APPROVED **[2020] IEHC 632**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 462 J.R.

BETWEEN

S.

APPLICANT

AND

MINISTER FOR JUSTICE

RESPONDENT

DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 December 2020

INTRODUCTION

1. The principal question for determination in these proceedings is as follows. Can a person who is detained in the Central Mental Hospital following a special verdict of "not guilty by reason of insanity" be characterised as a "sentenced person" for the purposes of the Transfer of Sentenced Persons Act 1995. If the answer to this question is "yes", then such a person is eligible to be transferred to another Convention State in order to serve the balance of their "sentence" (as defined).

2. The applicant had been tried for an offence of dangerous driving causing death, and the jury returned a special verdict to the effect that the applicant was not guilty by reason of insanity. The applicant is currently detained in the Central Mental Hospital. The parties are all in agreement that it would be in the best interests of the applicant were he to be transferred to his home country of Germany. The parties are also agreed that the applicant is eligible for transfer under the terms of the Transfer of Sentenced Persons Convention itself ("***the Convention***").

3. The dispute between the parties centres on whether the Convention has been properly implemented into domestic law. Remarkably, the Minister for Justice invites this court to adopt a *restrictive* approach to the interpretation of the domestic legislation, with the consequence that the applicant would be rendered ineligible for transfer. The logic of the position adopted by the Minister is that, as a result of legislative amendments introduced in 2006, domestic law is no longer fully compliant with the Convention.

4. The Minister's submission that the domestic legislation should be given a restrictive interpretation is all the more surprising given that the adequacy of the Irish State's legislative regime governing the transfer of sentenced persons is to be the subject of infringement proceedings. More specifically, the European Commission has publicly announced its decision to refer Ireland to the European Court of Justice for failing to transpose Council Framework Decision 2008/909/JHA of 27 November 2008. The Framework Decision replaced the corresponding provisions of the Convention with effect from 5 December 2011 insofar as transfers between Member States of the European Union are concerned.

FACTUAL BACKGROUND

5. The applicant had been charged with an offence of dangerous driving causing death, and was tried before a judge and jury in the Circuit Criminal Court. The jury returned a special verdict, finding the applicant not guilty by reason of insanity pursuant to section 5(1) of the Criminal Law (Insanity) Act 2006. Relevantly, such a special verdict entails a finding by the jury that the accused person committed the act alleged against them but that they ought not to be held responsible for the act because they were suffering at the time from a mental disorder.

6. Thereafter, the trial judge made a finding, in accordance with section 5(2) of the Act, that the applicant was suffering from a mental disorder (as defined), and required in-patient care and treatment. (The applicant has a diagnosis of schizophrenia). The trial judge then made an order committing the applicant to a specified designated centre, namely the Central Mental Hospital.

7. As required under section 13 of the Act, the applicant has been subject to periodic reviews by the Mental Health (Criminal Law) Review Board. On each occasion, the Review Board's decision was that the applicant still fulfilled the criteria for detention, and the board ordered that his detention continue pending further review.

8. The applicant is a German national, and had moved to Ireland in 2014. The applicant is married, with one child. His wife remains supportive but has had to move back to Switzerland with their child for her employment. The applicant's mother is very elderly and resides in Germany. She is unable to travel due to her ill health.

9. The applicant wishes to be transferred to an institution in Germany so that he can be close to his family. The applicant also wishes to avail of therapies for his mental illness in his native language.

10. An appropriate secure psychiatric institution in Germany has been identified, and the clinical director of that institution has confirmed his willingness to treat the applicant. The clinical director has also confirmed that this institution would provide detention facilities, treatment and reviews comparable to those which the applicant would receive in Ireland.

11. The German Ambassador to Ireland has written to the Minister for Justice in support of the transfer application, reiterating the benefit that the transfer would have on the applicant, a German citizen; and confirming that the secure psychiatric institution in Germany would be ready to accommodate the applicant.

12. A formal application for a transfer was made to the (then) Minister for Justice on 3 December 2018. An initial response to the application was received from the Irish Prisons Service on 17 December 2018 as follows.

> "I have received confirmation from the management of the Central Mental Hospital that [the applicant] is not a prisoner, and hence, the provisions of the Transfer of Sentenced Persons legislation do not apply to him. As you point out in your letter he is detained under Section 5(2) of the Criminal Law (Insanity) Act 2006. He has to date never been in the custody of the Irish Prison Service.
>
> There is no legal provision for inter European interstate transfer of patients detained under the Criminal Law (Insanity) Act 2006."

13. The solicitors acting for the applicant made a detailed submission in response to this letter the very next day, setting out their rationale for saying that the Transfer of Sentenced Persons Act 1995 is applicable.

14. There then ensued what can only be described as an inordinate delay on the part of the State agencies in progressing the application. Despite regular reminders, by letter and telephone, a substantive response was not received by the applicant's solicitors until 5 May 2020, that is, some eighteen months subsequent to the making of the transfer application.

15. Following a further exchange of correspondence, the reasons for the Minister's refusal to entertain the transfer application were set out as follows in a letter dated 10 June 2020. This letter is again from the Irish Prison Services.

> "I refer to your recent correspondence regarding your client [Name redacted]'s unsuccessful application to transfer to Germany under the provisions of the Transfer of Sentenced Persons Act. In light of advises received, the following summary outlines the reasons why the Minister does not have the statutory power to issue a transfer warrant.
>
> Background
> Criminal Law Insanity Act 2006
>
> Prior to the enactment of the 2006 legislation a person who pleaded insanity successfully would be found '*guilty but insane*' and remanded indefinitely to the Central Mental Hospital, however under the provisions of the Criminal Law (Insanity) Act, 2006 the accused person is not automatically committed to a mental hospital on foot of successfully pleading insanity. When the plea is successful, the verdict has now changed to '*Not guilty but insane*'.
>
> The consequences of this amendment is that a person cannot be remanded in some form of custody, rather the legislation in Section 5(2) of the 2006 Act empowers the judge to commit the person to the custody of 'a specified designated centre' only where the judge is satisfied that the person is suffering from a mental disorder and is in need of in-patient care and treatment. If the judge is not satisfied that the subject meets either of these criteria he cannot commit the subject to a relevant mental hospital.
>
> Transfer of Sentence Persons Act 1995 & 1997
>
> The 1995 Act definition of a Sentence ends with the words '*on account of the commission of an offence*'.

> It is the view of Senior Counsel that within the definition of the 1995 Act that an accused person found not 'guilty but insane, who is committed by the judge to the Central Mental Hospital, is not subject to a 'sentence' for 2 reasons. Firstly, he or she has been found not guilty and therefore has not been detained 'on account of the commission of an offence'. Secondly, the reasons and the only reasons for the committal of the person is that he or she suffers from a mental disorder and is in need of inpatient care or treatment.
>
> Having giving (*sic*) due consideration 'to all the information and legal advice received, it was recommended that this application is refused as Senior Counsel are of the view that the Minister does not have the statutory power to issue a transfer warrant because the Transfer of Sentenced Persons legislation does not apply to a person committed to a specified designated centre under Section 5(2) of the Criminal Law (Insanity) Act, 2006 as amended by the Criminal Law (Insanity) Act 2010."

PROCEDURAL HISTORY

16. The applicant instituted these judicial review proceedings by way of an *ex parte* application for leave on 20 July 2020. The judicial review proceedings came on for hearing before me on 3 December 2020. Counsel for all sides made admirably crisp and concise submissions. The parties were given liberty to file supplemental written submissions on the principles governing the interpretation of domestic legislation which gives effect to international instruments, such as the Convention on the Transfer of Sentenced Persons. The applicant's side, in their supplemental submissions, very helpfully referred me to a relevant Supreme Court authority, *Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42; [2014] 2 I.R. 732. I will return to discuss this judgment at paragraph 56 below.

CONVENTION ON THE TRANSFER OF SENTENCED PERSONS

17. The Irish State ratified the Convention on the Transfer of Sentenced Persons on 31 July 1995.

18. The recitals to the Convention provide 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 own society, and that this aim can best be achieved by having them transferred to their own countries.

19. The term "sentence" is defined as follows.

> "'sentence' means 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"

20. Relevantly, the Convention distinguishes between (i) the commission of a criminal offence, i.e. in the sense of the carrying out of the acts or omissions making up the offence, and (ii) the concept of criminal responsibility. This arises under Article 9 in the context of the transfer of persons, who for reasons of mental condition, have been held not criminally responsible for the commission of the offence.

21. The Irish State, by way of declaration, has indicated the procedure which it will follow in the case of such persons.

> "In accordance with the provisions of Article 9, paragraph 4, Ireland may apply the Convention to persons detained in hospitals or other institutions under orders made in the course of the exercise by courts and tribunals of their criminal jurisdiction."

22. There is no doubt, therefore, that a person who has been held not criminally responsible for the commission of an offence, but is detained in an institution under an order made by a criminal court, can apply for transfer into the Irish

State. It is also accepted by the Minister that such a person is eligible for transfer out of the Irish State.

23. Thus, the parties in the present case are all agreed that, under the terms of the Convention itself, the applicant is eligible for transfer notwithstanding that, as a result of the special verdict, he has not been found criminally responsible. Counsel for the Minister accepts that it is sufficient for the purposes of the Convention that the applicant had "committed", i.e. carried out, the act alleged against him, namely dangerous driving causing death. Counsel expressly stated that it is sufficient that an accused person has carried out the *actus reus* of the offence.

COUNCIL FRAMEWORK DECISION 2008/909/JHA

24. The written legal submissions filed on behalf of the applicant also make brief reference to a framework decision adopted by the European Council in 2008. The full title of the framework decision is as follows: Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. For ease of reference, this instrument will be referred to hereinafter as "***the Framework Decision on the Transfer of Prisoners***" or simply "***the Framework Decision***".

25. The Framework Decision replaces the corresponding provisions of the Convention on the Transfer of Sentence Persons in respect of transfers between Member States, with effect from 5 December 2011. (See Article 26 of the

Framework Decision). The Convention continues to govern the relationship between a Member State and a third State.

26. As with the Convention which it replaces, one of the principal objectives of the Framework Decision is to facilitate the social rehabilitation of convicted persons by allowing them to serve their sentence in their home country.

27. The definition of "sentence" under the Framework Decision reads as follows.

> "'sentence' shall mean any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings"

28. The European Commission has published a handbook on the transfer of sentenced persons and custodial sentences in the European Union to facilitate and simplify the daily work of designated competent authorities. (C:2019:403:TOC). The handbook expressly addresses the position of persons who have been found not to have criminal accountability as follows.

> 2.1.2. Ratione materiae
>
> With a view to facilitating the social rehabilitation of the sentenced person, the Framework Decision covers any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings (Article 1(b)).
>
> As is clear from the definition, any judgment, following criminal proceedings on account of a criminal offence, and resulting in a deprivation of liberty, may be forwarded under the Framework Decision. This means that decisions imposing internment – following the establishment of the offender's full or partial criminal unaccountability due to a mental disability (see recital 20) – are included in the definition used in the instrument.
>
> In addition, so-called combined sentences – where the judicial authority has deemed it necessary to impose a combination of a custodial measure together with another measure involving deprivation of liberty, such as psychiatric treatment – are covered by the Framework Decision."

29. As appears, it is not necessary that a person have been found to have criminal accountability in order for them to be eligible for transfer under the Framework Decision.

30. The Irish State has not yet transposed the Framework Decision. The Minister did, however, publish the general scheme of the Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2020 in July 2020.

31. The European Commission has publicly announced its decision to refer Ireland to the European Court of Justice for failing to transpose the Framework Decision.

TRANSFER OF SENTENCED PERSONS ACT 1995

32. The Convention has been given effect to in domestic law by the Transfer of Sentenced Persons Act 1995. It is evident from the Long Title of the Act that it is intended to apply not only to convicted prisoners, but extends to persons detained in hospitals or other institutions under orders made in the course of the exercise by courts and tribunals of their criminal jurisdiction.

33. The term "sentence" is defined under section 1 as follows.

> "'sentence' means 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;"

34. As appears, the wording differs slightly from that under the Convention itself in that it includes the additional words "the commission of" in the final clause, i.e. on account of *the commission of* an offence. As discussed under the next heading, the Minister attaches much significance to this difference in wording.

35. It should also be noted that the definition under the domestic legislation omits the word "criminal" from the phrase.

THE MINISTER'S POSITION

36. In her statement of opposition, the Minister maintains the position that the applicant is not a "sentenced person". The Minister has also pleaded that the Convention cannot assist in the interpretation of the terms "sentence" or "sentenced person" because the Oireachtas, in enacting the Transfer of Sentenced Persons Act 1995, has not adopted the meaning of "sentence" provided for in the Convention.

37. In the written legal submissions filed on her behalf, the Minister contends that the applicant cannot be regarded as having been deprived of his liberty "on account of the commission of an offence" for two reasons. First, it is said that the applicant has been found "not guilty" of the offence, albeit by reason of insanity. Secondly, it is said that the applicant has not been deprived of his liberty on account of the special verdict, but rather as a result of certain findings made by the trial judge subsequently.

(i) No requirement for criminal responsibility

38. The argument underlying the first reason appears to be that the term "the commission of an offence" entails a requirement for criminal responsibility. Sensibly, this argument was not pursued at the hearing before me. Leading counsel for the Minister very fairly accepted that this phrase refers merely to the carrying out of the acts alleged against an accused (*actus reus*), in this instance, dangerous driving causing death.

39. It is apparent from the wording of section 5(1) of the Criminal Law (Insanity) Act 2006 that the jury must find that the accused person had "committed" the act alleged against him or her before returning a special verdict to the effect that the accused person ought not to be held *responsible* for the act alleged because they

were suffering at the time from a mental disorder. The concept of the "commission" of an offence for the purposes of the Transfer of Sentenced Persons Act 1995 should be read consistently with the concept of an accused person having "committed" the act alleged in the criminal proceedings for the purposes of the Criminal Law (Insanity) Act 2006. In each instance, it refers to the carrying out of the *actus reus*.

(ii). Meaning of "on account of the commission of an offence"

40. In order to understand the argument underlying the second reason relied upon by the Minister, it is necessary to explain the procedure governing a special verdict under the Criminal Law (Insanity) Act 2006.

41. The circumstances in which a person, who has been found not guilty by reason of insanity, may be committed to the Central Mental Hospital are prescribed under section 5 of the 2006 Act.

42. Subsections 5(1) and (2) provide as follows.

> 5. (1) Where an accused person is tried for an offence and, in the case of the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that—
>
> (a) the accused person was suffering at the time from a mental disorder, and
>
> (b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she—
>
> (i) did not know the nature and quality of the act, or
>
> (ii) did not know that what he or she was doing was wrong, or
>
> (iii) was unable to refrain from committing the act,

> the court or the jury, as the case may be, shall return a special verdict to the effect that the accused person is not guilty by reason of insanity.
>
> (2) If the court, having considered any report submitted to it in accordance with subsection (3) and such other evidence as may be adduced before it, is satisfied that an accused person found not guilty by reason of insanity pursuant to subsection (1) is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, the court shall commit that person to a specified designated centre until an order is made under section 13 or 13A."

43. Subsection 5(3) provides for the preparation of a report by an approved medical officer, i.e. a consultant psychiatrist within the meaning of the Mental Health Act 2001, setting out his or her opinion on whether the person the subject of the special verdict is suffering from a mental disorder and is in need of in-patient care or treatment.

44. The effect of these provisions is that a special verdict of "not guilty by reason of insanity" does not automatically result in detention. Rather, the jurisdiction to detain the person the subject of the special verdict is contingent on the trial judge being satisfied that that person is suffering from a mental disorder (as defined), and is in need of in-patient care or treatment in a designated centre.

45. The essence of the Minister's submission is that the applicant is detained on account of the Circuit Criminal Court's finding that the applicant is suffering from a mental disorder and is in need of in-patient care or treatment, rather than "on account of the commission of an offence". (It will be recalled that the decision-letter of 10 June 2020 states that *the only reason* for the committal of a person under the 2006 Act is that he or she suffers from a mental disorder and is in need of inpatient care or treatment (see paragraph 15 above)).

46. The submission is neatly encapsulated at §6.4 of the written legal submissions as follows.

> "It may be correct […] that the Applicant would not have been the subject of a measure involving deprivation of liberty ordered by the Circuit Criminal Court for an unlimited period of time under Section 5(2) of the 2006 Act unless he had been tried for a criminal offence. However, it is respectfully submitted that it is incorrect to suggest either that he would not have been committed but for the trial or that the detention was as a result of the trial or verdict. It is plain that no detention can take place under Section 5(2) of the Act without a finding that the person, the Applicant in this case, is suffering from a mental disorder and is in need of inpatient care or treatment."
>
> (Emphasis in original).

47. This submission is then elaborated upon as follows. Attention is drawn to the fact that there is a separate statutory procedure (under section 8 of the Mental Health Act 2001) by which a person may be involuntarily admitted to an approved centre on the grounds that he or she is suffering from a mental disorder. This separate procedure is not contingent on a special verdict in a criminal trial. It is acknowledged that this is not the basis on which the applicant is actually detained.

48. The new legislative scheme introduced by the Criminal Law (Insanity) Act 2006 is contrasted with the previous scheme. In particular, attention is drawn to the fact that under the Trial of Lunatics Acts 1883, the consequence of a special verdict of guilty but insane was that the court shall order the accused to be kept in custody as a criminal lunatic.

49. The point is also made in the written legal submissions that, prior to the enactment of the Criminal Law (Insanity) Act 2006, the decision to release a person who had been detained following a special verdict of "guilty but insane" had resided with the executive branch of government. By contrast, the power to

release a person committed under the 2006 Act is conferred upon a newly established independent statutory body, namely the Mental Health (Criminal Law) Review Board. It is queried, at §11 of the written legal submissions, whether the Minister has any power, express or implied, to make any direction which results in the release of the applicant from detention. Sensibly, this point was not pursued at the hearing before me.

50. The Minister fully accepts that a person who had been detained under the legislative scheme in force *prior to* the enactment of the Criminal Law (Insanity) Act 2006 would have been eligible for transfer as a "sentenced person" under domestic law. The logic of the Minister's submission is, however, that the reforms introduced in 2006 had the unarticulated consequence that domestic law was rendered non-compliant with the Convention. Put otherwise, it is suggested that the introduction of legislative reforms, which were intended to ensure compliance with Article 5 of the European Convention on Human Rights (as interpreted in *Winterwerp v. The Netherlands* [1979] ECHR 6301/73), resulted in non-compliance with the Convention on the Transfer of Sentenced Persons. It is not suggested that this was a deliberate legislative choice. Nevertheless, the court is invited to interpret the Transfer of Sentenced Persons Act 1995 in a manner which is non-compliant.

DISCUSSION

51. The principal issue for determination in this judgment is whether the applicant's detention in the Central Mental Hospital can be said to be "on account of the commission of an offence", within the meaning of that phrase as used in the

Transfer of Sentenced Persons Act 1995. Before turning to address this issue, it is necessary first to identify the relevant rules of statutory interpretation.

52. A very useful statement of the modern approach to statutory interpretation is to be found in the judgment of the Supreme Court in *C.M. v. Minister for Health and Children* [2017] IESC 76. McKechnie J., speaking for the court, emphasised that, under the literal approach to interpretation, the intention of parliament is to be determined by reference to the ordinary and natural meaning of the words or phrases, having regard to both the proximate and general context in which they occur. See paragraph 58 of the judgment as follows.

> "Accordingly, a consideration of both the narrower and broader context of any disputed provision, including the subject matter of the legislation itself, is an integral part of the literal approach, as is the legislative history, the subject matter of the Act and, to use an almost obsolete phrase, the 'mischief' which was sought to be remedied by its provisions. In identifying such matters, the same is not intended, quite evidently, as a prescriptive ruling on this approach."

53. McKechnie J. then described the purposive approach to interpretation as follows (at paragraph 59).

> "Where this method [i.e. the literal approach] does not yield a sufficiently clear indication of parliament's intention, then further assistance may be called upon by adopting one or more of a range of options also available, including what is sometimes referred to as a 'purposive' approach, which involves looking beyond the plain text of the statute and considering the intended objective of the legislature and the reason for the statute's enactment. As is made clear in multiple court decisions going back very many years, where the words are obscure or ambiguous, or their true meaning is in doubt, such an approach is permissible [citations omitted]. Section 5 of the Interpretation Act 2005 now gives statutory recognition to this course. […]"

54. At an earlier point in the judgment (paragraph 56), McKechnie J. had noted the absence of any clear, definitive and easily understood demarcation line between

the literal approach and the purposive approach. One possible explanation for this is that the literal approach—in consequence of the requirement to have regard to the overall *context* of legislative provisions—now shares much of the territory previously occupied exclusively by the purposive approach.

55. I turn now to apply these principles to the present case. Irrespective of whether one applies a literal or purposive approach, the objectives of the Convention on the Transfer of Sentenced Persons undoubtedly form part of the "context" for the interpretation of the Transfer of Sentenced Persons Act 1995. This is because it is a well-established principle of statutory interpretation that regard should be had to the meaning of the underlying international instrument when interpreting domestic legislation which is intended to give effect to same. This principle is summarised as follows by Murray J. in *Crilly v. T. and J. Farrington Ltd* [2001] IESC 60; [2001] 3 I.R. 251 (at page 291 of the reported judgment).

> "For a very long time principles of common law concerning the interpretation of statutes which give effect to international treaties permit the courts to interpret such a statute in the light of the meaning of relevant provisions of the treaty concerned. No doubt this is in part because the intention of the national legislature is clear – to give effect to provisions of the treaty in domestic law – and the objective consequence of that intent can be clarified or ascertained, where necessary, by reference to the meaning of the relevant provisions of the treaty, itself a legal instrument. There is also the consideration that contracting parties to international agreements should seek, as far as possible, to give uniform effect to its provision in domestic law. Furthermore, with this latter objective in mind, international treaties are interpreted in accordance with the principles of international law according to which the *travaux prepatoires* may be consulted for the purposes of their interpretation (unless such an approach is excluded, expressly, or by implication by the terms of the treaty itself or if there are no *travaux preparatoires* available)."

56. This principle was relied upon in the specific context of the Transfer of Sentenced Persons Act 1995 by the Supreme Court in *Sweeney v. Governor of*

Loughan House Open Centre [2014] IESC 42; [2014] 2 I.R. 732. Clarke J. (as he then was) stated as follows (at page 753 of the reported judgment).

> "[…] On the other hand, it is likewise well established that, in seeking to interpret Irish statutes which have been put in place so as to enable Ireland to comply with obligations under international treaties, the courts will strive, if possible, to ensure that Irish implementing legislation is interpreted in a manner consistent with the international law obligations undertaken by Ireland by entering into the treaty concerned (see, for example, *H.I. v. M.G. (Child abduction: Wrongful removal)* [2000] 1 I.R. 110).
>
> It follows that, in interpreting the Act of 1995, the courts should endeavour, if possible, to give it a meaning which conforms with Ireland's obligations under the Convention. However, that is the only effect of the Convention on the legal rights and obligations which arise in this case. The Convention is not part of Irish law. There are no relevant European Union measures which affect the rights and obligations which arise in this case."

57. The import of the case law is that it is legitimate for a court, when called upon to interpret domestic legislation which gives effect to an international instrument, to look beyond a narrow literal interpretation. However, none of the authorities opened by the parties expressly address the extent to which a court may, if necessary, depart from the literal wording of domestic legislation in order to give effect to the objectives of an international instrument. The judgment in *Sweeney* does, however, posit the interpretative obligation in broad terms, i.e. the court should endeavour, *if possible*, to give the relevant domestic legislation a meaning which conforms with the Irish State's international obligations.

58. Of course, there are limits to the interpretative obligation. A court cannot, for example, favour an interpretation which would do violence to the language of the domestic legislation. Happily, it is not necessary for the resolution of the within proceedings to attempt to delineate the precise contours of the interpretative obligation. This is because the relevant provisions of the Transfer

of Sentenced Persons Act 1995 can readily be interpreted in conformity with the Convention without having to go much beyond the literal meaning (if at all).

59. (As discussed under the next heading below, the domestic legislation is also subject to the specific interpretative obligation imposed upon a national court to give effect to EU law).

60. It is apparent from the terms of the Transfer of Sentenced Persons Act 1995 that it has been enacted to give effect to the Convention on the Transfer of Sentenced Persons. Both parties are agreed that the correct interpretation of the Convention is that a person in the position of the applicant, i.e. a person who for reasons of mental condition has been held not criminally responsible for the commission of an offence, is eligible for transfer.

61. For the reasons which follow, I am satisfied that the domestic legislation is capable of being interpreted in a manner which is consistent with the objectives of the Convention. Specifically, the definition of "sentence" under section 1 of the Transfer of Sentenced Persons Act 1995 is broad enough to accommodate a Convention-compliant interpretation. The phrase "on account of the commission of an offence" includes circumstances where a person has been deprived of their liberty in accordance with section 5 of the Criminal Law (Insanity) Act 2006. To elaborate: the jurisdiction to commit a person who has been found "not guilty by reason of insanity" to indefinite detention at the Central Mental Hospital is contingent on a jury having returned a special verdict in criminal proceedings. It is, of course, correct to say that a special verdict on its own does not result in an automatic committal. Rather, there is an *additional* requirement that the trial judge be satisfied that the accused person is suffering from a mental disorder (as defined), and is in need of in-patient care or treatment

in a designated centre. Notwithstanding this additional requirement, the return by the jury of a special verdict is nevertheless an essential prerequisite to the exercise of the court's jurisdiction.

62. A special verdict in criminal proceedings is a *sine qua non* to the making of a committal order under section 5 of the Criminal Law (Insanity) Act 2006. There is thus a direct nexus between the finding that an accused person has carried out the acts constituting the offence (albeit without criminal responsibility), and the committal order made by the court.

63. It is also relevant that the definition of "sentence" under the Transfer of Sentenced Persons Act 1995 speaks of "punishment" or other "measure" involving deprivation of liberty, thus implying that the definition includes non-punitive detention. Notwithstanding that the purpose of the applicant's detention is the provision of in-patient care or treatment, the applicant could not have been subject to an order made by a court exercising its criminal jurisdiction *but for* the fact that he had been found by a jury to have committed the act of dangerous driving causing death. It is apparent from the Long Title of the Act that it is intended to apply not only to convicted prisoners, but extends to persons detained in hospitals or other institutions under orders made in the course of the exercise by courts and tribunals of their criminal jurisdiction.

64. The Minister, through counsel, has submitted that an interpretation of the term "sentence" which encompasses a person detained pursuant to section 5(2) of the Criminal Law (Insanity) Act 2006 would involve substituting the objectives of the Convention for the actual wording used in the domestic legislation. Put otherwise, it appears to be suggested that the interpretation would be *contra legem*. With respect, I cannot accept that this submission is correct. There are,

of course, limits even to the purposive approach to interpretation. If and insofar as a purposive approach involves moving beyond the literal meaning (in the strict sense) of legislation, then the statutory language must be capable of bearing that alternative meaning. The statutory language must be amenable to different interpretations, i.e. the wording must be open-textured, or present some degree of ambiguity.

65. The wording of the domestic legislation at issue in this case is sufficiently open-textured to accommodate a Convention-compliant interpretation. The phrase "on account of the commission of an offence" can legitimately be interpreted as meaning that the commission of an offence (in the sense of having carried out the act or omission alleged) is a prerequisite to, but not necessarily the only prerequisite to, the deprivation of liberty.

66. The analogy drawn by the Minister with the separate procedure for involuntary detention under the Mental Health Act 2001 (as amended) is not apt for the reasons outlined by leading counsel for the applicant. The involuntary detention is not contingent on criminal proceedings. Persons detained under the Mental Health Act 2001 are not, in general, treated in the Central Mental Hospital unless transferred there subsequently. Moreover, their continued detention is subject to review by the Mental Health Tribunal (not by the Mental Health (Criminal Law) Review Board). The latter legislation thus entails a separate and distinct statutory regime.

67. By contrast, the applicant is detained under a statutory regime that only governs individuals who have committed an act or omission which makes up a criminal offence (albeit they have been held not to have criminal responsibility).

EU LAW CONSIDERATIONS: FRAMEWORK DECISION

68. For the reasons set out under the previous heading, I have concluded that the domestic law definition of "sentence" (and the cognate definition of "sentenced person") can legitimately be given an interpretation which is consistent with the Convention. On this interpretation, the applicant represents a "sentenced person" and is thus eligible for transfer as a matter of domestic law.

69. The same result is reached by reference to the Framework Decision on the Transfer of Prisoners (Council Framework Decision 2008/909/JHA of 27 November 2008).

70. It may be helpful to the reader to pause briefly here, and to explain the nature of a framework decision. It represented a form of intergovernmental decision-making, which applied prior to the entry into force of the Lisbon Treaty, in the fields of police and judicial cooperation in criminal matters. Framework decisions were binding upon the Member States as to the result to be achieved, but left the choice of form and methods to the national authorities. Framework decisions did not entail direct effect.

71. Relevantly, a national court is obliged to interpret domestic law in conformity with a framework decision. This interpretative obligation is qualified by the *contra legem* rule. See Case C-105/03, *Pupino* (at paragraph 47) as follows.

> "The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

72. The relevant provisions of the Framework Decision on the Transfer of Prisoners have been set out earlier (at paragraphs 24 and onwards). Crucially, the Framework Decision maintains the same distinction between (i) the commission of a criminal offence, and (ii) the concept of criminal responsibility, as is found under the Convention on the Transfer of Sentenced Persons. If anything, the slightly modified wording of the definition of "sentence" under the Framework Decision emphasises this. It follows that the applicant is eligible for transfer under the Framework Decision as a "sentenced person". This is confirmed by the European Commission's published handbook on the transfer of sentenced persons and custodial sentences in the European Union (discussed earlier).

73. This court is obliged, insofar as possible, to interpret the relevant domestic legislation, i.e. the Transfer of Sentenced Persons Act 1995, in conformity with the Framework Decision. This interpretative obligation may well be stronger than that which applies in the case of a non-EU international instrument.

74. For reasons similar to those discussed under the previous heading, I am satisfied that the definition of "sentence" under section 1 of the Transfer of Sentenced Persons Act 1995 is broad enough to accommodate an interpretation which is compliant with EU law as set out in the Framework Decision.

CONCLUSION AND FORM OF ORDER

75. The uncontroverted evidence before the court is that it is in the applicant's best interests to be transferred to his home country of Germany. This would ensure that the applicant is close to his family (including his wife, young son and elderly mother). It would also allow the applicant to receive treatment in his native

language. A secure psychiatric institution in Germany has agreed to accept the applicant and to take responsibility for his treatment.

76. For the reasons set out herein, the Minister's decision to refuse the application for a transfer on the basis that the applicant is not a "sentenced person" is erroneous in law. The restrictive interpretation urged upon the court by the Minister would render the domestic legislation inconsistent with the requirements of both the Convention and the Framework Decision. Such an interpretation would be contrary to the principle that the courts should endeavour, if possible, to give the domestic legislation a meaning which conforms with the Irish State's obligations under the Convention. (*Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42; [2014] 2 I.R. 732). More fundamentally, it would be contrary to the interpretative obligation imposed upon a national court by EU law. (Case C-105/03, *Pupino*).

77. The correct interpretation of the Transfer of Sentenced Persons Act 1995 is that it applies to a person, such as the applicant, who for reasons of mental condition has been held not criminally responsible for the commission of an offence. The applicant is, therefore, eligible for transfer under the domestic legislation.

78. It follows that the applicant is entitled to an order of *certiorari* setting aside the Minister's decision to refuse to issue a warrant for his transfer out of the State. The court will also make a formal declaration to the effect that the applicant represents a "sentenced person" for the purposes of the Transfer of Sentenced Persons Act 1995.

79. The matter will now be remitted to the Minister with a direction to reconsider the transfer application and to reach a decision in accordance with the findings in this judgment (Order 84, rule 27). The applicant has liberty to apply to this

court in the event that a fresh decision has not been made within twenty-eight days of the date of this judgment. There has already been an inordinate delay in the processing of the transfer application (which it will be recalled was first made to the Minister on 3 December 2018). It is in the interests of justice that this matter be brought to a conclusion, one way or another, within a short period of time.

80. The reporting restrictions, which had first been imposed at the time of the application for leave to apply for judicial review, continue in force. Specifically, the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the applicant is prohibited pursuant to section 27 of the Civil Law (Miscellaneous Provisions) Act 2008.

81. These orders will be drawn up immediately, with the issue of costs to be addressed in a separate order.

82. Insofar as costs are concerned, and given that this judgment has been delivered electronically, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of such judgments, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

83. The default position under Part 11 of the Legal Services Regulation Act 2015 is that legal costs follow the event, i.e. the successful party is entitled to recover

their legal costs as against the unsuccessful party. Given that the application for judicial review has been successful, my *provisional* view is that an order for costs should be made in favour of the applicant as against the respondent. Such costs to be adjudicated in default of agreement by the Office of the Legal Costs Adjudicator. If the Minister wishes to contend for a different form of costs order than that proposed, or to say that costs should be dealt with under the Legal Aid – Custody Issues Scheme, then this should be addressed by way of written submissions to be filed electronically by 11 January 2021. The applicant's side will have two weeks thereafter to reply.

Appearances
Feichín McDonagh, SC and Julia Fox for the applicant instructed by Duncan Grehan & Partners
Robert Barron, SC and Michael D. Hourigan for the respondent instructed by the Chief State Solicitor
Donal McGuinness for the notice party instructed by Byrne Wallace Solicitors

Approved