Neutral Citation Number: [2014] IEHC 416

**THE HIGH COURT**

**[2014 No. 1062 SS]**

**IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION**

**BETWEEN/**

**FINTAN PAUL O'FARRELL**

**APPLICANT**

**AND**
**GOVERNOR OF PORTLAOISE PRISON**

**RESPONDENT**

**JUDGMENT of Mr. Justice Hogan delivered on the 26th day of August, 2014**

1. This application for an inquiry into the legality of the applicant's detention once again raises vexed questions concerning the contrasting nature of the sentencing systems in England and Wales on the one hand and in Ireland on the other, the capacity of this Court to correct documentary error and the general jurisdiction of the Court in Article 40.4.2 proceedings. The present application arises in the following circumstances:

**The background facts**
2. In May, 2002 the applicant pleaded guilty to a variety of serious offences involving terrorism, including conspiracy to cause explosives. From the details supplied by a Detective Inspector Miles of the Anti-Terrorism Branch of the (London) Metropolitan Police it appears that the applicant was a member of an illegal organisation styling itself as the "Irish Republican Army". He - along with others - had sought arms and financial support from the Iraqi Government in 2001. For that purpose they travelled to Slovakia where they believed that they had been dealing with agents from the Iraqi Intelligence Service. They had a variety of meetings with these agents and supplied them with details regarding the munitions and ordnance they required. The agents were in fact members of the British security services who had managed to infiltrate the illegal organisation in question.

3. The applicant was arrested (along with two others) by Slovak police on 5th July, 2001. They were subsequently extradited from Slovakia to the United Kingdom on 30th August, 2001. They were arrested and taken into custody. The applicant subsequently pleaded guilty at Woolwich Crown Court on 2nd May, 2002, to four serious terrorism offences. He received a sentence of 30 years' imprisonment from the presiding judge, Astill J., which sentence was back-dated to 5th July, 2001, the date on which he went into custody in Slovakia.

4. The applicant appealed the severity of that sentence to the Court of Appeal of England and Wales (Criminal Division). On 15th July, 2005, that Court set aside the original terms of 30 years' imprisonment and substituted a sentence of 28 years' imprisonment. There is no doubt but that the sentence as so varied constituted a final order of the courts of England and Wales.

5. On 28th July, 2006, this Court issued a warrant pursuant to s. 7 of the Transfer of Sentenced Persons Acts 1995-1997 ("the 1995 Act") providing for the transfer of the applicant to this State and detaining him in Portlaoise Prison. Since the terms of that warrant are of some importance to the issues raised in this litigation, it may be convenient if its terms are set out in full:

**"THE HIGH COURT**

Warrant pursuant to s. 7 of the Transfer Sentence Persons Act 1995-1997

**Applicant:** The Minister for Justice, Equality and Law Reform

**Sentenced Person:** Fintan Paul O'Farrell

**Sentencing State:** United Kingdom, Great Britain and Northern Ireland

**Crime:** (i) Conspiracy to cause explosions

Inviting another to provide money or property for the purpose of terrorism.

(iii) Entering into an arrangement to make money and property available for terrorism.

**Sentences in the**
**Sentencing State:** (a) 28 years imprisonment for the conspiracy to cause explosions at (i) above.

(b) 12 years imprisonment concurrent to the said 28 years imprisonment, for the offences at (ii) and (iii) above.

**Date of**

**commencement**
**of Sentences:** 7th May, 2002."

6. The terms of this warrant convey in rather unambiguous terms the impression that the applicant's sentence was one of 28 years' imprisonment commencing on 7th May, 2002. The situation is, however, somewhat more complicated than this. For this purpose it is necessary now to explain the background to the original application for a transfer to Ireland on the part of the applicant.

7. Following the completion of the appeal process and the finalisation of his sentence, the applicant then applied on 22nd August, 2005, for a transfer under the 1995 Act. The Minister wrote to Mr. O'Farrell on 29th March, 2006, prior to the transfer in order to draw his attention to the fact the standard rate of remission in Ireland was 25% rather than the one third figure which applied in the UK. On this basis, therefore, it was estimated that his final release date was 20th January, 2022, rather than the 29th April, 2020. The latter date was the Minister's understanding of the likely release date were the applicant to remain in prison in the UK. It was on this basis, therefore, that the applicant gave his consent to the transfer on 27th June, 2006.

8. Other formalities were also duly complied with. The relevant British and Irish officials accordingly satisfied themselves that the applicant was an Irish national and that there was the necessary correspondence under the law of England and Wales and Irish law respectively concerning the offences of which the applicant had been convicted. The applicant was then transferred from the United Kingdom to Ireland in late September, 2006.

**The plenary proceedings**

9. At this point it is necessary to say something about the nature of the proceedings. The applicant originally moved this Court for an order of the release under Article 40.4.2 of the Constitution. One of the claims advanced related to the constitutionality of s. 7 of the 1995 Act and it was contended that this provision was unconstitutional insofar as it allowed for the making of an order detaining the prisoner on an *ex parte* basis. Although the language of the Constitution itself expressly envisages that the constitutionality of a law may be determined in Article 40 proceedings, it is has often been found more convenient that such issues would be determined in plenary proceedings following an exchange of pleadings.

10. The parties mutually agreed that this course would be adopted in the present case. The applicant then commenced separate plenary proceedings (2014, No. 15582P) in which the Governor, the Minister for Justice and Equality, Ireland and the Attorney General were named as defendants. While there is some degree of overlap between the two sets of proceedings, it has been agreed that I should first give judgment on all issues relating to the warrant of detention made by this Court on 28th July, 2006, under s. 7 of the 1995 Act. The question of the constitutionality of this procedure and, indeed, s. 7 itself accordingly stands adjourned pending the resolution of this first question.

**The sentencing system in England and Wales and the decision in Sweeney**

11. The real complication which arises in the present case is that the sentencing system which operates in England and Wales is now appreciably different from that which obtains under Irish law. It is, however, common case between the parties that, having regard to the relevant law of England and Wales, the applicant was automatically entitled to release on licence following completion of two thirds of his sentence. In effect, the applicant was required under that law to serve the one third balance of his sentence in the community, although there are circumstances whereby that law provides that a prisoner can be returned to prison during the course of that final third of his sentence. Indeed, it is clear in the case of prisoners who have been convicted in England and Wales *after 4th* April 2005 that the (UK) Criminal Justice Act 2003 ("the UK 2003 Act") now provides for automatic release on licence after a period *of one half* of the sentence: see the affidavits of law of Hamish Arnott of 12th July, 2014 (on behalf of the applicant) and Victoria Ailes of 16th July, 2014 (on behalf of the respondent). Since, however, the applicant was convicted *before that date*, he was required to serve two-thirds of the sentence imposed by the court.

12. The significance of these differences between the two sentencing regimes was at the heart of the Supreme Court's decision in *Sweeney v. Governor of Loughan House Open Centre* [2014] IESC 42. In *Sweeney* the applicant had received a sentence of 16 years following his conviction by the English courts for serious drugs offences in December 2006, *i.e.,* after the provisions of the UK 2003 Act had taken effect. Following his transfer to Ireland under the 1995 Act, the issue arose as to what constituted the sentence (or, to use the terminology of s. 1(1) of the 1995 Act, the period of "deprivation of liberty") for the purposes of the 1995 Act.

13. It was common case that both the Strasbourg Convention on the Transfer of Sentenced Persons (1983) and the 1995 Act envisaged that the legal effect of the sentence was governed by the law of the sentencing state (in this case, England and Wales), nevertheless, as Clarke J. put it (at para. 3.2), "sentence administration and enforcement is for the host country." It was nevertheless necessary for the Irish courts to have regard to what Murray J. described (at para. 37) as "an objective assessment of its duration and legal nature." (The 1995 Act gave effect in Irish law to the terms of that Convention for the purposes of Article 29.6 of the Constitution.)

14. In the light of this analysis the Supreme Court concluded that, for the purposes of Irish law, the sentence must be regarded as one of 8 years' duration. This is evident from the judgments of Murray and Clarke JJ. who both make this point in unequivocal and emphatic terms. As Murray J. said (at paras. 42-45):

> "42. It is true that once the prisoner is released (automatically) on licence he is released under conditions which are stricter than those which would have been imposed on a prisoner released for remission or on parole in England and Wales. I do not think it is necessary to recite the nature of the conditions which are imposed. The fact that the prisoner is released under strict conditions does not take away from the objective fact that as and from a half-way point in his or her sentence the prisoner must be released by operation of law and then is entitled to serve the remainder of the term of "imprisonment" at liberty in the community under the licence conditions. It was, of course, pointed out by counsel on behalf of the Minister that if the appellant is to be released on the basis that his sentence was one of 8 years duration only, his release could not be made the subject of the licensed conditions envisaged by the English legal sentencing regime since there is no provision in Irish law for such a form of licensed release. Effect therefore could not be given to that portion of the English sentence. That may very well be the consequence but it is not one which could be a basis, in law, for requiring the appellant to serve a longer and more onerous custodial sentence in this country. It is a consequence of the Minister's misconception of the duration of the sentence, within the meaning of the Convention and the Act, imposed by the English court.
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> 43. In the light of the foregoing it seems to me quite self-evident that, whatever descriptive terms are applied to the sentence imposed on the appellant by the English court, objectively it consisted of one period of imprisonment or 'deprivation of liberty', to use the language used in the Act in defining a "sentence", and a second period of liberty under licence which occurred by operation of law and not by virtue of any remission, discretionary or otherwise, granted by the English authorities. In my view, the interpretation of the sentence as imposed in the sentencing state adopted by the Minister is misconceived. In the light of the foregoing, I can see no legal basis on which the appellant could be regarded, as contended by the Minister, as being required to serve in this country a term of imprisonment, or deprivation of liberty, of 16 years, subject only to the rules on the enforcement of a 16 year term of imprisonment applying in this country, namely, the grant of discretionary remission for good behaviour by the Minister. That would require him to serve a sentence longer than that imposed in the sentencing state. For the reasons stated the legal nature and duration of the sentence, namely, deprivation of liberty, is 8 years of actual imprisonment.
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> 44. One might, at the most, draw a parallel between a suspended sentence imposed on a convicted person, however strict any conditions for the suspension might be. A person given a suspended sentence in another State could not, obviously, avail of the Transfer of Sentenced Persons because he is not serving a sentence "involving deprivation of liberty ordered by a court" (s.1(1) of the Act) even though he or she might potentially have to serve such a sentence if the terms on which it was suspended were breached.

> 45. In any event, it is quite clear, as a matter of English law, that once the appellant completed 8 years of his sentence of imprisonment he was then entitled, by operation of law, to be freed from custody. The question of his recall to prison could only arise if he was in breach of the terms of his licensed release. Such a sentence cannot, in my view, be characterised as a sentence to a period of loss of liberty of 16 rather than 8 years within the meaning of either Article 1 of the Convention, or s.1 of the Act of 1995."

15. Clarke J. was likewise of a similar view (at para. 4.13):

> "...there is a material difference in the legal nature of a sentence which, on the one hand, operates as a matter of binding law as one of 8 years actual imprisonment followed by 8 years in the community subject to terms and recall and, on the other hand, a sentence of 16 years imprisonment with the possibility of remission, even where that remission may amount, as in the Irish case, to an entitlement under [Rule 59] of the Prison Rules to that remission but subject to loss of remission in appropriate cases."

16. As that particular eight year sentence in that case had, however, already expired, it followed that the applicant was entitled to be released. The actual order of the Supreme Court of 18th July, 2014, recites that the warrant of imprisonment was to be quashed by way of *certiorari* and the court further declared that the applicant should be released forthwith from detention.

**The implications of the decision in *Sweeney* for the present case**

17. What, then, are the implications of *Sweeney* for the present case? First, so far as the warrant is concerned, it can scarcely be doubted but that the s. 7 warrant which is relied on by the respondent to justify the detention of the applicant is defective. Passing over any question of the exact date of release or whether the sentence of the Woolwich Crown Court should be deemed to have been back-dated to the date on which the applicant was first arrested by Slovak police – as distinct from the date on which that sentence was actually pronounced - it is nonetheless clear that, prior, at any rate, to the decision in Sweeney, the respondent was proceeding on the understanding that the sentence should be treated in Irish law as one of 28 years' duration. Thus, for example, the applicant's solicitor, Mr. Quinn, has exhibited a document entitled "Prisoner Information System – Certificate of Imprisonment" which states the applicant's "remission date" (*i.e.*, the sentence which it may be expected that he will actually serve taking into account the standard 25% remission provided in Rule 59(1) of the Prison Rules 2007 (S.I. No. 252 of 2007) as 10th January, 2022. Such a release date is consistent only with the sentence having been treated as a sentence of 28 years' imprisonment.

18. It follows, therefore, that the warrant exhibited by the respondent to justify the detention of the applicant must accordingly be adjudged to be defective as it stands. It cannot be overlooked in this context that the warrant in *Sweeney* was actually quashed by the Supreme Court precisely for this reason.

19. Applying by analogy the reasoning of the Supreme Court in *Sweeney*, the applicant's sentence was in reality one of 18 years, 8 months and some days. It is now also acknowledged by the respondent that Astill J. made an order immediately after the pronouncement of the sentence that the sentence should take effect from the 5th July, 2001(the date of the Slovakian arrests), but that the present warrant does not adequately reflect this rather important detail. I will return presently to the legal consequences of the defective nature of this warrant.

20. It is clear from the correspondence exchanged between British and Irish officials prior to the transfer that both parties envisaged that the sentence of the Woolwich Crown Court would be "continued" in the manner envisaged by Article 9(1)(a) of the Strasbourg Convention (and reflected in s. 7(4) of the 1995 Act) rather "converted" into an Irish sentence as provided for by Article 9(1)(b)(and reflected in s. 7(5) of the 1995 Act). In their judgments in *Sweeney* both Murray and Clarke JJ. alluded to the possibility that an English sentence of this kind might have to be "adapted" rather than "continued." It was not necessary, however, for the Supreme Court to consider this question any further because it was clear by reference to the facts of that case that Mr. Sweeney's sentence had already expired and that he was entitled to be released forthwith.

21. I nevertheless cannot help thinking but that a further consequence of *Sweeney* is that the English sentence should in fact more properly have been "adapted" under s. 7(5) of the 1995 Act. I find myself coerced to that conclusion because it seems necessarily implicit in *Sweeney* that the continued enforcement option envisaged by Article 9(1) and Article 10(1) of the Strasbourg Convention (as reflected in s. 7(4) of the 1995 Act) is no longer appropriate in the case at least of sentences *of this kind* imposed by the courts of England and Wales having regard to the manner in which those sentences provide, not for remission as such, but rather for automatic release following the service of an appropriate portion of the nominate sentence imposed.

22. The "continued enforcement" regime also presupposes that the sentencing state has a sentencing system broadly similar to ours*, i.e.*, full service of the sentence, subject to the right of the prisoner under Rule 59 of the Prison Rules to obtain remission for good behaviour. This is reflected in the very language of s. 7(4) itself which states that, subject to sub-sections (5) to (7), the effect of a warrant under this section shall be:

> "to authorise the continued enforcement by the State of the sentence 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."

23. Yet, as both Murray and Clarke JJ. stressed in their judgments in S*weeney*, our sentencing regime is in fact very different from that now operating in England and Wales, in particular as the latter jurisdiction does not operate a remission sentence of the kind with which we are familiar, at least so far as the sentences presently under consideration are concerned. As Clarke J. noted (at para. 4.13):

> "...there is a material difference in the legal nature of a sentence which, on the one hand, operates as a matter of binding law as one of 8 years actual imprisonment followed by 8 years in the community subject to terms and recall and, on the other hand, a sentence of 16 years imprisonment with the possibility of remission, even where that remission may amount, as in the Irish case to entitlement under [Rule 59] of the Prison Rules to that remission, but subject to loss of remission in appropriate cases."

24. One could sum up the difference by saying that the British system of *automatic release by way of legal entitlement* after service of two-thirds (or, in the case of a conviction after April 2005, one-half) of the sentence goes to the *legal nature* of the sentence imposed by the judicial branch of the sentencing state, whereas the Irish system of remission (which is normally one-quarter) is a fundamentally a matter going to the question of the *administration* of the sentence by the executive of the receiving state.

25. All of this points to an incompatibility between this form of English sentence and Irish law. In the light, therefore, of the decision

in *Sweeney* it would accordingly seem more appropriate if the English sentence were to have been adapted in the present case so that its legal nature could have been converted to a fixed sentence of approximately 18 years and 8 months (*i.e.*, two thirds of a sentence of 28 years). This would seem to be particularly so given that s. 7(6)(a) of the 1995 Act (as substituted by s. 7 of the Transfer of Sentenced Persons (Amendment) Act 1997) provides that:

> "The legal nature of a sentence adapted under [s.7(5)(a)] 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."

26. Here it may be recalled that in *Sweeney* the Supreme Court stressed that the legal nature of the sentence imposed by the English court corresponded to one-half (or, in the present case, one-third) of the nominate term of imprisonment: see, *e.g.*, the comments of Murray J. at para. 37 of his judgment. Murray J. also expressed concern (at para. 43) that the Minister's misunderstanding as to the nature of that sentence had brought about a situation whereby the prisoner was required to serve a sentence longer than that imposed in the sentencing state. Of course, this state of affairs also points to the desirability that a sentence of this kind is appropriately adapted. Had this been done, then the question of the potential aggravation of the original sentence would not have arisen.

27. It is, however, significant that s. 9(1)(b) of the 1995 Act allows the Minister to apply to this Court "at any time" to vary "one or more of the provisions of the [s. 7] warrant". Section 9(2) allows this Court upon such application to make an order revoking or varying the warrant "if it considers appropriate to do so in order that effect may be given to the provisions of the Convention." It follows that it would still be open to the Minister to apply to this Court – should she elect to do so – to vary the terms of the original s. 7 warrant so that the references in the present warrant of 28th July 2006 should be made to conform with the specifications of the Supreme Court in *Sweeney*.

**Should the applicant be released by reason of the defective nature of the s. 7 warrant?**
28. There is no doubt whatever but that an applicant may be released in Article 40.4.2 proceedings where the underlying return (in the present case, the s. 7 warrant) has been shown to be defective. It is perhaps sufficient to cite three representative authorities for this purpose.

29. In the first of these, *Carroll v. Governor of Mountjoy Prison* [2005] IEHC 2, [2005] 3 I.R. 292, 306 Peart J. held that where was a "genuine ambiguity or uncertainty" in the duration of a sentence which "cannot be cleared up by reference to the warrants themselves, or any other documents", then the defect would have to be regarded as so fundamental as to justify the release of the applicant in Article 40.4.2 proceedings.

30. The decision of the Supreme Court in *GE v. Governor of Cloverhill Prison* [2011] IESC 41 is to broadly similar effect. In that case Denham C.J. expressly stated that a warrant (in that case, an arrest warrant under the Immigration Act 2004) must "contain clear information on its face as to the basis of its jurisdiction".

31. Denham C.J. further held that the arrest warrant was invalid as it did not disclose jurisdiction on its face:

> "A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison or any other [person] who is holding a person in custody and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution. In this case the document of 2nd of August refers only to s. 5(2)(a) of the Immigration Act 2003....That is insufficient to show jurisdiction. The document is defective because it does not state on its face the reason for the arrest and detention of the appellant."

32. A similar state of affairs was found by me to exist in *Joyce v. Governor of Dóchas Centre* [2012] IEHC 326, [2012] 2 I.R. 666 where the committal warrant failed to disclose any details whatever of the offence of which the applicant had been convicted. In these circumstance I held that the respondent could not establish that the applicant had been detained in accordance with law for the purposes of Article 40.4.2 ([2012] 2 I.R. 666, 678-679):

> "If in *GE* the Supreme Court held that an arrest warrant did not show jurisdiction on its face by disclosing the reason for the arrest, this must be true *a fortiori* of a committal warrant which fails to give any details whatever of the offence of which the applicant stood convicted....The position might well be different if there was in existence a separate conviction order which contained those details of the offence of which the applicant was convicted and which was offered as a justification for the detention. Where, however, as here, the only document forming the basis of the detention is a committal warrant of the kind we have just described, this must be adjudged to be defective and not forming a sound basis in law for the applicant's detention. ...."

33. Counsel for the respondent, Mr. Barron S.C., submitted that even if the warrant was defective, it would not in itself entitle the applicant to release by way of Article 40.4.2. It is true that in *The State (McDonagh) v. Frawley* [1978] I.R. 131, 136 O'Higgins C.J. stressed that the defects of this kind had to be fundamental before for an order of release in Article 40.4.2 proceedings could properly be made. It would not be sufficient, for example, if the conviction warrant had incorrectly described the penalty as life imprisonment when it ought to have stated penal servitude for life.

34. I cannot agree that the infirmities in the s. 7 warrant in the present case fall into this category of harmless error of the kind identified by O'Higgins C.J. in *McDonagh*. The errors in the present case were, on the contrary, significant and might well have contributed to a state of affairs whereby the applicant spent a longer period of time in prison than was ever intended or contemplated by the sentencing court. Indeed, an affidavit filed on behalf of the Irish Prison Service late in the proceedings now identifies 24th October 2016 as the applicant's scheduled release date. This, after all, is a date over *five years earlier* than the date which, prior to these proceedings, had hitherto been contemplated as the scheduled release date. As Peart J. stated in *Carroll* ([2005] 3 I.R. 292, 303):

> "A fundamental requirement for any authority to detain a person in custody is that the person detaining and the person detained should know precisely the duration of such detention should know precisely the duration of such detention. There should be no room for ambiguity in this regard."

35. At the same time, neither can it be said that the warrants are so obviously defective in the manner identified in cases such as *GE* and *Joyce.* Here it must be stressed that the s. 7 warrant is itself a very full document which describes the sentenced person, the sentencing state, the offences of which the applicant was convicted and the sentences imposed by the sentencing state. The errors in question misdescribe the legal nature of the sentences and the date on which those sentences should be taken to have commenced.

36. It is clear that in Article 40.4.2 proceedings the Court enjoys the widest possible powers to investigate the matter itself in respect of this intermediate category of case: see here the comments of Baker J. in *Miller v. Governor of Midlands Prison* [2014] IEHC 176. In that case Baker J. held that a short form conviction warrant which, *when taken alone*, did not describe the nature of the offence of which the applicant had been convicted did not provide "sufficient information as to the reason for the applicant's detention." To that extent, the short form warrant could not justify the basis for the detention.

37. Unlike the situation in *Joyce*, however, the short form warrant at issue in *Miller* contained certain identifiers unique to that applicant. In those particular circumstances Baker J. held that she could in principle, at least, investigate whether the short form document could be joined to other documents in order to enable an adequate and certain record to be prepared and exhibited before the court. In this regard Baker J. stressed the wide powers enjoyed by the Court conducting the Article 40.4.2 inquiry, coupled with the fact that the very language of Article 40.4.2 itself requires the Court to give the respondent an adequate opportunity of justifying the detention prior to making any order for release.

38. Baker J. went on to observe that:

> "The Supreme Court, in *In re Tynan* [1969] I.R. 273, considered the question of whether the warrant was bad on its face, in that it did not state the particulars of the offence in respect of which it was stated the applicant had been convicted. Walsh J., albeit he held in that case that the warrant was sufficient on its face, stated the following, at p. 281:'The records of the Circuit Court would testify to the acts and proceedings there if the occasion called for an inquiry as to the same, but there is nothing on the face of the warrant which calls for such inquiry.'
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> In *The State (Brien) v. Edmond J. Kelly & Ors* [1970] I.R. 69, the Supreme Court was prepared to resolve any ambiguity in the Circuit Court sentences by reference to the Circuit Court records of the spoken decision on sentence. These judgments clearly point to the court having a jurisdiction to hear evidence which can explain the facts in the warrant and are authority for that proposition. The jurisdiction of the court, however, is discretionary and in *McMahon v. Leahy* [1984] I.R. 525, McCarthy J., at p. 547, was not prepared to "overlook the careless approach and lack of attention to detail" which he found in what was, in that case, an extradition warrant. The court indicated that one might overlook "patent errors in a printed document" but that there were circumstances when this would not be exercised in favour of the respondent. I am not satisfied that there exists any unusual or special circumstances that might require me to exercise my discretion in this case not to admit the additional evidence, especially as I can do so without any oral or extrinsic evidence or any explanation which cannot be gleaned from the face of the documents offered by the respondent."

39. As the defects in the present case fall *into this intermediate category* of the kind I have just identified, it seems to me that the approach adopted by Baker J. in *Miller* can be adapted by analogy so as to enable the Minister, should she elect to do so, to apply to this Court under s. 9(1)(b) of the 1995 Act to have the terms of the existing s. 7 warrant varied so that the duration of the sentence is appropriately recorded. By adopting this step in this intermediate case of this kind, the Court can best effectuate the constitutional command contained in Article 40.4.2 itself ("…after giving the person in whose custody he is detained an opportunity of justifying the detention…") in a meaningful fashion.

40. This would seem especially apt given that the errors resulted from a mutual misunderstanding as to the manner in which the sentencing system of England and Wales actually operated, which misunderstanding did not come to light until immediately after the decision in Sweeney. Nor can one readily overlook the interests of the sentencing state (namely, the United Kingdom) in seeing that its sentences are appropriately enforced by the host State. Having regard to this international dimension and the principle that inter-State co-operation in respect of a potentially sensitive aspect of criminal justice must operate on a full faith and credit basis – a principle which is at the heart of the Strasbourg Convention - it must accordingly be acknowledged, therefore, that the s. 7 warrant in the present case is in certain respects *sui generis* and different from a warrant which emanated in a purely domestic context. It is, critically, however, the fact that the defects in the warrant in the present case fall into the intermediate category which I have described which makes the present approach the appropriate one.

41. Given that the applicant has a direct interest in any such application, I consider that the constitutional imperatives regarding the administration of justice and fair procedures with regard to the application of statutory powers identified in a long succession of cases from *East Donegal* onwards (*East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317) would require that any such application should be made on notice to the applicant. This, of course, is entirely without prejudice to the wider constitutional argument which also stands adjourned pending the resolution of the present Article 40.4.2 application.

42. For the avoidance of any possible doubt I should stress that the decision as to whether any such application is to be made is entirely a matter for the Minister. I would also add that nothing in this judgment should be taken as expressing a concluded view as to whether an order varying the existing s. 7 order could or should be made.

43. In these circumstances, I propose to adjourn the present Article 40.4.2 application for the shortest possible time (which I would measure in days and weeks rather than months) in order to enable such application to be made. Following the outcome of any such application (should it be made), I will then resume the inquiry into whether there is a valid legal basis for the detention of the applicant. In the event, however, that no such order is made varying the terms of the s. 7 warrant, then under those circumstances this Court would have no option but to order the release of the applicant.

**Conclusions**

44. In summary, therefore, I have concluded as follows:

45. The sentence imposed by the Woolwich Crown Court (as varied by the Court of Appeal for England and Wales) was in truth a sentence of approximately 18 years and 8 months.

46. Inasmuch as the s. 7 warrant issued by this Court in July 2006 records that sentence as one of 28 years, it is to that extent defective.

47. Given that the sentencing system in England and Wales is so appreciably different from that which obtains in Ireland, the

sentence in the present case should more properly have been adapted pursuant to s. 7(5) of the 1995 Act. The British system of *automatic release by way of legal entitlement* after service of two-thirds (or, in the case of a conviction April 2005, one-half) of the sentence goes to the *legal nature* of the sentence imposed by the judicial branch of the sentencing state, whereas the Irish system of remission (which is normally one-quarter) is a fundamentally a matter going to the question of the *administration* of the sentence by the executive of the receiving state. All of this points to an incompatibility between this form of English sentence and Irish law and, consequently, the necessity for such sentences to be adapted at the time of the transfer of the prisoner to this State.

48. The court can direct the release of an applicant in Article 40.4.2 proceedings where the warrant is so defective that no proper basis for the current detention has been made by the detainer. In other cases, the defects may be so peripheral or technical that they may safely be classified as harmless errors, not affecting the underlying validity of the detention warrant.

49. The defects in the present case fall into an intermediate category. They are too serious to be dismissed as harmless, yet given that the warrant is otherwise replete with details specifying the offences in question, they are not (yet) so pervasive as to destroy the validity of that warrant.

50. In these circumstances, by way of analogy with the approach taken by Baker J. in *Miller v. Governor of Midlands Prison* [2014] IEHC 176 I propose to adjourn the present application under Article 40.4.2 to enable the Minister (should she consider it appropriate to do so) to apply separately to this Court pursuant to s. 9(1)(b) of the 1995Act to vary the existing s. 7 order so that the English sentence can be properly adapted into our law and, especially, that the duration and commencement of the sentence be properly recorded.

51. Any such adjournment would have to be measured in days and, at most, weeks. I express no view as whether this Court could or should make such an order in the present case. In the event that any such variation order is made by this Court, this is a matter to which I will have appropriate regard. In the event that no such order is made, then in those circumstances this Court will have no alternative but to order the release of the applicant.