THE HIGH COURT

[2011 153 EXT.]

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

R. O (No. 2)

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 26th day of February, 2018

Introduction

1. On 2nd November, 2017, I delivered a preliminary judgment in this matter (see *Minister for Justice and Equality v. R.O (No. 1)* [2017] IEHC 663). In that judgment, I held, on the basis of the most recent reports available to me from the National Preventive Mechanism ("NPM") of the United Kingdom of Great Britain and Northern Ireland ("the UK") under the Optional Protocol to the United Nation's Convention Against Torture, and in light of the specific vulnerabilities of this respondent, that there was specific and updated information concerning the conditions of detention in Maghaberry Prison that gave rise to a concern that there was a real risk that this respondent would be subjected to inhuman and degrading treatment should he be surrendered to the United Kingdom.

2. Following on from the preliminary judgment, a letter was sent by the central authority on behalf of the High Court requesting "further information as to the prison conditions in which this respondent may be held should he be surrendered to the United Kingdom and thereafter remanded in custody." The letter requested that the information "should address any specific provisions that may be made for this respondent in light of his particular vulnerabilities." That letter sent by the central authority in this state was quite properly sent to the central authority in the United Kingdom. According to the 2002 Framework Decision (Council Framework Decision 2002/584/JHA), a central authority may be appointed to assist the competent judicial authorities. This usually means they are responsible for the administrative transmission and reception of the EAWs, as well as other official correspondence. Unfortunately, the letter that was sent to the central authority in the UK did not specifically request that the information requested should be provided by the issuing judicial authority.

3. Instead of a reply from the issuing judicial authority, the response came from the Crown Solicitor in Belfast by way of letter dated 4th December, 2017. The Crown Solicitor enclosed a letter from the head of the Northern Ireland Prison Service ("NIPS") responding to the request made by this Court as, in her view, he was best placed to provide the information. There is nothing in the reply to indicate that the response was directed by the issuing judicial authority, or even to indicate if the issuing judicial authority had received the request for further information sent by the central authority in this jurisdiction on behalf of the High Court. This is an issue to which I will return.

The Response of the Northern Ireland Prison Service

Preliminary issue

4. The head of NIPS, Mr. Ronnie Armour, refers to the vulnerabilities of R. O as found by the High Court. Mr. Armour also refers to "selective aspects of two reports" that R. O had relied upon in his submissions to the Court. These were the report of the unannounced inspection of Maghaberry Prison, dated November 2015 and the overview of initial findings published in February 2016. Mr. Armour then draws the attention of the Court to a number of comments in the "Report of unannounced visit to Maghaberry Prison, 5/7 September 2016, to review progress against the nine inspection recommendations made in 2015 - published in November 2016" ("the November 2016 report").

5. The letter from Mr. Armour states as follows:

> "NIPS consider that the independent inspections and subsequent reporting are evidence indicating that it has made considerable progress in addressing the issues relied on by [R. O]. These reports clearly establish that [R. O] will not be subject to inhuman or degrading treatment should he be remanded in Maghaberry Prison."

6. At the outset, the Court affirms that it does and will have regard to the principles of mutual trust and confidence which underpin the entire operation of the EAW procedure. This Court is disturbed however, by the fact that the issuing state has chosen to respond to the findings of this Court with respect to the independent inspections and subsequent reports, in a manner which seeks to undermine those findings. The issuing state was not requested to enter into a dispute or dialogue with this Court as to the Court's objective findings on the conditions in Maghaberry Prison which was based upon the reports before the Court. This Court had sought from the issuing state, information which would enable the Court to carry out its functions as an executing judicial authority. There is a distinct difference between an agency of an issuing state providing relevant information to an executing judicial authority, and that agency engaging in direct argument with conclusions reached by the executing judicial authority. It is unfortunately necessary to state that this Court will not be influenced in reaching its own determination on the issues before it based upon opinions expressed by agencies of the issuing state.

7. The Court must however take into account that, through oversight in the presentation of materials at the hearing of the original application, another report of the NPM based on a visit in September 2016 the November 2016 report which is referred to by NIPS in its response, had not been considered by this Court. The November 2016 report therefore did not feature in the preliminary judgment which had been sent to the issuing state. In those circumstances, the view expressed by NIPS appears to be based on the consideration of more materials than had been considered by this Court. The Court, as indicated in the Addendum to the preliminary judgment , was however in possession of a further report published in August 2017.

The contents of the response

8. The response of NIPS was divided into three parts under separate headings.. The first heading was 'threat to life', the second was 'vulnerable prisoners' and the third was 'healthcare'. Under the heading 'threat to life', NIPS stated that this respondent was requested for surrender based on allegations of murder and arson. The response went on to say they had experience of dealing with many prisoners charged with and convicted of such crimes. This does not accurately portray the offences for which the surrender of the respondent is sought. He is also sought for an alleged offence of rape and it is the nature of such an offence that brings with it

certain requirements for protecting prisoners.

9. The response from NIPS however states, that prisoners may present as vulnerable for a variety of reasons, one of which includes the alleged offence of rape. NIPS have stated that all prisoners are assessed immediately on committal both by specialised reception officers and healthcare professionals.

10. Furthermore, NIPS state that should a prisoner be subjected to death threats, they will carry out their own risk assessment, seek to establish all known factors about that risk, and consequently develop appropriate operational response to the risk identified. They say they have experience in considering, assessing, and managing actual and perceived risks to prisoners and provide a prisoner-specific response to existing threats. The tailored approach taken by them to threats to the life of a prisoner may also involve engagement of outside agencies, such as the Police Service of Northern Ireland ("PSNI"), in order that all relevant information be known to enable potential risks to be identified based on available intelligence. NIPS said that while the day-to-day aspects of risk management for prisoners is operationally sensitive, it is the case that they have experience of dealing with and responding to risks against prisoners. They said that such arrangements include, but are not limited to, the arrangements which may be put in place to assist and support vulnerable prisoners.

11. In the assessment of vulnerable prisoners, all factors are taken into account, including mental or physical health issues, threats, type of offence, notoriety, etc. They said they had excellent information sharing processes established with the PSNI which allows for up to date information regarding threats to be made available. The PSNI in turn liaise with An Garda Síochána regarding interjurisdictional information as regards the issue of threats. They say that if the prisoner's risk is deemed to be of a level that would preclude him being held in the general population, then alternatives are put in place. If after addressing all the relevant information it is seen that serious concerns exist, a new committal may be held in an area separate from the general population from his stay in custody. Maghaberry Prison has a unit that holds those seen as vulnerable due to their crime/alleged crime. This unit is self-contained. Activities for the unit are facilitated separately and many activities actually take place on the landing itself. They also have another area for whom even that unit is not suitable. That is the previous healthcare ward and it houses a small number of prisoners who have a high public profile or have specific healthcare demands. No person who is seen as a risk of harm to others will be considered suitable for that unit. The unit is supervised by staff who have been trained to enable them to provide effective support and to identify problems before they become concerning issues.

12. NIPS also indicate that any prisoner assessed to be vulnerable will be supported. The focus of the support is to seek to reduce actual and perceived vulnerability. They have several areas in the prison with small populations of those deemed vulnerable, managed by specially selected staff who have first-hand knowledge of the issues affecting their charges and are able to deal with any issues that arise or may signpost as appropriate.

13. The response from NIPS also went on to indicate that vulnerable prisoners may exceptionally be housed in the Care and Supervision Unit, where opportunities for interaction with others is necessarily limited and which may impact and exacerbate feelings of vulnerability. Any prisoner assessed to be vulnerable will be supported, and the focus of the support will be to avoid the use of the Care and Supervision Unit. No prisoner is subject to 24 hour lockdown, but opportunities for interaction with others are necessarily limited. For any prisoner who is held in the Care and Supervision Unit under Prison Rule 32 (Restriction of Association), there would be action taken to ensure that the stay is as short as possible. All those cases are subject to regular reviews and the nature of that review is set out in the document.

14. The Prisoner Safety and Support Team take on the cases of vulnerable prisoners and, when appropriate, a multidisciplinary approach tailored to each case is taken forward. The Care and Supervision Unit also has in place an anti-bullying process that allows staff to monitor such matters; the process allows for full input from those prisoners affected and ensures prisoner engagement throughout. In addition, the security department operates a "keep apart policy" whereby appointments of those seen as vulnerable cannot be booked at the same time and place as someone they have issues with.

15. NIPS also say that the processes around family and legal visits have been amended to take account of a persons' vulnerability. This measure would be deemed necessary if it was seen that the rights of the prisoner, or the visitors, would be adversely impacted upon. Similarly, when a vulnerable prisoner is required to attend court, measures are put in place to keep him apart from others on the journey to the court and on returning to the prison. All courts are able to provide a separate holding area while under the supervision of staff.

16. The final heading in the letter was that of 'healthcare'. The letter outlines that the healthcare in the prison is the responsibility of the South Eastern Health and Social Care Trust. Joint working between these two organisations leads to effective medical care being provided. Prisoners with a range of conditions have received appropriate care both in the prison and at hospital while being escorted by staff. It is stated that care provided within the prison has ranged from care for those with mobility issues up to palliative end-of-life care. It is also the case that care and medical needs are assessed on entry to the prison. Healthcare needs are signposted to and identified by the Trust, who are then responsible for providing an appropriate package of care to ensure all relevant aspects of need are met. Medication as required and further medical multidisciplinary is planned and coordinated through the Trust, with NIPS facilitating the provision of prescribed and planned care such as, for example, attendance for physiotherapy or outside hospital appointments. The Trust and NIPS work together to ensure the identifiable healthcare needs are provided for as deemed appropriate by the Trust. That healthcare provision by the Trust operates through the entirety of the prison estate, regardless of where the prisoners are housed within the prison.

17. The November 2016 report looked at the progress against the nine inspection recommendations that had been made in 2015. Under the heading 'leadership and ability', it was reported that the general improvements at the prison have shown that urgent action had been taken to strengthen leadership, which was then focused on stabilising the prison. It appeared that there were significant management changes. It also appeared from the data provided by Maghaberry Prison that levels of violence and disorder had dropped significantly since the visit in January 2016 and was now running below what was seen in many similar prisons in England and Wales. They however at that stage had been unable to verify the date, but it was clear that the signs were encouraging. More prisoners than ever were being monitored for bullying. The prison felt more settled and calm.

Submissions

18. Counsel for the respondent referred to other aspects of the November 2016 report which had not been referred to by the Northern Ireland Prison Service. Under the heading of 'vulnerable prisoners', the report states:

> "There was still no overall safer custody strategy outlining how the prison would respond to safety issues, and/or those who were vulnerable. This continued to be a significant omission that impeded work in those key areas. A NIPS death in custody action plan was in place which sought to outline how the prison was responding to recommendations made by the

prison ombudsman. However, we could find no evidence of this action plan being actively monitored to ensure any recommendations made were embedded in prison processes to support prisoners deemed vulnerable to suicide and/or self harm. This remained a significant area of concern."

19. The November 2016 report had also gone on to say that the use of observation rooms for those prisoners at risk had remained stubbornly high. It appears that those prisoners who are on what are termed 'supporting prisoner at risk reports' ("SPAR") were being placed in these observation rooms. Of the 45% of the SPAR in those rooms, 83% had their own clothing removed in favour of demeaning anti-ligature clothing. According to the report:

> "This way of managing men in crisis seemed to us to be designed to minimise the operational impact of keeping people safe, rather than designed to enhance care and support. It remains our view that such wide use of these approaches is unnecessary and detrimental to the wellbeing of what were already vulnerable men."

20. In the *R.O (no. 1)* judgment, it is stated that this respondent had not made any submissions as to his current state of mental health. That was correct; but at the renewed hearing, it was urged upon the Court that his most recent absence from the High Court in October 2017 was due to an incident of self-harm. It appears that this incident had been referred to in the forensic psychiatrist's report carried out upon the respondent with the view to assess his capacity to instruct counsel in these proceedings. It had referred to the fact that he was hospitalised for a suspected methadone overdose. It is noted however that he denied that this was a suicide attempt. Indeed it seems that the respondent was claiming that he was being poisoned. He did not appear to have any clear acute psychotic symptoms at that stage, but as the account of the overdose was unusual he was referred for further psychiatric assessment with the psychiatric in-reach team in order to clarify events leading up to his hospitalisation and to provide an assessment of his ongoing mental state in prison. It appeared the respondent denied he had ever self-harmed, but it appears from his prison records from Maghaberry Prison that he has had a history of deliberate self-harm on a number of occasions while in custody there. It is therefore incumbent upon this Court to carefully scrutinise all of the information about vulnerable prisoners including those prisoners who are vulnerable by reference to mental illness, including dangers of self-harm.

21. Counsel for the respondent submitted to the Court that the response of NIPS did not address the specific issues which this Court had asked to be considered. These were the fact that he has a threat to his life, that he is sought for a rape offence, and that he has particular medical frailties. Counsel for the respondent submitted that the response from NIPS was vague and generalised. She submitted that this respondent was not "an unknown quantity" but was a person with very particular frailties and that NIPS should have been in a position to say what precisely would happen to him if surrendered.

22. In her response, counsel for the minister submitted that the response of NIPS in fact did deal with the issues that the Court had raised. She accepted that the particular circumstances of this respondent were not set out individually therein but submitted that that was not in fact what the Court had sought. What the Court had sought from the issuing judicial authority was whether the individual needs of this particular respondent would be met in Maghaberry Prison if surrendered. Counsel for the minister submits that that was what the response from NIPS had addressed insofar as it stated that the individual needs of its prisoners had to be assessed. In effect, it was not possible for a specific plan to be put into place at this juncture and that it would only occur if and when he was surrendered. In her submission, the issue was whether there was an adequate plan.

Analysis and determination by the Court

23. In light of the new submissions regarding the incidents of self-harm by this respondent, the Court will therefore return to a consideration of the most recent report from August 2017 (*Report on an unannounced visit to Maghaberry Prison, 3-4 April 2017*, published August 2017). In that report, under the heading of 'care of vulnerable prisoners', the NPM had noted that reception and first night arrangements were reasonably good. However, it is then stated as follows:

> "We continued to have significant concerns about the management and care for vulnerable men, particularly those who self-harm. Further work was needed by the wider criminal justice and healthcare system to provide alternatives to custody for highly vulnerable prisoners. The lack of a safer custody strategy was a major concern, and we again observed much variance in practice.
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> Some limited progress had been made. The NIPS now had a single over-arching death in custody action plan, and levels of self-harm and the number of men self-harming had decreased, although both remained high in relative terms. Quality assurance of Supporting Prisoners at Risk (SPARs) was being developed.
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> However, there were major shortcomings in the care and support provided to the most vulnerable men in the population of Maghaberry and we were not confident that lessons were being learned from previous self-inflicted deaths in custody. There had been 11 self-inflicted deaths at the prison since 2012 and three in 2016. The death in custody action plan was not being effectively reviewed to drive improvements; minutes of the strategic safer custody meeting did not reflect meaningful discussions about the issues it raised; it was not clear what action had been taken and when; some actions were blank, some contradictory and it was not clear that all the recommendations had been clearly understood. This was a very concerning picture."

24. Having carefully considered the further information, including the reference to the November 2016 report which was not made available to the Court at the earlier stage, the new submissions regarding self-harm, and a reconsideration of the August 2017 report, I have come to the conclusion that it is necessary to revert to the issuing judicial authority for further information. I do so because of the following matters:

> (a) The letter sent by the central authority on behalf of this Court unfortunately did not make clear that the information should be provided by the issuing judicial authority in line with the decision of the CJEU in *Aranyosi and Caldararu (Joined Cases C-404/15 and C-659/15)* [2016] E.C.L.I. 198. It can be made clear to the issuing judicial authority that it is a matter for the issuing judicial authority as to where the information may be sourced, but what is of utmost importance is that the information must be provided by the issuing judicial authority. The situation in the present case can be contrasted with the situation in *Minister for Justice and Equality v. Corcoran* [2018] IEHC 29 where no formal decision had been made by this Court that there were deficiencies in Maghaberry prison that raised a real risk of a violation of the respondent's Article 3 rights. The additional information received in *Corcoran* was on foot of a s. 20 request issued by this Court. At para. 20 of that judgment, the Court made clear the distinction between a s. 20 request and a request under *Aranyosi and Caldararu:*
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> > "I note that the specific provisions of s. 20 of the Act of 2003 allows for information to be requested of the issuing state. In circumstances where this was not a request of the type set out in *Aranyosi and Caldararu*, the question

of whether it was necessary to involve the issuing judicial authority does not arise."

(b) This Court, as executing judicial authority, has already made the determination in this matter based upon the reports then available to it as to the general conditions in Maghaberry Prison to which this respondent as a vulnerable prisoner may have been exposed. That was a judicial decision that this Court was entitled to make and it is not seeking to enter into a dispute or dialogue with the appropriate authorities in the UK concerning that decision. What is of concern is whether "there [can] be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that [R. O] will be detained in that member state". It is for the issuing judicial authority to provide that supplementary information, which is as specific as it can be, as to the position of this respondent. For example, this respondent is not simply charged with murder and arson but is also charged with rape. Furthermore, he has been subject to death threats as confirmed by the PSNI. He also had incidents of self-harm while previously in custody. Furthermore, he has certain residual weaknesses existing from his previous stroke.

(c) The precise concerns of the August 2017 report which deals with the major shortcomings in the care and support provided to the most vulnerable men in the population of Maghaberry Prison should now also be addressed specifically. It has now been clarified to the Court that this respondent is a person with a history of self-harm in custody. In light of those concerns, as well as the other vulnerabilities of this respondent, the issuing judicial authority should provide information dealing with the conditions in which it is envisaged that this respondent will be detained in Maghaberry prison.

25. Whereas issues around Article 3 of the European Convention on Human Rights are matters of fundamental concern, it must also be recalled that the EAW mechanism is based on a high level of confidence between member states. This Court has not taken lightly the decision to find that the prison conditions in a prison in our neighbouring jurisdiction for vulnerable prisoners amounts to a violation of the prohibition of inhuman or degrading treatment. The Court made that decision on the basis of objective, reliable, specific and updated reports of the UK's national preventive mechanism. Having made that decision, the Court expects that the issuing judicial authority will respond in a serious, considered, and comprehensive manner. The Court is dissatisfied with the tone and content of the response that has been made to it by an agency of the issuing state that is not the issuing judicial authority.

26. There has also been a certain inadequacy of response from NIPS, but that may have been contributed to by the absence of any reference in the first judgment to the November 2016 report. Furthermore, it may be due to the fact that the issuing judicial authority was not involved in the transmission of the response which led to NIPS not addressing the issues in the manner required under the provisions of the *Aranyosi and Caldararu* judgment. In circumstances where the issuing judicial authority does not appear to have received the request for further information as to the conditions in which it is envisaged this respondent will be held, this Court should give the issuing judicial authority the opportunity to respond.

27. While there has been significant delay in this case to date, a significant proportion of that is due to the intervening ill-health of the respondent. There has also been delay because the minister chose not to seek information earlier; if he had done so, it may have resulted in this aspect of the case being disposed of at an earlier stage.

28. The final sentence of para. 104 of the judgment of the Court of Justice of the European Union in *Aranyosi and Caldararu* suggests that reasonable time could be extended to an issuing state for the purpose of ensuring compliance with the provisions of Article 3 of the European Convention on Human Rights. In the present case, the time given for a further response from the issuing judicial authority is being granted to ensure that the information sought is actually provided rather than for the purpose of ensuring that conditions will actually comply with Article 3.

29. In my view, it is perfectly right and appropriate to seek information at this point as to whether surrender can take place in this case. It is particularly appropriate to grant an adjournment for further information to be obtained where the offences for which surrender is sought are of the utmost gravity, and where there has been an unfortunate confusion in the manner in which the request for information was transmitted to the issuing state. In all the circumstances, it is appropriate for the Court to seek further information despite the fact that this respondent is in custody on this matter alone.