Neutral Citation Number: [2010] IEHC 213

THE HIGH COURT

2010 521 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN

JONATHON CAFFREY

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered on 20th day of May 2010

1. In this *habeas corpus* enquiry a transferred prisoner, the applicant Jonathon Caffrey, claims to be in unlawful custody. He is serving life imprisonment, a sentence that was imposed in England in December 1999 for the murder in that jurisdiction of Andrew Cook in November 1994. As in Ireland, a conviction for murder in England carries a mandatory sentence of imprisonment for life. In England, however, the trial judge, unlike in Ireland, makes a recommendation as to the minimum term to be served. In this instance, it was twelve years. Jonathan Caffrey's sentence was backdated to begin in March 1998, when he was first taken into custody. In consequence, that minimum term expired in March of this year. He claims that the nature of the sentence that he was given in England comprised a punitive element of twelve years imprisonment followed by preventive detention for the rest of his life. In May 2005, he was transferred from prison in England to Ireland in order to serve the balance of his sentence nearer to his family. Since preventive detention is a concept unknown in Irish sentencing law, it is argued that since the applicant has served the punitive element of his sentence he should be immediately released.

The Offence

2. On the night of 6th November 1994, Jonathon Caffrey, Brett Evans and Justin Reiss went to the home of Andrew Cook, at 33 Downside Walk in Northolt, England. A row broke out over some allegation of sexual infidelity with a girl who was not present. The applicant, Jonathon Caffrey, beat Andrew Cook so badly that he was rendered senseless and unconscious in his living room. Brett Evans then got a knife from the kitchen and, sitting astride the helpless victim, stabbed him a number of times, so that there was blood spurting from his wounds, and he left the knife stuck into his neck. Most of the evidence came from Justin Reiss who, it was alleged, was not involved in this attack. He described Brett Evans as encouraging Jonathon Caffrey while he beat Andrew Cook senseless. Brett Evans then went into the kitchen, where Justin Reiss claimed to be, and took a large knife out of the sideboard saying that they had to finish Andrew Cook off. This would have been out of the hearing of Jonathon Caffrey, according to Justin Reiss. The body was not discovered for some days. There was an issue at trial as to whether the date of death estimated by two forensic pathologists could have given both men an alibi. Jonathon Caffrey had immediately departed for Ireland. When he was extradited back to England, he could not be interviewed but, instead, gave the police a prepared statement claiming that he had acted in self-defence when the deceased had attacked him. To that evidence was added testimony from Mark McGirr, a friend of Jonathon Caffrey. He told him about the murder; that he had lost his temper and given the deceased "a good hiding" and had "beaten him to a pulp and his mate had stabbed the man". He told him that his mate had gone to the kitchen and come back with a knife and had said "we've got to finish him off", whereupon his mate stabbed the man ten times and blood had spurted out. To Mark McGirr, Jonathon Caffrey demonstrated a stabbing movement and smirked as he did so. On the occasion of a later admission to the same witness, to much the same effect, there was no smirking and Jonathon Caffrey added that he was "gutted" over what had happened. The Court of Appeal in England, on an appeal against the conviction, by a judgment of 22nd March 2001, found it to be safe and satisfactory. In *R. v. Evans and Caffrey* [2001] EWCA Crim 730 at para 78, Waller L.J. stated:-

> "Caffrey and Evans had been involved in a joint enterprise in beating up the deceased. They both had a motive, and perhaps Caffrey's was stronger for finishing the deceased off, in order that neither of them would be identified. Caffrey was in the room following the fight when Evans returned armed with a knife saying "we've got to finish him off" and Caffrey did not suggest to McGirr on either occasion that he (Caffrey) dissented or protested at what Evans was clearly about to do. At no stage did Caffrey suggest that he made any protest as to what Evans was doing during the attack on the deceased when the deceased was stabbed 10 times. On that evidence the jury would be entitled to conclude that Caffrey intended to encourage, wilfully did encourage, and that Evans was encouraged in the attack which he made on the deceased. They would be entitled to conclude that Caffrey was not just voluntarily present at the scene of the crime, but that, following a joint attack without a knife, Caffrey assented to Evans "finishing Cook off". Caffrey had the time and even the power to try to prevent the attack by Evans but he did not do so. It was for the jury to decide whether the ingredients were present to make Caffrey an aider and abettor, and the judge's ruling to leave the case for the jury was, in our view, clearly correct."

The Court also held that the trial judge's direction on the issue of encouragement, to establish participation in the crime, was correct. The trial judge instructed the jury that they could not find the applicant Jonathon Caffrey guilty of murder unless he actually encouraged Brett Evans to "finish off" the victim Andrew Cook and intended to so encourage him.

The Sentence

3. The trial judge sentenced Jonathon Caffrey to life imprisonment for the murder, which was the second count in the indictment. Both men had also been found guilty on the first count which was of assault causing grievous harm with intent. Jonathon Caffrey received eight years on that count. The trial judge made a recommendation as to the minimum to be served by both men. The trial

judge sent a report to the Home Secretary which contained a heading that it was to be "disclosed in full to the defendant". It reads, as to the part relevant to Jonathon Caffrey:-

> "Trial judges view on tariff (the period of years to be served in custody necessary to meet the requirements of retribution and general deterrence) indicating that the factors which aggravate and mitigate the offences).
>
> This was vicious and brutal stabbing instigated by Evans. He had a long record of offences, mostly for dishonesty but some for violence. Cook was already unconscious and on the floor. Caffrey was of course the principal in count 1 but not in count 2. He was man of hitherto good character.
>
> For Evans I would suggest fifteen years. For Caffrey – twelve years."

4. Lord Bingham C.J. affirmed these recommendations on 10th January 2000. He has a role in approving these recommendations under the United Kingdom legislation.

5. The actual order of the Central Criminal Court is an "order for imprisonment". It recites that the accused, born on the 5th July 1975, was on 15th December 1999 sentenced, I quote precisely from this order: "imprisonment [for life]" on count 2, the count of murder, and to eight years imprisonment on count 1. The sentence of life imprisonment was passed pursuant to the Murder (Abolition of Death Penalty) Act 1965. This is entitled as an Act to abolish capital punishment in the case of person convicted in Great Britain of murder. The relevant provisions, at the time, some of which have been subsequently repealed, are in ss.1(1) and 2, and they are straightforward:-

> "1. (1) No person shall suffer death for murder, and a person convicted of murder shall, subject to subsection (5) below, be sentenced to imprisonment for life.
>
> (2) On sentencing any person convicted of murder to imprisonment for life, the court may at the same time, declare the period which it recommends to the Secretary of State as the minimum period which in its view should lapse before the Secretary of State orders the release of that person on licence under Section 27 of the Prison Act 1952, or Section 21 of the Prisons (Scotland) Act 1952…
>
> (3) No person convicted of murder shall be released by the Secretary of State on licence under Section 27 of the Prison Act 1952 or Section 21 of the Prisons (Scotland) Act 1952 unless the Secretary of State has prior to such release consulted to the Lord Chief Justice of England or the Lord Justice General as the case may be, together with the trial judge, if available."

6. Section 1(5) concerns the conviction of children and is not relevant.

The Transfer

7. Jonathon Caffrey, together with his family from 2001, sought his transfer from England to Ireland for the purpose of serving his sentence under the Transfer of Sentenced Persons Act 1995 as amended by the Transfer of Sentenced Persons (Amendment) Act 1997. A warrant was issued on 31st August, 2004 by the High Court authorising the transfer. Prior to that, Jonathon Caffrey was informed as to the effect on his sentence of transferring to Ireland. Shortly after his conviction and sentence, he had been informed on 24th January, 2000 by her Majesty's Prison Service, that the twelve years recommended by the trial judge was "the number of years which you must serve in custody so as to satisfy the requirements of retribution and deterrence". Prior to his transfer to Ireland, Jonathon Caffrey was informed by letter from the Irish Prison Service, dated July 3rd 2003, that he should expect "save for exceptional circumstances arising, to serve, at a minimum, the tariff imposed in the U.K. (excluding time deemed to be served in the U.K.)". Information was attached to that letter in respect of the remission/temporary release scheme in Ireland. It was added that there could be "no guarantee that the Minister would see fit to authorise any form of temporary release in your case". By a further letter, dated the 7th July, 2003, these statements were repeated. A consent form was then signed by Jonathon Caffrey indicating that he had been informed in writing of the international arrangements concerning the repatriation of sentenced persons; of the affect of the warrant authorising his transfer to Ireland; of "the effect in relation to me, as so much of the law of Ireland as has effect with respect to repatriation under these arrangements"; of the arrangements governing the continued enforcement of the sentence in Ireland; of the powers of the Minister in that regard; and that he would "continue to serve his sentence of life imprisonment imposed on 15th December 1999 as advised in this O'Gorman's letter dated 3rd July 2003". He then signed the letter indicating his consent to his transfer.

Waiver

8. I find it impossible to conclude that there is any discretionary aspect to my decision in this *habeas corpus* enquiry. This is not a judicial review proceeding. I am required to decide if the applicant is in lawful, or in unlawful, custody. If he is not lawfully detained, I find it impossible to conclude that I have any option under Article 40.4.2º of the Constitution save to "order the release of such a person from such detention". The idea of consent is central to the transfer scheme whereby prisoners are brought from one State to another to serve out their 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 which infringe the guarantee of liberty contained in Article 40.4.1º of the Constitution but, rather, that they should be transferred from one jurisdiction to another. Acquiescence to court jurisdiction can occur in respect of a court that actually has jurisdiction in law where a prisoner understands that there may be some claim that might be made concerning the manner in which he is brought before a court, but chooses to allow a trial to take place which results in a sentence of imprisonment. That accords with the power conferred by law on a court. Examples of this kind of acquiescence might occur where statute provides that the jurisdiction of a court or a tribunal must be invoked within a particular time, or promptly, and the prisoner knowing of some such preliminary defect chooses not to raise an objection at an appropriate time; *Brennan v. Governor of Portlaoise Prison* [2008] 3 I.R. 364. A situation can also occur where a statutory mechanism exists, and is invoked, whereby incidental procedural matters to the detention of a patient in a mental hospital may be corrected; see *W.Q. v. Mental Health Commission* [2007] 3 I.R. 755. In the latter case a period of unlawful detention can later be rendered lawful through the intervention of the Mental Health Tribunal on which that corrective power is specifically conferred by law. The statutory mechanism for the correction of the status of detention thereby confers jurisdiction in law to detain the paitient. A court on which jurisdiction has been properly conferred by law but which may be more properly constituted where a selection process for the tribunal of fact is used and accords with the Constitution, nonetheless retains its jurisdiction. An election not to challenge that tribunal may mean that a point that is otherwise valid is passed because the objection was not taken at the appropriate time; see *The State*

(Byrne) v. Frawley [1978] I.R. 326. All of these refer to matters incidental to the jurisdiction properly conferred by law. There is no case which decides that a court which has no jurisdiction in law to order imprisonment somehow is invested with appropriate power because an accused before it did not raise an objection.

9. What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the Court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in *habeas corpus* proceedings. There is only one issue in this kind of enquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment.

Legislation

10. The legislation in Ireland governing the transfer of prisoners is entirely based on the Convention on the Transfer of Sentenced Persons signed at Strasbourg on 21st March 1983. I am satisfied that the Transfer of Sentenced Persons Act 1995 ("the Act of 1995" as amended by the Transfer of Sentenced Persons (Amendment) Act 1997 ("the Act of 1997") should be construed in the light of that Convention. The definition section of the Act of 1995 makes specific reference to the Convention and to those States which apply it. Apart from other specific references to the Convention, the text of the legislation makes it clear that it is giving effect to the Convention.

11. The mechanism whereby the Act of 1995 operates is by designating the relevant international arrangements as enabling the transfer of prisoners. Usually, that is the Convention. While the Convention is specifically mentioned in s. 2, the Minister for Foreign Affairs can extend the area of operation of the Act beyond those who are party to it, through mutual arrangement. Where a person is to be transferred out of Ireland, as sentencing state, and into the territory of another country to administer the sentence, it is the Minister for Justice, Equality and Law Reform who issues a warrant under s. 5 of the Act of 1995. A prisoner who is to be transferred is entitled to information as to the effect of a transfer. Where a sentencing state agrees, usually at the request of a prisoner, to transfer him or her to Ireland, a request is made by the sentencing state to the Minister for Justice, Equality and Law Reform to accept that prisoner. Under s. 7 of the Act the Minister then applies to the High Court for a warrant whereby the prisoner can be brought into the State. That warrant, if granted, authorises the detention of the prisoner in Ireland in accordance with Irish Law.

12. The prisoner is entitled on transfer, to such remission of sentence as he or she has earned in the sentencing state. When they are returned to Ireland, Irish law governs any further remission. This has the practical effect that although transferred prisoners are given credit for remission in accordance with the law of the sentencing state, any further remission is in accordance with Irish legislation and the Prison Rules. I understand, for example, that in the United Kingdom, those who are serving a definite period of imprisonment, as opposed to life imprisonment, are entitled to earn remission of sentence of up to one third. In Ireland, remission is 25%. Thus, a person sentenced to a term of eleven years imprisonment in England for armed robbery, and who has served three years in England prior to being transferred to Ireland, is entitled to be credited with one year of remission off their sentence. This is because the English rule applies while they are in England. For the balance of eight years, the prisoner can earn remission of two years; which is 25% of the remaining 8 years. On the totality of eleven years the remission earned in England of one year will be added to the two year remission they earn in Ireland, resulting in their release after eight years of imprisonment in both Ireland and England. The local law of the enforcement of the sentence cannot result in a prisoner receiving remission of one third on the full sentence of eleven years.

13. Section 7 of the Act of 1995, as amended by s. 1 of the Act of 1997 is central to the issue before the Court. I quote it in full:-

> "7. (1) Where the Minister consents to a request for a transfer under section 6 of this Act, he or she shall apply to the High Court for the issue of a warrant authorising the bringing of the sentenced person concerned into the State from a place outside the State and the taking of the person to, and his or her detention in custody at, such place or places in the State as may be specified in the warrant.
>
> (2) Where an application is made to the High Court under subsection (1) of this section that court shall, if it is satisfied that the requirements specified in paragraphs (a), (b), (d), (e) and, where applicable, (c) of section 6 (3) of this Act have been fulfilled and that the Minister consents to the transfer concerned, issue a warrant authorising the bringing of the sentenced person into the State and the taking of the person to, and his or her detention in custody at, such place or places in the State as are specified in the warrant.
>
> (3) The High Court may specify, in a warrant under subsection (2) of this section, any place or places to which the court would have jurisdiction to commit the sentenced person concerned if the sentence in respect of which the person is being detained by the sentencing state was imposed by the court at the time of the issue of the warrant.
>
> (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 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 any event, either -

(i) aggravate it, or

(ii) exceed the maximum 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

(7) A person transferred into the State under this Act to serve a sentence or the balance of a sentence imposed on him or her by another sentencing state may not appeal in the State against the conviction in respect of which the sentence was so imposed.

(8) Enforcement of the sentence specified in a warrant under this section shall cease where the State is notified by the sentencing state of any decision or measure, other than a decision or measure in respect of remission, as a result of which the sentence ceases to be enforceable in the sentencing state.

(9) The Criminal Procedure Act, 1993, shall not apply to a person in respect of whom a warrant is issued under this section.

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

Legal Nature and Duration

14. It is argued for Jonathon Caffrey that the legal nature of the sentence which he is presently serving has no punitive or general deterrent aspect. Instead, it is argued that the sentence as imposed in England, having passed the tariff line of twelve years for punishment and general deterrence set in that regard, is now entirely preventative. In other words, it is claimed that Jonathon Caffrey is being held to stop him from offending again. Therefore, the legal nature of the sentence, it is urged, is incompatible with the law of Ireland because it does not seek to punish or rehabilitate him for the murder which he committed, but simply to prevent him from offending again. The purpose for which the sentence was passed becomes, it is said, part of the nature of the sentence that a prisoner is required to serve. As between Ireland and the United Kingdom, it is submitted, the legal nature of the sentence differs. Since the Constitution prohibits preventative detention, a foreign sentence of imprisonment with a preventative aspect cannot remain intact because, it is argued that, by its very nature, it is unlawful under the Constitution. Further, to hold Mr. Caffrey beyond the recommended tariff of twelve years, it is urged, aggravates the punitive element of the sentence beyond any question of merely managing that sentence through the administering State. Even adapting the sentence under the Act to a form acceptable in Irish law, in the light of these arguments, would be highly questionable, though, as a matter of fact, it was never adapted under s. 7(5) of the Act of 1995, as amended.

15. By letter dated the 9th December 2008, the Ministry of Justice in the United Kingdom wrote to the Midlands Prison clarifying the nature of Jonathon Caffrey's sentence. The letter states that following Jonathon Caffrey's conviction, his tariff was set by the Home Secretary at twelve years:-

> "This was the whole period he was required to serve for the purposes of punishment and deterrence and included times spent in custody on remand. According to our records, Mr. Caffrey was remanded on 24th March 1998."

His tariff expiry was therefore set at March 2010 – which was twelve years from the date of remand. In November 2006, Jonathon Caffrey was interviewed by the Parole Board in Ireland. He was not granted release, either immediately or at a particular future date. The Parole Board recommended that he continue with his education and engage "with the therapeutic services in relation to offence focussed work". A review was then promised two years later. In May 2009, the Parole Board reviewed the case again and decided to recommend that should Mr. Caffrey continue to positively engage with the services available to him in the Midlands Prison that they would consider, in May 2010, transferring him to the training unit. Following this, in 2011, a release plan would be put in place.

16. This administration of Jonathon Caffrey's sentence in Ireland clearly focuses on the issue of rehabilitation. The Parole Board are of the view that he is not yet ready to be released but that the time when he can be released, with appropriate safeguards, is approaching within the next few years.

17. Sentences are passed for a variety of reasons. Some are inadmissible in law. Thus, if a judge imposes a lengthy sentence for rape on the basis that he will thereby protect other women from the predations of the convicted prisoner,, so much of the sentence as exceeds the appropriate punitive and rehabilitative elements will be wrong in principle. The Court of Criminal Appeal will correct the sentence and replace it with a sentence that accords with correct principles. A sentence can be passed to deter a prisoner from offending again, because that is part of the rehabilitative and punitive elements allowed in Irish sentencing law. But it does not appear possible for a judge to pass a sentence on an individual prisoner that is designed to deter the community at large from ever being involved in a similar offence. Instead, the sentence is approached individually;, on the basis of judging its gravity and then tailoring its nature and duration to the particular circumstances of the offender before the court. Normally, the rehabilitative element of any sentence is argued by counsel in the plea of mitigation that proceeds it, to reduce the appropriate term. If the prisoner engages in rehabilitation, the relevant decisions indicate, that society will benefit when he or she has paid back his or her debts to society in terms of punishment; thereby, the punishment may be mitigated to take that factor into account. If the prisoner rejects rehabilitation by indicating, for example, that he is not a bit sorry for having committed the crime (a truly rare expression of honesty), then a lesser rehabilitative prospect can be held out in reality. In consequence, the sentence becomes one where the judge is motivated solely by punishing the offender and deterring him from recidivism through that punishment. It may be that the notion of

the appropriate punishment for an offence sets an upper limit beyond which any attempt by the court to rehabilitate the offender through sentencing cannot exceed. I am not sure if that is so. I make no comment on it. Rehabilitation of a prisoner is not simply to the benefit of society, it also benefits the prisoner where he has enough strength to avoid, for instance, criminal associates, or to forego giving way to the impulses that lead to homicide or sexual violence or theft. To ensure that a sentence, by its deterrent and punitive effect, is also subject to such safeguards as will ensure that the prisoner has a reasonable prospect of rehabilitation is appropriate. It is plain to me, on reading the documents from within the Irish prison system, that rehabilitation, so that a release with the appropriate safeguards of Mr. Caffrey can take place, is what is now motivating the Parole Board in any recommendation they make to the Minister.

18. I am not convinced that I have sufficient information which indicates what the motivation of the Parole Board in England and Wales would be in considering the release of this prisoner, were he now there instead of in Ireland. Would that motivation be merely the prevention of further offences and not his preparation, where appropriate, for re-entry into society? In *Lynch v. The Minister for Justice, Equality and Law Reform* [2010] IESC 34, (Unreported, Supreme Court, 14th May, 2010) a declaration was sought that the mandatory life sentence for murder is incompatible with the Constitution and with the European Convention on Human Rights. The Supreme Court upheld the findings of Irvine J. in the High Court, rejecting the arguments advanced in support of the declarations sought. In *Weeks v. United Kingdom* [1987] 10 E.H.R.R., the European Court of Human Rights concluded that the division of a sentence of life imprisonment into a tariff period for punishment followed by detention for preventative reasons, required procedures compatible with Article 5 of the European Convention on Human Rights where a person is to be detained beyond that tariff period. In *Stafford v. United Kingdom* [2002] 35 E.H.R.R. 1121 it was held that the recall of a person sentenced to life imprisonment after his release had to be adjudged in the context of the punitive element of the offence having been exhausted. Murray C.J. emphasised, as did Irvine J. in the High Court, that there was no preventative element possible in any sentence imposed under Irish Law. He concluded at p. 34:-

> "In the light of the foregoing the Court is satisfied that the learned High Court Judge was correct in her conclusion that the case-law of the European Court of Human Rights relied upon by the appellants in their application pursuant to s. 5(1) of the Act of 2003 has no material application to the circumstances of this case where the sentence imposed under s. 2 of the Act are wholly punitive and bear no relationship to the system in the United Kingdom which was scrutinised by the Court of Human Rights. The Court of Human Rights continue to recognise that a mandatory life sentence as a punitive measure for a serious crime imposed in accordance with national law does not as such offend against any provision of the Convention provided at least that national law affords the possibility of review with a view to its commutation or conditional release…"

19. The nature of a sentence is the type or kind of punishment that is handed down by a court. This accords with the text of the Convention, to which I shall shortly refer in detail. Under s. 1(1) of the Act of 1995 a sentence is defined as meaning "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". That definition is consistent with the classification of sentence as between their nature and duration. It does not admit of a classification as between motivation, or appropriate sentencing principles, and the nature of the offence imposed.

20. I have concluded that the nature of the sentence imposed on Jonathon Caffrey is one of imprisonment for life. The motivation of the trial judge in setting a particular tariff in respect of personal deterrence and punishment does not change the nature of that sentence. In the event that an inadmissible motivation emerges from the sentencing remarks of a trial judge, this is a matter for correction by an appropriate appeal court. It does not change the nature of a sentence. I am obliged in deciding if the prisoner is in lawful custody to apply s. 7(5) and (6) of the Act of 1995 whereby the sentence of the sentencing state is not to be aggravated as to its legal nature or duration. Where the nature of any foreign sentence is incompatible with Irish Law, however, under s. 7(5) of the Act an application can be made to the High Court to adapt the sentence appropriately. In my view, this tends to admit of one meaning.

21. As to the nature of an offence, a sentence can generally differ in Ireland as between imprisonment, suspension, fine, forfeiture and community service. Section 7(10) of the Act makes it clear that a reference to the legal nature of a sentence does not include a reference to the duration of such sentence. Under the Act, the administering state is prohibited from commuting a sentence of imprisonment into any other kind of sentence than imprisonment or detention as monetary penalties or community service is not contemplated in the definition of "sentence" in s. 1(1) of the Act. Under s. 7(6) the sentence imposed by the sentencing state cannot be aggravated and nor can it exceed the maximum penalty set down by the law of the administering state for a similar offence. This issue arose in *Read v. Secretary of State for the Home Department* [1988] 3 ALL E.R. 993. There, a prisoner was sentenced in Spain for an offence against Spanish currency. The offence carried a minimum sentence under Spanish law of twelve years imprisonment. That was the sentence. In England, on his transfer there, the maximum sentence was only ten years while, in practice, sentencing precedents indicated that four years was the likely tariff. The High Court in England, in administering the sentence, remitted the sentence of twelve years to the maximum available, a sentence of ten years. Lord Bridge, in giving the speech of the House of Lords, emphasised that the sentence was to be administered under English law. In interpreting the Repartition of Prisoners Act 1984, the relevant United Kingdom legislation, he derived assistance from the text of the Convention.

22. In the matter of *Jhan (Abdur Rashid)* [2006] EWHC 2826 (Q.B.) a reference was made to the High Court as to the appropriate adaptation of a sentence where the prisoner had been convicted in Canada of the second degree murder of his daughter-in-law. In Canada, a mandatory life imprisonment sentence was imposed, together with a recommendation that the prisoner serve a minimum of ten years prior to being eligible for parole. Burnton J., in adapting the sentence, made the same order, also determining that the minimum term to be served would be ten years. In construing the relevant legislation he also referred to the Convention. His remarks at para. 15 are apposite:-

> "Article IX.I of the Convention confers on this country, as the administering State, the option either to continue the enforcement of the original sentence or to convert the sentence into a decision of this country, substituting for the original sentence one prescribed by English Law. Since the sentence of a transferred life prisoner must be referred to the High Court under section 273, it follows that in the case of such a prisoner the original sentence must be converted under Article IX.I(b) into a decision of this country. By Article X.I, this country is bound by the legal nature and duration of the original sentence. Counsel for Khan submits that the duration of the original sentence was ten years. I disagree. The legal nature of the original sentence was custodial; its duration was for the term of his life. Khan's counsel's submission confuses the minimum duration of the original sentence with its actual duration, which was for Khan's life. The potential for release on parole did not reduce or quantify the duration of the sentence. Even if Khan had been released in Canada on parole, Khan's sentence would not have expired."

23. I also think that the nature of the sentence in this instance is imprisonment and that its duration is for life. Like the House of Lords and the High Court in England, I find myself turning to the text of the Convention in an attempt to confirm my view as to the

meaning of what the nature of the sentence is under the Act of 1995 as amended.

Convention

24. One of the aims of the Convention is to further the ends of justice "and the social rehabilitation of sentenced persons". By Article 2, the parties to the Convention agreed to co-operate with each other in allowing a person sentenced within the sentencing state to be transferred to their country of origin, where the sentence will be administered. It is implicit in this aim that the sentence will be administered until it ends. Articles 2 and 3 set out the conditions for transfer, and the manner in which the sentencing state and the administering state may co-operate with each other. The means of this are set out in Articles 5, 6 and 7. The transfer of a prisoner cannot take place without his or her consent. Under Article 7 the procedure for the giving of such consent is governed by the law of the sentencing state. Once the prisoner is transferred, however, the sentence is suspended as to its enforcement within the sentencing state and the administering state, under Article 9, takes on the burden of ensuring the completion by the prisoner of the sentence. In that regard, under Article 9.1.b, the sentence of the prisoner is converted into a sentence of the administering state through an administrative or judicial procedure. In this country it is an order of the High Court. Article 9.3 provides:-

> "The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions."

25. Article 10 provides that the administering state is bound by the legal nature and duration of the sentence as determined by the sentencing state. That sentence may be converted, where its nature or duration is incompatible with the law of the administering state, into a sentence which corresponds, as far as possible, with that imposed by the sentencing state. Under Article 10.2 the administering state is not entitled to aggravate, as to the nature or duration of the sentence, the sanction imposed by the sentencing state and is not entitled to exceed the maximum sentence prescribed for the offence by the law of the administering state. Although the sentence of Jonathon Caffrey was not so converted, this Article is relevant in interpreting what the Convention means, and how the Act of 1995, as amended, is to be interpreted, in referring to the nature of a sentence and the duration of a sentence. Under Article 11 of the Convention, where a sentence is to be converted, because it is incompatible with the law of the administering state, that converting state is bound by the facts that are explicit or implicit in the judgment of the sentencing state. A sanction involving deprivation of liberty cannot be converted into a pecuniary sanction. Finally, the administering state is obliged to deduct the full period of deprivation of liberty served by the sentenced person.

26. There is nothing in the Convention which leads me to the conclusion that the nature of a sentence is changed by the motivation for imposing it, or the underlying rationale in administering it. Once a sentence is, of its nature, a sentence for life imprisonment, then, under Article 9.3., it is for the administering state to enforce it and "to take all appropriate decisions". A sentence would be changed as to its nature if, for instance, under Article 10.2, the punishment were adapted so as to conform to the law of the administering state as to what the nature of a sentence is, within the meaning of the Convention, this is made clear by Article 11.1(b) whereby it is forbidden to convert any sentence of imprisonment, that is one "involving deprivation of liberty" into a pecuniary sanction.

27. It will not have escaped the attention of anyone with a general interest in penal policy outside Ireland that some states in Europe operate differing forms of imprisonment. I do not see, in this regard, any difference in nature between a sentence of imprisonment which is to be served in a high security prison, in a training unit, or in an open prison. All of these involve, of their nature, a deprivation of liberty founded on confining the prisoner to a state-run penal institution and requiring him to be subject to the discipline regime therein. In other countries, the nature of a sentence of deprivation of liberty can take place outside the confines and discipline of a state-run institution: it can include house imprisonment, for example. The Act of 1995, as amended, applies only to any punishment that involves a deprivation of liberty. The nature of such a sentence can vary, however. One can be deprived of liberty, in addition to within a prison, inside a psychiatric hospital. The Act of 1995 would appear to extend, by s. 1(1), to that kind of depravation of liberty; as in the case of a person who successfully pleads a mental deficit contributing to, or causing, the commission of the external element of a crime. Such a person may be subject to a measure involving the deprivation of liberty, as opposed to a punishment. Both are embraced by the definition section. Ireland operates penal measures which can involve persons being released under supervision. The nature of such release, as it may be operated in this country, can mean attending for meetings with a probation officer and abiding by appropriate directions. This would be hard to be seen as a deprivation of liberty. People in those circumstances can go where they please, though they may be restricted away from a person or area. In other countries, however, a person may be deprived of liberty by being confined to their home, or by being confined to a particular place or area and monitored by an electronic or satellite device. Such a sentence would have to be adapted to an appropriate sentence under Irish law, were there to be a transfer of that prisoner, because these forms of deprivation of liberty are not as yet provided for in our penal system. Some forms of sentence in other jurisdictions may also involve the requirement to work. Sentences of penal servitude or imprisonment with hard labour no longer operate within this jurisdiction, but they still carry a historical resonance that is not pleasant. Such sentences would need to be adapted to an ordinary sentence of imprisonment under s. 7(5) of the Act of 1995, as amended.

28. This convinces me that the nature of a sentence of life imprisonment in the United Kingdom is, as to its nature, the same as a sentence of life imprisonment in Ireland. Before releasing such a prisoner, the Parole Board in their recommendation to the Minister, would have regard to s. 2 of the Criminal Justice Act 1960, as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003. This requires close consideration of the prisoner's ability to reintegrate into society; whether the prisoner has been prepared in that regard; and whether the prisoner has been rehabilitated. The Minister, if making a direction for temporary release, would have to have regard to the nature and gravity of the offence; the period of imprisonment that has actually been served by the prisoner; any potential threat to the public; and "any recommendations of the court that imposed that sentence". The nature of the sentence to be served, on conviction for murder in both Ireland and England, is life imprisonment. That is its nature and that is what s. 7(4) of the Act of 1995, as amended, refers to.

29. In contrast to the careful approach by the Parole Board to the rehabilitation of Jonathon Caffrey, the order sought from the Court is for his immediate release from custody. He is a life prisoner who has some significant way to go in rehabilitation. If that is an order which the Court must make because the prisoner is in unlawful custody, then that is the order which the Court would make. The nature of the sentence imposed on Mr. Caffrey, however, is one of life imprisonment and there are no grounds for declaring his detention unlawful.

Explanatory Report

30. To confirm this view, I have had regard to another document. An explanatory report was prepared following the discussion of the committee that drew up the text of the Convention on the Transfer of Sentenced Persons. This was submitted to the Committee of Ministers of the Council of Europe. While it does not provide an authoritive interpretation of the text I note that the Convention was

opened for signature at Strasbourg on 21st March, 1983, and that the explanatory report would have been available to any country, such as Ireland or the United Kingdom, considering becoming party to the Convention. The following sections of the explanatory report are relevant:-

> "(46) The basic difference between the "continued enforcement" procedure under Article 10 and the "conversion of sentence" procedure under Article 11 – commonly called "exequatur" – is that, in the first case, the administering State continues to enforce the sanction imposed in the sentencing State (possibly adapted by virtue of Article 10, paragraph 2), whereas, in the second case, the sanction is converted into a sanction of the administering State, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing State.
>
> (47) In both cases, enforcement is governed by the law of the administering State (paragraph 3). The reference to the law of the administering State is to be interpreted in a wide sense; it includes, for instance, the rules relating to eligibility for conditional release. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions.
>
> (48) Paragraph 4 refers to cases where neither of the two procedures can be applied in the administering State because the enforcement concerns measures imposed on a person who for reasons of mental condition has been held not criminally responsible for the commission of the offence. The provision allows the administering State, if it is prepared to receive such a person for further treatment, to indicate, by way of a declaration addressed to the Secretary General of the Council of Europe, the procedures which it will follow in such cases.
>
> (49) Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.
>
> (50) If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11, under which the administering State *substitutes* a sanction for that imposed in the sentencing State, the procedure under Article 10.2 enables the administering State merely to *adapt* the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system."

31. As Article 10 of the Convention on the Transfer of Sentenced Persons explains, the administering State, accepting a prisoner under a transfer, is "bound by both the legal nature and the duration of the sentence." As is explained, the sentencing state may opt for a diversity of penalties involving deprivation of liberty that may embrace penal servitude, imprisonment or detention. These forms of imprisonment may be unknown in the law of the administering state and so may require to be changed to an appropriate form. That form, as para. 50 of the report explains, should be as close to the nearest available equivalent form of imprisonment under the law of the administering state. The manner of enforcement, as para. 47 explains, and as para. 46 clarifies, is no longer directly based on the sanction imposed by the sentencing state but is governed by the law of the administering state.

32. To my mind, therefore, the nature of life imprisonment is not changed as between Ireland and England where a prisoner is transferred. Where a prisoner is transferred from England to Ireland, notwithstanding any recommendation made under the law of the sentencing state, the nature of the sentence is imprisonment for life.

33. I note that in *Read v. Secretary of State* [1988] 3 All E.R. 993, that Lord Bridge at pp. 999-1000 referred to the explanatory report as an aid to interpreting the Convention. The resort that I have had to the explanatory report merely confirms the meaning which emerges from the text of the Convention. The Convention, in turn, elucidates my interpretation of the Act of 1995, as amended. I believe that this approach to statutory interpretation is consistent with the judgment of the Supreme Court in *Crilly v. Farringdon Limited* [2001] 3 I.R. 251 where at 291 Murray J. stated:-

> "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). This common law approach to the interpretation of statutes giving effect to treaties has existed side by side with the general rule which excludes recourse to parliamentary debates and which Costello J. then acknowledged has been extant since 1769 (*citing Miller v. Taylor* 4 Burr. 2303). This rule, Costello J. acknowledged, "has been applied ever since both in England and in this country". The decision in *Bourke v. Attorney General* [1972] I.R. 36 does not purport to qualify the common law exclusionary rule as to parliamentary history of statutes."

34. At p. 307 of the same report Fennelly J. added:-

> "Treaties are interpreted in accordance with special rules, long recognised in international law and now expressed in the Vienna Convention on the Law of Treaties of 1969. The fact that those rules, article 32 in particular, make specific provision for reference totravaux préparatoires can, of itself, have no bearing on the interpretation of statutes. Article 32

provides:-

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."

Article 31 states the general rule, according to which, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Moreover, there is cogent persuasive authority to the effect that resort to these materials should be rare. (*Fothergill v. Monarch Airlines* [1981] A.C. 251, per Lord Wilberforce at p. 278.)

35. Since my conclusion is based directly on the wording of the Act of 1995, as amended, and interpreted within the context of the Convention, I feel I do not need to add anything to the above statements beyond noting that my interpretation of the Convention accords with that of the authors of the Explanatory Report.

Result

36. In the result, Jonathon Caffrey is in lawful custody. It can be expected that he will continue his rehabilitation and await, in due course, the decision of the Minister for Justice, Equality and Law Reform as to his release at a time and on terms advised by the Parole Board.