

Repatriation Developments in Ireland

Irish Council for Prisoners Overseas

The Irish Council for Prisoners Overseas (ICPO) is a small charitable organisation with offices in Maynooth (Ireland) and in London. It was established in 1985 to provide advice, information and support to Irish prisoners overseas and their families. The ICPO works with approximately 1,200 Irish people imprisoned in almost 30 countries and those in immigration detention.

We also work closely with the Consular Service Division of the Department of Foreign Affairs and with the Irish Probation Service. The ICPO's services include:

- Providing information and support to prisoners on a range of issues, including repatriation, deportation, health and legal matters, discrimination and ill-treatment
- Keeping in contact with prisoners through letter writing, newsletters, emails, phone calls and visits
- Representing prisoners' interests to relevant parties (for example, Irish embassies and consulates, welfare agencies and probation services)
- A pen friend scheme which involves volunteers in Ireland corresponding on a regular basis with ICPO clients;
- Monitoring repatriation applications with the Irish Prison Service
- Visiting people in prison and assisting families with travel and accommodation
- Providing support and advice to the families of prisoners and detainees
- Providing resettlement assistance and advice to people returning to Ireland after serving a sentence overseas.

In 2019, there were over 10,000 letters, phone calls, emails and prison visits, to, from or on behalf of Irish citizens overseas. Among the issues we provided assistance to clients were health, release on licence, repatriation, deportation and resettlement. We also provide small grants to prisoners with no other source of support for phone credit, postage, books and writing materials.

Transfer of prisoners (repatriation)

Background

Twenty five years ago this year, the Irish Parliament passed the Transfer of Sentenced Persons Act 1995. This provided for a scheme where Irish prisoners serving their sentence in another country could apply to transfer back to serve their sentence in an Irish prison and foreign national prisoners in Ireland could similarly apply to transfer back to their country of nationality. This legislation also enabled Ireland to ratify the Council of Europe Convention on the Transfer of Sentenced Persons 1983 (Transfer Convention), which it had signed in 1986.

During the debate on the Transfer of Sentence Bill 185, the then Minister for Justice stated that "some of the delay related to certain concerns expressed about the repercussions the convention might have on an already crowded prison system" ... and that she had a duty "to

guard against placing an intolerable burden on our prison system.”¹ The Bill was passed and the final Act adhered to the main provisions of the Convention, however unlike the Convention it does not allow for the conversion of sentences handed down in another jurisdiction.

Number of Transfers

After a promising start where 80 prisoners were transferred in the first five years of the Act being implemented, the number of transfers declined considerably. In the period 1996 – 2018, a total of 154 prisoners were transferred back to Ireland to serve their sentence out of a total of 546 applications.² In recent years, the inward transfer process has appeared beset by lengthy delays and legal challenges resulting in very few people transferred into Ireland. While there have been more outward transfers, the numbers are nonetheless relatively small. From 2009 to 2018, there were 13 inward transfers. During the same period however 68 applications were refused and a further 18 were withdrawn. 25 applicants for transfer were released during this period before their transfer application was processed to completion.³

Many applicants have to wait several years before they receive a decision on their application. Of the 28 applications on hand in the Department of Justice at the end of 2018, 10 had applied before 2016, 9 applications were made in 2017 and a further nine in 2018. Moreover 22 of the 28 applications were awaiting advice from the Chief State Solicitor’s Office (CSSO) and other reports.

In contrast to the 13 inward transfers, there were 88 outward transfers in the years 2009-2018. From 1996 to 2018, 189 sentenced persons were transferred from Ireland and 505 applications were received from people in Irish prisons seeking to serve their sentence in their home country.

Legal challenges

The issue of incompatibility of foreign sentences with Irish law first arose less than two years of the Act coming into force. In 1997, a number of Irish prisoners in England who were serving sentences which were longer than those provided for under Irish law sought to transfer to Ireland. The then Minister for Justice stated that the UK authorities had requested “specific assurances about the length of time to be served by persons seeking transfer here” under the Convention.⁴ In order for the Minister to provide reassurances that the prisoners in question would serve their full sentences, existing legislation was amended to provide that the court may adapt a sentence that is incompatible by its duration with Irish law only where an application to the court is made by the Minister for Justice.

This issue arose again in two cases before the Irish Supreme Court in 2014 and 2016. Both cases related to prisoners who had been transferred to Ireland from England under the Transfer of Sentenced Persons Act. In *Sweeney v Governor of Loughan House* in 2014, the Supreme Court ruled that as a result of an incompatibility between sentencing practices in England and Ireland the prisoner’s continued detention was illegal. In *O’Farrell v Governor*

¹ Dáil Debates, 03 May 1995.

² Report of the Minister for Justice and Equality Charles Flanagan to the Houses of the Oireachtas on the operation of the Transfer of Sentenced Persons Acts 1995 and 1997 for the 1 January 2018 – 31 January 2018.

³ Figures from the Reports of the Ministers for Justice on the operation of the Transfer of the Sentenced Persons Acts 1995 and 1997 for the years 2009 – 2018 inclusive.

⁴ Dáil Debates, 17 December 1997.

of Portlaoise Prison (2016), the Supreme Court held that the warrants used to detain the prisoners were defective and these defects could not be remedied nor the sentences adapted after the prisoners had been transferred on the basis that the adaptations sought went to the nature and duration of the sentences and were not merely procedural in nature.

All applications were put on hold from July 2016 until 2018 as the Government sought legal advice. The then Minister for Justice explained the difficulties confronting the Government arising from these judgments. Referring to the O'Farrell case, he noted that "The principal issue in the judgment is the significantly different sentencing systems that operate in the UK and in this State. In particular, the judgment raises the issue of how best to adapt and administer under Irish law a foreign sentence that contains features not found in Irish sentences."⁵ The ICPO made representations in 2017 that transfers could continue for prisoners in other countries where an equivalency of crime and sentence existed although the Government did not recommence those applications until May 2018.

The majority of Irish prisoners overseas are in the UK and it is from here that most applications for transfer have come since the implementation of the Act. However, few applications from the UK are currently successful and current legislation must be amended to take account of the Supreme Court judgments. In addition, in 2018 the Irish Court of Appeal found in favour of the Minister's discretion to refuse applications from prisoners service a sentence of imprisonment for public protection (IPP). This sentence does not exist in Irish law.

Amending legislation

While the general scheme (or 'Heads') of a Bill was published in 2019 and included in the legislative programme, there was no further progress. Although applications from determinate sentenced prisoners are being processed, none of these prisoners will be transferred back to Ireland until the legislation is amended and we believe that this creates a false hope among applicants. The proposed legislation did not progress due to the dissolution of the Irish parliament prior to the General Election in February 2020. This Bill has again been included in the legislative programme for Autumn 2020 but disappointingly it has not been included among the priority Bills. The main provisions of the Scheme of the Bill are that where the foreign sentence consists of a period of deprivation of liberty and a period of conditional release (for example release on licence), the High Court may substitute a suspended sentence of imprisonment for that period of conditional release. It also provides that a sentence may be adapted by the High Court at any time after the issuing of a warrant thus avoiding the problems encountered in the O'Farrell case

Framework Decision 2008/909/JHA

Just as Ireland was the last EU Member State to ratify the Convention on the Transfer of Sentenced Persons, similarly it is also last (with Bulgaria) to transpose Framework Decision 2008/909/JHA. The purpose of the Framework decision is to establish rules under which Member States - with a view to facilitating the social rehabilitation of the sentenced person - will recognise the judgment and enforce the sentence imposed by another Member State.. In July 2019, the European Commission sent reasoned opinions to Ireland for having failed to transpose a number of Framework Decisions into domestic law. These included Framework

⁵ Dáil Debates 17 April 2018.

Decision 2008/947/JHA which has now been transposed by means of the Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Act 2019.⁶ The third ‘complementary’⁷ Framework Decision is Framework Decision 2009/829/JHA on the transfer of bail supervision between EU Member States. A bill to transpose this into domestic law is currently before the Irish Parliament.

There is also some progress in relation to FD 2008/909 JHA. The scheme of a bill to transpose this framework decision was approved by the Government in July this year - the Criminal Justice (Mutual Recognition of Custodial Sentences) Bill. The Bill has been listed for pre-legislative scrutiny in the autumn parliamentary session. This means that the relevant parliamentary committee will examine the scheme of the Bill and produce a report for the Irish Parliament.

The number of prisoners serving sentences in EU states who have applied for repatriation in Ireland is small. In the years 1996 – 2018 there have been less than 50 applications from Irish prisoners in EU countries to transfer their sentence back to Ireland but of these only 10 were transferred. Transposing the Framework Decision into Irish law would mean a more efficient and expeditions transfer process for these prisoners.

Under the Convention on the Transfer of Sentenced Persons the consent of the prisoner is one of the basic elements of the transfer.⁸ The Framework Decision on the other hand does not require the consent of the prisoner to be obtained in certain circumstances. However, Irish Governments have been of the view that consent should be a prerequisite to transfer taking place, a position that is fully supported by the ICPO. During the debate on the Transfer of Sentenced Persons Bill in 1995, the then Minister for Justice concluded that “Nothing would be gained by transferring someone against his or her will and without the person appreciating fully the legal consequences of such a transfer.”⁹ When Ireland ratified the Additional Protocol to the Convention on the Transfer of Sentenced Persons in 2006 a declaration stating that Article 3 of the Protocol which limits the requirement to seek the prisoners consent to transfer would not be applied.¹⁰

Conclusion

We are not in the unfortunate situation whereby the majority of our clients in the UK are unable to access repatriation be they determinate, indeterminate (IPP) or life sentenced prisoners, thus frustrating the intent of existing legislation and causing considerable distress to many Irish prisoners in the UK and their families. While there have been some encouraging signs of progress including movement on Framework Decision 2008/909/JHA and relatively high rates of decisions, it is disappointing that yet again the Bill to amend the Transfer of Sentenced Persons Acts has not been given priority. It is also concerning that the number of applications for inward transfer have dropped (the ICPO is not aware of any

⁶ Wahl, T. Infringement Proceedings against Ireland for Failure to Transpose Several Mutual Recognition Instruments. 10 September 2019. www.eucrim.eu/infringement-proceedings-against-Ireland-failure-transpose-several-mutual-recognition-instruments/

⁷ Montaldo, S. EU Law Enforcement. The Cross-border enforcement of probation measures and a

⁸ Explanatory Report to the Convention on the Transfer of Sentenced Persons, ETC No 112, Strasbourg, 21.III.1983, p23.

⁹ Dail Debates, 03 May 1995. <https://www.oireachtas.ie/ga/debates/debate/dail/1995-05-03/6/>

¹⁰ Council of Europe, Reservations and Declarations for Treaty No. 167 – Additional Protocol to the Convention on the Transfer of Sentenced Persons. [Coe/int/en/web/conventions/full-list/-/conventions/treaty/167/declarations?p_auth=ggjrkvdy](http://coe.int/en/web/conventions/full-list/-/conventions/treaty/167/declarations?p_auth=ggjrkvdy)

applications in 2020) as prisoners understandably lose confidence in the process. It has been long established policy by successive Irish governments that prisoners should service their sentences close to their families.¹¹ However, practice to date has fallen somewhat short of that.

¹¹ Report of the Minister for Justice and Equality Charles Flanagan to the Houses of the Oireactas on the operation of the Transfer of Sentenced Persons Acts 1995 and 1997 for the 1 January 2018 – 31 January 2018.