excise Management Act 1979. Having entered a plea of not guilty when arraigned on the 3rd July 2006, the applicant was tried at Canterbury Crown Court between the 27th November and 7th December 2006, and was convicted. Having no known previous convictions, on the 7th December 2006 the applicant was sentenced to 16 years imprisonment with the 252 days that he had already spent in custody on remand to be taken into account in calculating that term.

5. The applicant avers that, in passing sentence, Her Honour Judge Adele Williams informed him that he would serve 8 years of the 16-year sentence in custody and 8 years on licence. From that statement, the applicant understood that his release date was in March 2014. The applicant avers that he further understood, and was advised, that the sentence passed by the judge contained two distinct elements: a period of time spent in custody followed by a period of time spent in the community under the supervision of the probation services. While subsequently a prisoner in Her Majesty's Prison Lowdham Grange, the applicant received a "Release Dates Notification Slip" recording, among other matters, that the his "sentence expiry date" was the 29th March 2022 and that his "conditional release date" was the 29th March 2014.

The transfer request

6. The applicant avers that his partner, son and two grandchildren live in County Sligo and that his elderly mother and four siblings live in County Fermanagh. While it appears that the applicant made enquiries concerning a possible transfer to serve his sentence in Northern Ireland, it is certainly the position that, at the beginning of 2007, the applicant applied to the relevant authorities in the United Kingdom to be transferred to serve his sentence in this jurisdiction in accordance with the terms of the Transfer Convention.

7. The applicant has exhibited a letter dated the 9th January 2007 addressed to him from the private secretary to the Minister for Justice, Equality and Law Reform noting the applicant's interest in a transfer to Ireland and enclosing for his information an explanatory leaflet on the Acts. Although the applicant does not exhibit that explanatory leaflet together with the letter just described, a copy of it is exhibited to the affidavit of Gerry McDonagh, sworn on behalf of the respondents on the 17th December 2012. Mr. McDonagh is Principal Officer of the Prisons Policy Division of the Department of Justice and Law Reform ("the Department"). The leaflet states, in relevant part:

"What about eligibility for conditional/early release after transfer?

If you are transferred to your home country, your sentence will be administered in accordance with the laws and regulations of your home country. Your home country will take all appropriate decisions on eligibility for conditional release."

8. On the 19th October 2007, Mr. Jason Ruffy of the Cross Border Transfer Section of the UK National Offender Management Service

("NOMS") wrote to the Department, enclosing documentation relevant to the applicant's transfer request. One of those documents was a sheet headed "Repatriation of Prisoners Sentence Details" in respect of Mr. Sweeney, annotated "Proposed Date of Transfer: 01/03/2008 (Out)". That sheet records, among other details, Mr Sweeney's sentence as one of "16 years imprisonment" and the "Total number of days in sentence" as "5,844" i.e. the number of days in 16 years. Having noted that Mr. Sweeney's "Conditional Release Date (CRD)" is "06/12/2014" and that his "Sentence Licence & Expiry Date (SLED)" is "06/12/2022", it goes on to record the "total number of days served" as 1,404 and the "balance to serve on transfer" as 4,440 days (again representing an aggregate total of the number of days in 16 years).

9. On the 31st July 2008, Mr. Brendan Eiffe, Assistant Principal Officer in the Prisons and Probation Policy Division of the Department, wrote to Mr. Ruffy, communicating the State's consent to the applicant's transfer. In that letter, Mr. Eiffe went on to state as follows:

"Having considered all the details which you have made available about Mr. Sweeney's case, my opinion, based on experience of the administration of sentences within the State and in the context of continued enforcement under the Convention, is that if Mr. Sweeney had received a similar sentence in this jurisdiction, he could expect, save for exceptional circumstances arising, to serve his entire sentence, allowing only for remission at the standard rate of 25%.

I note that Mr Sweeney's conditional release date is 6 December 2014. In the event of his transfer to Ireland, he would be eligible to earn remission of up to one quarter of the balance of his sentence left to serve from the date of the transfer as compared to the one half remission applicable to him in the UK. His final release date in Ireland will depend on his actual date of transfer but under normal circumstances would not, in any event, occur before his current UK release date.

I am to ask that Mr Sweeney be advised of the contents of this reply to you and that he give his consent in writing to a transfer to Ireland subject to the arrangements/conditions outlined on the previous page. A consent form is attached for Mr. Sweeney's signature."

10. On the same date, Mr Eiffe wrote to the applicant personally, informing him that the Minister had consented to his application for transfer to Ireland under the Acts. That letter went on to state as follows:

"The enclosed documentation sets out for your information the legal consequences for you of a transfer to a prison in Ireland. In particular you are asked to note that:-

1. If you consent to a transfer to Ireland, it is likely, given that you will be eligible to earn remission of up to one quarter of the balance of your sentence (as opposed to a rate of one half in the UK), that your final release date will extend beyond 6 December 2014.
2. You will be expected to serve the balance of your sentence in accordance with the "continued enforcement" procedure under the Convention on the Transfer of Sentenced Persons.
3. Information in respect of remission/temporary release is attached. There can be no guarantee that the Minister would see fit to authorise any form of temporary release in your case.
4. While every attempt will be made to take account of your personal circumstances in the event of your transfer to this jurisdiction, there can be no guarantee of your being accommodated in any particular prison or institution."

11. The letter just quoted concludes by reciting that a copy of the Acts and an explanatory leaflet on their operation are enclosed with it. Another document addressed specifically to the applicant was also enclosed with that letter. It is headed "Administration of Prison Sentences – Powers of Minister for Justice, Equality and Law Reform." It purports to summarise the position (under the applicable law and relevant rules) in respect of remission, release/temporary release and the role of the Parole Board. It also contains a specific section headed "Estimate of Sentence (based on a hypothetical transfer date of 1 November 2008)." That section comprises a table that includes the following information: estimated length of sentence remaining on 1 November 2008, 3950 days; assuming remission at 25%, 988 days; estimated actual time to serve in Ireland, allowing for remission, 2692 days; and estimated release date, 12 December, 2016.

12. I have described the contents of the foregoing correspondence at some length because there is a controversy about what happened next. The applicant avers to his understanding that, when the relevant documentation arrived at HMP Lowdham Grange, Ms. Pam Ealden, the official who was dealing with the matter there, was on holiday and the documentation was mislaid. The applicant avers that he subsequently spoke to Mr. Eiffe (apparently by telephone) and requested that a copy of that documentation be sent to the prison. According to the applicant, Mr. Eiffe informed him that, as the documentation concerned was extremely important, he (Mr. Eiffe) would speak to Mr. Ruddy regarding the matter.

13. Mr. Eiffe swore an affidavit and was cross-examined at the hearing of the present application. He has no recollection of the telephone call that the applicant describes and was not cross-examined upon that point. However, it does seem entirely consistent with the respondents' position in these proceedings that Mr. Eiffe may have spoken on the telephone to the applicant and, had he done so, would have emphasised the importance of the contents of the relevant documents from the applicant's perspective.

14. The applicant next avers that he met Ms. Ealden when she returned from holidays on which occasion she asked him to sign a single sheet of paper. The sheet of paper concerned formed part of the documentation furnished under cover of Mr. Eiffe's correspondence of the 31st July 2008. That sheet is headed "Transfer of Sentenced Persons Acts, 1995 and 1997 – Consent of Prisoner to Transfer to Ireland" and, in the context of the controversy that has arisen, it is appropriate to set out the full substance of the text that appears beneath:

"I, Vincent Gerard Sweeney, hereby confirm that I have read Mr. Eiffe's correspondence dated July 2008 advising me as to the administration of my sentence on transfer to Ireland. I also confirm that I have been informed in writing in my own language

(a) of the substance, so far as is relevant to my case, of the international arrangements between Ireland and the United Kingdom for the repatriation of sentenced persons;

(b) of the effect in relation to me of a warrant authorising my transfer from the United Kingdom to Ireland;

(c) of the effect in relation to me of so much of the law of Ireland as has effect with respect to repatriation under these arrangements;

(d) of the arrangements governing the continued enforcement of my sentence in Ireland;

(e) of the powers of the Minister for Justice, Equality and Law Reform under Section 9 of the Transfer of Sentenced Persons Act, 1995, and,

(f) that I will continue to serve my sentence of 16 years imprisonment, and other concurrent sentence imposed at Canterbury Crown Court on 7 December, 2006, as advised in Mr. Eiffe's letter of 31st July 2008, and I hereby give my consent to my transfer from the United Kingdom to Ireland."

15. The applicant's signature appears immediately beneath the text just quoted, followed by the handwritten date, the 19th August 2008, underneath which is the signature of one Kev Bentley as witness, with the same handwritten date underneath that.

16. The applicant avers that, having asked him to sign that single sheet of paper, Ms. Ealden explained to him that she would fax the signed sheet to Ireland and that he would be on his way there soon. The applicant then expressly avers "I always understood that my release date which had been notified to be (*sic*) by the sentencing Judge would not be interfered with."

17. The applicant does not explain how he can have arrived at that understanding concerning his own transfer request or how he can have persisted in it after he had received the Minister's letter to him of the 9th January 2008, together with the explanatory leaflet on the operation of the Acts that was enclosed with it. Nor does the applicant explain how he came to sign a document expressly recording, among several other matters, that he had read Mr. Eiffe's correspondence and that he had been informed in language he understood of the arrangements governing the continued enforcement of his sentence in Ireland, if – as he now avers – neither of those things was true. It is not suggested that the applicant has any literacy difficulty or any intellectual disability, nor is any such problem evident from so much of the applicant's correspondence as has been exhibited for the purpose of these proceedings.

18. Both parties to these proceedings have engaged in separate correspondence with various persons (either directly or through their legal representatives) to establish what actually occurred in relation to the provision of the relevant information to the applicant in HMP Lowdham Grange at the material time. Both parties have exhibited the replies that they have received in that regard, although they each accept that the evidential value of that correspondence is necessarily limited. None of the authors of the correspondence concerned gave direct evidence in these proceedings and more than one of them expressed opinions that would not have been admissible even had they done so. Subject to that fundamental qualification, and although the Court has concluded for reasons set out later in this judgment that nothing turns on the matter, it may nevertheless be worth summarising the various assertions that have been made. Ms. Ealden recalls the documentation from Mr. Eiffe being sent to the prison by fax from NOMS at her request, as she does not believe it had arrived in the post while she was on annual leave. She cannot recall being present when the applicant signed the relevant document. Kevin Bentley, who is a prison custody officer, has written that he can recall signing and witnessing the applicant's paperwork, "but none other than the one page him and myself signed." On behalf of NOMS, Christopher Binns writes that NOMS received a letter dated the 31st July 2008 from Mr. Eiffe to the applicant with which was enclosed a further 22 pages of information concerning the enforcement of sentences in Ireland and a consent form for the applicant to sign. NOMS sent that information in the post on the 11th August 2008 to HMP Lowdham Grange for the attention of the applicant and of the Prison Director. According to Mr. Binns, NOMS was subsequently alerted by the prison that the information had not been received and, as a result, 25 pages of documentation were faxed to the prison at 11.15 a.m. on the 18th August 2008 and NOMS was subsequently notified that the documentation concerned was forwarded to the applicant on the same day. The documentation comprised:

"1. Administration of Prison Sentences, Powers of Minister for Justice, Equality and Law Reform.

2. Transfer of Sentenced Persons Acts 1995 and 1997; Consent of Prisoner to Transfer to Ireland.

3. Statement of information Relating to the Transfer of Sentenced Persons.

4. Transfer of Sentenced Persons Act 1995.

5. Transfer of Sentenced Persons (Amendment) Act 1997.

6. Transfer of Sentenced Persons Act 1995 and 1997: Information Leaflet.

Covering letter from NOMS dated 11 August accompanied this information and they were addressed to the prison Director and Mr. Sweeney. These letters were in addition to the letter addressed to Mr. Sweeney from Mr. Eiffe dated 31 July 2008. The letters from NOMS and Mr Eiffe specifically refer the prisoner to the documents sent by the Irish authorities which set out the consequences of Mr Sweeney's transfer."

The transfer

19. Mr. Ruffy of NOMS wrote to Mr. Eiffe in the Department on the 19th August 2008, informing him that the United Kingdom authorities were consenting to the transfer and enclosing a copy of Mr. Sweeney's signed and witnessed declaration of consent as already described above.

20. The Minister for Justice provided his consent to the transfer of the applicant into the State under section 6 of the Acts by certificate signed on the 16th September 2008. On the 15th October 2008, an application was made for the issue of a warrant pursuant to the terms of section 7 of those Acts. A warrant issued in response to that application on the 22nd October 2008, authorising the execution of an Order to bring the applicant in custody into the State and to lodge him in Mountjoy Prison to serve his sentence there.

21. The applicant was transferred to Ireland on the 16th December 2008.

The applicant's release date

22. The applicant avers that there was some confusion concerning his release date during the period after his transfer and that various purported release dates were suggested to him by different officials at different times. However, it is common case that, on the 5th March 2010, the Prisons Policy Division of the Department wrote to the applicant (who was then detained at Castlereagh Prison,

County Roscommon) in the following terms.

"As you are aware, the correspondence to you from Mr. Eiffe of this Department dated 31 July, 2008 was based on a hypothetical transfer date of 1 November, 2008 and estimated your release date in Ireland assuming remission to be 12 December, 2016

I can inform you that your release date has been re-calculated based on your actual date of transfer to Ireland which occurred on 16 December, 2008. **Your release date in Ireland with remission will be 16 November, 2016.** This date has been confirmed with the Operations Directorate of the Irish Prison Service, Longford."

The proceedings

23. The applicant was granted leave to seek judicial review by Order of Peart J made on the 26th March 2012. The applicant avers, in essence, that it took him some time after his transfer into the jurisdiction to establish the precise details of the sentence he is required to serve here. The applicant's solicitor has averred that it was necessary take instructions from the applicant in custody, to pursue a Freedom of Information Act request with the Department of Justice on the applicant's behalf, and to obtain appropriate expert evidence of United Kingdom law before instituting the present proceedings. No issue has been taken on behalf of the respondents in relation to the time limits that apply to applications for judicial review.

The argument

24. The applicant's argument is that his continued detention beyond the 29th March 2014 is *ultra vires* the Acts in that the legal nature of the sentence imposed by the sentencing state in this case is not one of 16 years imprisonment but, in effect, one of eight years spent in custody followed by eight years of release into the community under licence.

25. This argument is based upon the provisions of English law that govern the administration of prison sentences of 12 months or more. Each side has filed an affidavit sworn by an expert in English law. Beyond a very limited difference of emphasis, there does not seem to be any significant disagreement between those experts. They agree that the relevant provisions of the UK Criminal Justice Act 2003 govern the position in that jurisdiction.

26. As David Perry Q.C. avers on behalf of the respondents, section 244 of the Criminal Justice Act 2003 states:

"(1) As soon as a fixed-term prisoner...has served the requisite custodial period, it is the duty of the Secretary of State to release him on licence under this section.

...

(3) In this section "the requisite custodial period" means-

(a) in relation to a person serving a sentence of imprisonment for a term of 12 months or more..., one half of his sentence."

27. On behalf of the applicant, significant reliance is placed on the following paragraph in Mr. Perry's affidavit:

"I say that the sentence passed is not simply a statement of the period of time that an offender must spend in prison. A determinate sentence of imprisonment of 12 months or more has two parts. The first part is the custodial period. This comprises one half of the sentence. The second part of the sentence is to be served in the community. The offender is then subject to licence conditions for the entirety of that period. The entitlement to release on licence is automatic. A failure to release a prisoner on licence will result in further imprisonment being unlawful. During the licence period the Secretary of State may recall the offender to prison as explained above."

28. The applicant further particularly relies on the following extract from the Sentencing Guidelines Council of England and Wales *New Sentences: Criminal Justice Act 2003 – Guideline* (exhibited to the affidavit of Kenneth Carr, sworn on 12th March 2012 on behalf of the applicant):

"B. Imposition of Custodial Sentences of 12 Months or more

(i) Length of Sentence

2.1.5 The requirement that the second half of a prison sentence will be served in the community subject to conditions imposed prior to release is a major new development and will require offenders to be under supervision for the full duration of the sentence prescribed by the court. The Probation Service will be able to impose a number of complementary requirements on the offender during the second half of a custodial sentence and these are expected to more demanding and involve greater restriction on liberty than current licence conditions.

2.1.6 As well as restricting liberty to a greater extent, the new requirements will last until the very end of the sentence, rather than the three-quarter point as at present, potentially making a custodial sentence significantly more demanding than under existing legislation. Breach of these requirements at any stage is likely to result in the offender being returned to custody and this risk continues, therefore, for longer under the new framework than under the existing legislation.

...

2.1.10 The changes in the nature of a custodial sentence will require changes in the way the sentence is announced. Sentencers need to continue to spell out the practical implications of the sentence being imposed so that offenders, victims and the public alike all understand that the sentence does not end when the offender is released from custody. The fact that a breach of the requirements imposed in the second half of the sentence is likely to result in a return to custody should also be made very clear at the point of sentence.

...

When announcing sentence, sentencers should explain the way in which the sentence has been calculated, how it will be served and the implications of non-compliance with licence requirements. In particular, it needs to be stated clearly that the sentence is in two parts, one in custody and one under supervision in the community.”

29. In light of the foregoing, the applicant submits that the legal nature of the sentence concerned in his case, imposed by the relevant court in England as a court of the sentencing state concerned, is one of 8 years imprisonment (and 8 years release on licence into the community). It follows, or so the applicant contends, that the warrant issued on the 22nd October 2008 ordering that he serve a sentence of “16 years imprisonment with 252 days on remand taken into consideration” is *ultra vires* section 7(4) of the Transfer of Sentenced Persons Acts, 1995 and 1997, in that it purports to go beyond the continued enforcement by the State of the sentence concerned imposed by the sentencing state concerned in its legal nature, which that section permits. On that basis, the applicant contends that, in considering the issue of a warrant to authorise the continued enforcement in the State of the sentence imposed on the applicant in England, the High Court should have adapted that sentence to one of 16 years imprisonment with 8 years of that sentence suspended on conditions designed to mirror the standard licence conditions and/or the conditions prescribed by the Secretary of State that are imposed on a prisoner in England who is released after serving half of a determinate sentence of more than 12 months. The applicant contends that he should have been legally represented for the purpose of the relevant warrant application on the basis that the relevant proceedings should be considered as directly analogous to a criminal sentencing. Finally, the applicant contends that the continued enforcement of his sentence under the warrant now at issue is a disproportionate interference with his right to liberty and the security of the person under the European Convention on Human Rights in view of the disparity between his conditional release date in the United Kingdom and his unconditional release date (with remission) in this jurisdiction.

Prison law compared

30. The experts retained by both sides in this case agree that, in the United Kingdom, the administration of the applicant’s sentence was governed by the provisions of the UK Criminal Justice Act 2003 and that, had the applicant remained in custody in England, he would have been required to serve half of his sentence in custody, at which point he would have been entitled to conditional release (or release on licence) into the community. Those conditions (and that licence) would have remained in force for the entire duration of the applicant’s 16-year sentence. This means that, while his conditional release date was the 6th December 2014, he would have remained on licence until the 6th December 2022, which was his “Sentence Licence & Expiry Date (SLED)”.

31. As the sentencing guideline document of the Sentencing Guidelines Council of England and Wales *New Sentences: Criminal Justice Act 2003 – Guideline* already quoted above makes clear, the conditions imposed by the Probation Service under that Act are more demanding and involve greater restriction on liberty than those formerly imposed in that jurisdiction. Breach of those conditions at any stage during that entire period would have been likely to result in the applicant being returned to custody. The standard licence conditions include restrictions or controls upon place of residence, nature and change of employment, and travel outside the United Kingdom. In addition, there is a discretion to impose conditions of a kind prescribed by the Secretary of State.

32. The applicant could have had no eligibility for remission of any sort, as remission was abolished by the UK Criminal Justice Act 1991

33. Having transferred to Ireland on the 16th December 2008, the applicant has been informed that his release date, with remission, will be the 16th November 2016. As the applicant acknowledges, that calculation is based, in part, on according him the benefit of two separate periods of remission. First, the applicant has been given credit for the 952 days he spent in custody in the United Kingdom prior to his transfer to Ireland as though he was eligible for 50% remission on time served there (rather than for release on licence there after he had served half his sentence), thereby according him 952 days remission in calculating the remaining period of imprisonment he is required to serve in this jurisdiction. Second, he is deemed eligible to earn remission of up to a further 25% of that remaining period of imprisonment, under the ordinary rules for the government of prisons applicable to all persons serving determinate sentences in Ireland. The release of a prisoner credited with remission is full and unconditional release (although the availability of full remission is, of course, contingent on the maintenance of good conduct while in prison).

34. It must also be remembered that the applicant sought his transfer to Ireland in order to be closer to his family. In the affidavit that grounds the present application, the applicant has addressed at length the difficulties and hardship that he experienced in serving his sentence in England. He describes the inability of his elderly mother, who lives in Fermanagh, to visit him, and the 24-hour round trip that his other family members had to make to visit him from either Sligo or Fermanagh, resulting in just one visit from one family member each month for the duration of his imprisonment there. The recitals contained in the preamble to the Transfer Convention record the signatory States’ objective of further developing international co-operation in the field of criminal law, and that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons, and that the said objective requires that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their society.

35. In summary then, in transferring to Ireland from England, the applicant lost the entitlement that he would have had in the latter jurisdiction to release on licence under strict conditions on the 29th March 2014 (subject to those conditions, and to potential recall, at any time until the 29th March 2022), whereas he gained an entitlement to serve his sentence within his own society near his own family and to unconditional (although contingent) release on the 16th November 2016.

The law

36. As Charleton J. concluded in *Caffrey v. Governor of Portlaoise Prison* [2010] IEHC 213, the Acts fall to be construed in the light of the Transfer Convention, not only because specific reference is made to the latter by the former but also because the text of the legislation is clearly designed to give effect to the applicable provisions of the Convention.

37. Section 7 of the Acts deals with the procedure to be followed where the Minister consents to a request for the transfer of a sentenced person into the State, whereby a warrant may be issued by the High Court authorising the bringing of a sentenced person into the State and the taking of that person to, and his detention in custody at, such place or places in the State as are specified in that warrant. The provisions of that section upon which the applicant places particular reliance for the purposes of his argument are the following:

“(4) Subject to *subsections* (5) to (7) of this section, the effect of a warrant under this section shall be to authorise the continued enforcement by the State of the sentence concerned imposed by the sentencing state concerned in its legal nature and duration, with due regard to any remission of sentence accrued in the sentencing state, but such a warrant shall otherwise have the same force and effect as a warrant imposing a sentence following a conviction by that court.

(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 either event, either-

(i) aggravate it, or

(ii) exceed the maximum statutory 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.

...

(10) In this section, a reference to the legal nature of a sentence does not include a reference to the duration of such sentence."

38. The word "sentence" is expressly defined in section 1 of the Acts to mean "any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a limited or unlimited period of time on account of the commission of an offence." The term "sentence" is also specifically defined in Article 1 of the 1983 Convention on the Transfer of Sentenced Persons to mean "any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence."

39. Under the express terms of Article 9.3 of the Transfer Convention, "[t]he enforcement of a sentence shall be governed by the law of the administering State and that State alone shall be competent to take all relevant decisions." In this context it is important to remember that Ireland's instrument of ratification of the Transfer Convention, deposited on the 31st July 1995, contains a declaration excluding the "conversion of sentence" procedure provided for in Article 9.1(b) of the Transfer Convention in cases where Ireland is the administering State. Instead, it is the "continuation of enforcement" procedure provided for in Article 9.1(a) of the Transfer Convention to which effect is given by section 7 of the Acts.

Analysis

40. It is clear that the relevant court or tribunal in this case, for the purpose of the foregoing definitions, was Canterbury Crown Court and that the punishment imposed on the applicant by that court for the criminal offences of which he was convicted was one of 16 years imprisonment (with 252 days spent in custody on remand to count towards that sentence).

41. There is no doubt that, in imposing a sentence of the relevant length, the Crown Court was required under the applicable sentencing guidelines to inform the applicant of the statutory duty imposed by the British Parliament on the Secretary of State when administering that sentence to grant the applicant conditional release on licence once he had served one half of it. Nor is there any doubt that the Crown Court so informed the applicant in this case. However, that does not alter the legal nature of the sentence imposed by that court. The relevant requirement plainly operates to inform a sentenced person - such as the applicant - of the effect of the law governing the administration of his sentence in the United Kingdom but, under the provisions of the Transfer Convention which section 7 of the Acts is intended to implement, once a sentenced person has been transferred to another Convention State (as administering State), the enforcement of the relevant sentence is governed by the law of the administering State and that State alone is competent to take all relevant decisions.

42. In *Caffrey v. Governor of Portlaoise* [2012] 1 I.R. 637, the issue presented concerned the legal nature of the sentence imposed on a prisoner transferred from the U.K. who had been convicted of murder there and sentenced to life imprisonment with a recommendation by the trial judge that he serve a minimum tariff period of 12 years imprisonment. The Supreme Court (*per* Denham C.J., Hardiman and Macken JJ concurring) found that the sentence imposed in England was a mandatory sentence and was imprisonment for life. Fennelly J. (dissenting, with him Murray J.) took the view that the expression "legal nature" is one of broad import, and that the legal nature of the sentence imposed in that case was one of 12 years imprisonment (by way of retribution and general deterrence), followed by any further period of imprisonment that the prisoner may be required to serve thereafter (justified exclusively on grounds of public protection), which latter period of imprisonment was not compatible with Irish law in that it amounted to impermissible preventative detention. For the purpose of the present judgment it is only necessary to note that the different conceptions of the "legal nature" of the sentence at issue in that case were both squarely based upon the sentence directly imposed by the trial court in that case. There was no question in that case of the Supreme Court expanding the import of the term "the legal nature of the sentence concerned" to encompass, not only the punishment ordered by the relevant court, but also the law or practice governing the enforcement of that sentence.

43. Having carefully considered the foregoing principles, I have concluded that the legal nature of the sentence imposed on the applicant in this case, that is to say the legal nature of the punishment ordered by the relevant court, was that he should serve a sentence of imprisonment of 16 years, with 252 days spent in custody on remand to count towards that period. It follows that the warrant issued on the 22nd October 2008 ordering that the applicant serve a sentence of "16 years imprisonment with 252 days on remand taken into consideration" is *intra vires* section 7(4) of the Transfer of Sentenced Persons Acts, 1995 and 1997, in that it does not go beyond the continued enforcement by the State of the sentence concerned imposed by the sentencing state concerned in its legal nature, which that section permits.

44. In case I am wrong in that conclusion, and in view of the issue of personal liberty that is at stake, I propose to address the applicant's remaining arguments, notwithstanding the fact that most, if not all of them, might well be considered to depend for their force and effect on a preliminary finding that, in stipulating a sentence of "16 years imprisonment with 252 days on remand taken into consideration" on the face of the warrant issued by it on the 22nd October 2008, this Court was acting *ultra vires* section 7 of the Acts.

45. The first such argument is that, in considering whether to issue a warrant authorising the continued enforcement in the State of the sentence imposed on the applicant in England, the High Court should have adapted that sentence to one of 16 years imprisonment with 8 years of that sentence suspended on conditions designed to mirror the standard licence conditions and/or the conditions prescribed by the Secretary of State that are imposed on a prisoner released after serving half of a determinate sentence of more than 12 months in England.

46. As section 7(5) of the Acts expressly states, the power of this Court to adapt the legal nature of the sentence imposed by the sentencing state when issuing a warrant authorising the transfer into, and detention within, the State of a sentenced person, arises only "if the sentence concerned imposed by the sentencing state concerned is by its legal nature incompatible with the law of the State."

47. As a matter of general principle, a sentence of 16 years imprisonment is not by its legal nature incompatible with the law of the State. It scarcely needs to be pointed out that the sanction or punishment of imprisonment is well known to Irish law. There is no incompatibility between the sentence received by the applicant in England and the penalty prescribed by the law of this State for a similar offence. The English court applied no condition or qualification on the sentence of 16 years imprisonment, which it imposed, that altered the legal nature of that punishment. Accordingly, I can find no incompatibility with the law of the State in respect of that sentence that would have permitted the High Court to exercise the adaptation power conferred upon it by section 7(5) of the Acts.

48. That being so, there was no scope for a hearing of any kind under that sub-section and, in consequence, there is no basis for the applicant's next argument that such a hearing should have been conducted in a manner directly analogous to a criminal sentencing (or re-sentencing).

49. The applicant's contention that the continued enforcement of his sentence under the warrant now at issue amounts to a disproportionate interference with his right to liberty and the security of the person under the European Convention on Human Rights might be considered a separate and free-standing argument. As noted earlier in this judgment, that argument relies for its force on the disparity between the applicant's conditional release date in the United Kingdom (the 29th March 2014) and his unconditional release date (with remission) in this jurisdiction (the 16th November 2016).

50. In *Szabo v. Sweden* (dec.), no. 28578/03, 27 June 2006, the European Court of Human Rights ("the ECtHR") was required to consider whether the involuntary transfer of the applicant in that case from Sweden to Hungary under the Transfer Convention in respect of a 10 year sentence for drugs offences imposed on the 18th December 2000 was in breach of the fair trial requirements of Article 5(1)(a) of the European Convention on Human Rights because the date of his eligibility for conditional release in Sweden (the 25th May 2007) was 16 months earlier than the date of his eligibility for conditional release in Hungary (the 22nd September 2008) and because prison conditions were stricter in Hungary than in Sweden .

51. In addressing that submission, the ECtHR stated:

"To lay down a strict requirement that the sentence to be served in the administering country should not exceed the sentence that would have to be served in the sentencing country would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is reflected in the Transfer Convention and is, in principle in the interests of the person concerned (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, pp. 34-35, § 110). Accordingly, the possibility of a longer period of imprisonment in the administering state does not in itself render the deprivation of liberty arbitrary as long as the sentence to be served does not exceed the sentence imposed in the original criminal proceedings.

Nevertheless, the Court does not exclude the possibility that a flagrantly longer *de facto* term of imprisonment in the administering State could give rise to an issue under Article 5, and hence engage the responsibility of the sentencing State under that Article. However, the sentencing State could only be responsible for consequences which were foreseeable at the time when the transfer decisions were taken.

As has been noted above, following the applicant's transfer to Hungary he is likely to serve eight years of his ten-year prison sentence, whereas he could have expected to serve six years and eight months of that sentence in Sweden. While the difference of one year and four months certainly cannot be considered insignificant, the time he will serve remains well within the sentence imposed. Moreover, the likely additional period of detention in Hungary corresponds to 20% of the time he could have expected to serve in Sweden. In these circumstances, the Court finds that the longer *de facto* term of imprisonment is not so disproportionate that it will entail a breach of Article 5.

Furthermore, this conclusion is not altered by the fact that, as the applicant claimed, the prison conditions may be stricter in Hungary than in Sweden. In this connection, the Court reiterates that, in its decision of 26 October 2004, it declared a similar complaint submitted by the applicant under Article 3 of the Convention, inadmissible as being manifestly unfounded."

52. Applying that analysis to the circumstances of the present case, I consider the following matters to be relevant:

(i) Following the applicant's transfer to Ireland he will serve approximately 10 years and 8 months of his 16 year sentence, whereas he could have expected to serve 8 years of that sentence in custody in the United Kingdom.

(ii) While there is a difference of 32 months, the sentence the applicant will serve in this jurisdiction remains well within the sentence imposed in the United Kingdom.

(iii) The likely additional period of detention in Ireland corresponds to one third of the time the applicant could have expected to serve in the UK.

(iv) In this case, unlike in *Szabo*, the later release contemplated in Ireland is unconditional release whereas the release contemplated in the United Kingdom was conditional release on licence effective until the 29th March 2022.

(v) The applicant is detained in an open prison in this jurisdiction and, in any event, no question arises of the applicant being detained under stricter conditions in Ireland than in England.

(vi) In this case, unlike in *Szabo*, the applicant requested the relevant transfer under the Transfer Convention on the basis that it would, if granted, ameliorate the hardship of imprisonment for him by facilitating closer contact with his family.

53. In light of those circumstances, the Court is satisfied that the additional period of detention that the applicant may serve in Ireland is not so disproportionate as to entail a breach of Article 5, or of any other provision, of the European Convention on Human Rights.

The issue of consent

54. One final matter, addressed at some length earlier in this judgment, concerns the circumstances in which the applicant, while still a prisoner in HMP Lowdham Grange, came to furnish a signed witnessed consent to his transfer to Ireland. The applicant asserts that he did so although he had not had sight of the extensive materials that accompanied that consent form, and which clearly set out, as part of the information provided, details of the applicant's estimated release date in this jurisdiction. The matter is relevant to the applicant's contention that he "always understood" that the conditional release date notified to him by the sentencing judge "would not be interfered with" in the event of his transfer to Ireland.

55. It is not necessary to make any finding of fact concerning the applicant's state of knowledge at the time of his transfer, as it became clear in the course of argument before the Court that nothing turns on the issue. The respondents made clear that their opposition to the present application is not based on the argument that the lawfulness of the applicant's detention is based on acquiescence, or informed consent, in relation to the duration of his proposed imprisonment within the State. No such argument could succeed in light of the following dictum of Charleton J. in *Caffrey v. Governor of Portlaoise Prison* [2010] IEHC 213:

"The idea of consent is central to the transfer scheme whereby prisoners are brought from one State to another to serve out the sentence. What prisoners are consenting to, in that regard, is not that their detention should continue beyond the appropriate time, or that it should continue within circumstances that infringe the guarantee of liberty contained in Article 40.4.2° of the Constitution but, rather, that they should be transferred from one jurisdiction to another."

56. Equally, the Court understands that the applicant does not contend that the conditions necessary for the Minister's consent to the applicant's transfer request, under section 6(5) of the Acts were not present in this case. That is to say that the Minister was satisfied that all reasonable steps had been taken to inform the applicant in writing in English of the following matters: (a) the substance of the international arrangements relevant to his proposed transfer; (b) the effect of the warrant that may be issued in respect of his transfer to, and detention in, the State; (c) the effect of the law in relation to his detention within the State under that warrant; and (d) the powers of the Minister to apply to the High Court to revoke or vary the warrant in appropriate circumstances.

57. In that context it should be noted that, before the Minister issued a certificate, pursuant to the provisions of section 6(6) of the Acts, consenting to the transfer on the 16th September 2008, he would have been aware of the following facts: (a) that a letter had been written to the applicant on his behalf on the 9th January 2007, enclosing an explanatory leaflet on the Acts and on the applicant's eligibility for conditional/early release after transfer; (b) that two letters had been written on the 31st July 2008, one to the relevant authorities in the UK and one to the applicant directly, each of which, in conjunction with the accompanying materials, contained the relevant information for the purposes of section 6(5) of the Acts; and (c), most significantly, that he had received a witnessed consent form, signed by the applicant on the 19th August 2008, in which the applicant expressly acknowledges that he had been informed in writing in his own language of all of the relevant matters.

58. It is true that Article 7(1) of the Transfer Convention imposes an obligation on the sentencing state to ensure that the person required to give consent to the transfer does so voluntarily and with full knowledge of the legal consequences thereof. However, the same Article goes on to provide that the procedure for giving such consent is governed by the law of the sentencing state, in this case the United Kingdom. It follows that, for a variety of practical and jurisdictional reasons, this Court is in no position to adjudicate on what did, or did not, occur at HMP Lowdham Grange at the material times in July and August 2008. Were the Court in a position to do so, it would require significantly more evidence from the applicant concerning the correspondence he did receive and the consent form that he did sign, before it could reasonably conclude that, on the balance of probabilities, he was not aware that his conditional release date in the United Kingdom would not apply to his imprisonment in Ireland.

Conclusion

59. For the reasons set out above, this Court is satisfied that the continued detention of the applicant pursuant to the terms of the warrant issued by this Court on the 22nd November 2008 is in accordance with law and will remain so after the 29th March 2014. The relief sought is, therefore, refused.