

Prisoner seeking transfer to Northern Ireland from Republic – Convention on Transfer of Sentenced Prisoners – alleged breaches of Articles 8 and 14 of the ECHR - whether prisoner in Republic can rely on breaches in Northern Ireland

Neutral Citation no. [2004] NIQB 41

Ref: **GIRC4183**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **24.06.04**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY KIERAN DOHERTY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND
PRISON SERVICE**

GIRVAN J

[1] This is an application by Kieran Doherty for leave to apply for judicial review of a decision of the Northern Ireland Prison Service refusing the applicant's application to transfer from Portlaoise Prison in the Republic of Ireland to a prison in Northern Ireland.

[2] The applicant is a sentenced prisoner presently in custody in Portlaoise Prison. He applied to be transferred to a prison in Northern Ireland from his prison in the Republic of Ireland in May 2002. In December 2002 the Minister of Justice, Equality and Law Reform in the Republic of Ireland approved his application. His application was then forwarded to the Northern Ireland Prison Service in January 2003. On 11 September 2003 the Northern Ireland Prison Service indicated that the application had been refused because of operational reasons and severe accommodation pressures. The Prison Service indicated that the matter would be kept under review. In a letter of November 2003 the Prison Service indicated that the decision made in respect

of his application had not been a political one and that the real reason for the refusal was indeed the shortage of accommodation. In January 2004 the applicant's solicitors requested that the matter be re-considered and raised a concern that, despite the reasons given for the refusal of the application, there was evidence that sentenced prisoners from Great Britain had been accepted for transfer to Northern Ireland. The Prison Service responded that they had nothing further to add to the correspondence. Further correspondence ensued the effect of which was that the applicant complained that he was given different treatment from applicants for transfer from Great Britain. It was alleged that the applicant's Article 8 rights and his rights under Article 14 were being infringed by reason of the refusal to treat him in the same way as applicants from Great Britain and in refusing his application the consequence was that his family rights in Northern Ireland were being interfered with.

[3] In opposing the granting of leave Mr Maguire on behalf of the Prison Service contended that the applicant who is currently based in the Republic of Ireland cannot rely on any breach of Convention rights within Northern Ireland and that accordingly the basis of his judicial review application was misconceived.

[4] The transfer of sentenced prisoners between states which are party to the Convention on the Transfer of Sentenced Prisoners is governed by the provisions of that Convention. As a general principle under Article 2 the parties to the Convention undertake to afford each other the widest measure of co-operation and respect of the transfer of sentenced prisoners in accordance with the provisions of the Convention. Under Article 3 a sentenced prisoner may be transferred under the Convention only on the conditions set out in Article 3. Paragraph (4) of that Article provides as a condition that the sentencing and administering states "agree to the transfer". As the explanatory note in respect of the Convention prepared by the European Committee on Crime Problems makes clear, the Convention confines itself to a procedural framework for transfer. The document does not contain an obligation on contracting states to comply with a request for transfer. For this reason it was not necessary to list any grounds for refusal nor to require the requested state to give reasons for its decision to refuse an application for a requested transfer. The applicant cannot rely on the Conventions conferring any legal entitlement to be transferred and unless he can rely on the Human Rights Act 1998 and its domestic law incorporation of the Convention rights within the United Kingdom his application has no foundation.

[5] In *Bankovic v Belgium and Others* (Application 52207-99) the European Court of Human Rights made clear that a person outside the jurisdiction of a particular member state cannot assert a Convention breach against that state. The applicants in that case were citizens of the Federal Republic of Yugoslavia and were injured or lost relatives of the result of the bombing air-strikes

carried out by NATO during the Kosovan crisis in 1999. They brought claims against the European member states of NATO involved in the air-strikes alleging breaches of Convention rights. Following its earlier decision in the case of *Soering* the Court held that Article 1 of the Convention sets a limit, notable territorial, on the reach of the Convention. In particular, the engagements undertaken by the contracting states is confined to securing the listed rights and freedoms to persons within the relevant state's jurisdiction. The case law of the court demonstrate that its recognition of the exercise of extra-territorial jurisdiction by the contracting states is exceptional; it is done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government. Additionally other recognised instances of extra-territorial jurisdiction include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in or flying the flag of that state. In those specific situations customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state (see paragraphs 71 and 73 of the judgment in *Bankovic*).

[6] In *R (ex parte v Abassi) v Secretary of State for Foreign and Commonwealth Affairs* (2002) EWC CIV1598 Lord Phillips expressed the position as follows:

- “(i) the jurisdiction referred to in Article 1 of the Convention will normally be territorial jurisdiction.
- (ii) where a state enjoys effective control of foreign territory, that territory will fall within its jurisdiction for the purposes of Article 1.
- (iii) where, under principles of international law, a state enjoys extra territorial jurisdiction over an individual and acts in the exercise of that jurisdiction, that individual would be deemed to be within the jurisdiction of the state for the purposes of Article 1, in so far as the action in question is concerned.”

[7] Mr Larkin QC sought to argue that the applicant could rely on paragraph (iii) in Lord Phillips' analysis because of the nature of the convention on the transfer of sentenced prisoners which is an international convention. However, as Mr Maguire demonstrated from the wording of the Convention the United Kingdom is under no obligation to accept the applicant as a transferred prisoner and has declined to do so. The United Kingdom accordingly is not acting in the exercise of any jurisdiction over the

applicant and it does not enjoy extra territorial jurisdiction over him. In the result it is clear that the applicant, who lives outside the jurisdiction, cannot rely on any breach of Convention rights within this jurisdiction. Mr Larkin argued that the effect of the decision was to affect the applicant's family rights within Northern Ireland and that accordingly he suffers consequences within the jurisdiction, however, what the applicant is seeking to assert is a breach of Article 8 and Article 14 suffered by him as a person and the consequences are suffered not where he might enjoy the rights, if he came to Northern Ireland, but where he is, that is to say in the Republic of Ireland.

[8] I am satisfied that the applicant has made out no arguable case to justify the granting of leave and I refuse the application.