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Judgment Title: Minister for Justice and Equality -v- Kelly aka Nolan

Neutral Citation: [2013] IESC 54

Supreme Court Record Number: 316/2012

High Court Record Number: 2011 350 EXT

Date of Delivery: 10/12/2013

Court: Supreme Court

Composition of Court: Denham C.J., Murray J., MacMenamin J.

Judgment by: Denham C.J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Denham C.J.	Link	Appeal dismissed	Murray J., MacMenamin J.

Outcome: Dismiss

THE SUPREME COURT

Appeal No. 316/2012

Denham C.J.
Murray J.

MacMenamin J.

Between/

The Minister for Justice and Equality

Applicant/Appellant

and

Laurence Kelly aka Gavin Nolan

Respondent

Judgment of Denham C.J. delivered on the 10th day of December, 2013 by Denham C.J.

1. This is an appeal by the Minister for Justice and Equality, the applicant/appellant, referred to as "the appellant", against the judgment and order of the High Court (Edwards J.), delivered on the 24th May, 2012.

2. The surrender of Laurence Kelly, aka Gavin Nolan, the respondent, referred to as "the respondent", was sought by the authorities in the United Kingdom pursuant to a European Arrest Warrant issued on the 5th October, 2010, and was refused by the High Court.

3. The European Arrest Warrant was endorsed in accordance with s. 13 of the European Arrest Warrant Act, 2003, as amended, and the respondent was arrested on the 24th October, 2011, and brought to the High Court. The hearing of the request took place on the 8th March and 12th March, 2012, and on judgment being delivered on the 24th May, 2012, surrender was refused and the respondent was discharged from the proceedings.

4. On the 18th June, 2012, an application was made by the appellant for an order certifying a question for this Court. The learned trial judge granted the application and the order of the High Court was perfected on 25th June, 2012. The certified question posed to this Court is:-

> Is the sentence which the respondent is sought to serve so contrary to the scheme and order envisaged by the Constitution that surrender must be refused by the Court?

Background

5. In the early hours of the 9th April, 2005, in Kilburn, London, the respondent attacked a woman, committing the offences of attempted rape and assault causing actual bodily harm.

6. On the 4th April, 2005, a new form of sentencing had come into force in the United Kingdom, which applied to offences committed after that date, and which, in certain circumstances, obliged a sentencing court to impose an indeterminate sentence for public protection.

7. On the 1st August, 2005, the respondent pleaded guilty at Harrow Crown Court and on the 8th November, 2005, he was sentenced to a determinate period of two and a half years imprisonment to be followed immediately by an indeterminate sentence for the protection of the public.

8. On appeal, the Court of Appeal Criminal Division in the United Kingdom varied the

sentence, but only in that the imprisonment was to be served in a young offenders institution. Thus, the sentence had two parts. The first was the minimum term of imprisonment, sometimes referred to as the tariff period, which was a specified period, in this case two and a half years. The second part was open-ended, to protect the public, and was preventative in nature, and depended on assessment of future risk posed by a defendant. The Parole Board could only direct the release of a defendant once he was no longer a risk to the public. This two part sentence was called a sentence of imprisonment for public protection, referred to as IPP.

9. After serving approximately four and a half years detention, the respondent received his first hearing with the Parole Board, which did not recommend his release.

10. After serving five years and three months of his sentence the respondent absconded whilst on temporary release. His surrender was then sought in Ireland under the European Arrest Warrant.

The High Court

11. The High Court refused to surrender the respondent to the United Kingdom and delivered a wide ranging judgment.

United Kingdom

12. Material concerning the status and functioning of this statutory form of sentencing in the United Kingdom was tendered in evidence. This established that the Government in the United Kingdom had indicated a plan to abolish the indeterminate sentence. Following the publication of a Green Paper, the Government introduced the Legal Aid, Sentencing and Punishment of Offenders Bill into Parliament on the 21st June, 2011.

13. In evidence it was established that the Secretary of State for Justice and Lord Chancellor, the Rt. Hon. Kenneth Clarke, M.P., spoke on this to Parliament in Westminster on the 1st November, 2011 stating:-

> "What is wrong is that indeterminate sentences are unfair between prisoner and prisoner. The Parole Board has been given the task of trying to see whether a prisoner could prove that he is no longer a risk to the public. It is almost impossible for the prisoner to prove that, so it is something of a lottery and hardly any are released. We therefore face an impossible problem.
>
> As I have said, IPP sentences are piling up, and they have been handed down at a rate of more than 800 a year even after the changes made in 2008. At the moment, more than 6,500 offenders are serving those sentences, of whom more than 3,000 have finished what the public regard as their sentence - the tariff for what they have done. If we do not do anything about it, the number of IPP sentences will pile up to 8,000 or 9,000 by 2015 - 10% of the entire prison population. Sometimes, their co-accused who committed the same crime and were given a determinate sentence were released long ago. That is unjust to the people in question and completely inconsistent with the policy of punishment, reform and rehabilitation, which has widespread support. Only Opposition Front Benchers are still in favour of a punishment that leaves a rather randomly selected group to languish indefinitely in prison, for their lifetime if necessary.
>
> ... Apart from the very outlying people on the right and the left, I hope that I have satisfied everybody. It is high time that we reformed indeterminate sentences. Personally, I am amazed that they have survived judicial review

> and challenge in the courts thus far, but if something was not done, they would not survive very much further, which would lead to unfortunate consequences if a count suddenly started ordering us to release such prisoners and decided that they were being held unlawfully. I have recently described them as a 'stain on the system'. I said that at a private meeting in the House of Lord - although it soon found its way into the press -but it is my opinion. What we are putting in place is protection for the public: far more rational, certain, determinate sentences. which is much more in line with how we think the British system should behave."

14. The material before the Court also established that at the Committee Stage of the Bill to abolish indeterminate sentences, being the Legal Aid, Sentencing and Punishment of Offenders Bill in Westminster on the 21st November, 2011, Lord McNally, the Minister for State for Justice, said:-

> "I now wish to turn to one of the Bill's most important reforming measures, namely reform of the current system of indeterminate sentences for public protection. IPPs are poorly understood by the public. They lead to inconsistent sentences for similar crimes. They deny victims clarity about the length of time an offender will serve. The previous Government estimated that there would be around 900 such prisoners in jail. There are now 6,500 and more than half of those are beyond their tariff. As of the end of June 2011, only 320 had been released.
>
> IPPs clearly need major reform. We will replace the IPP with the new extended determinate sentence. Instead of serious violent and sexual criminals being released automatically halfway through their sentence, those receiving the new extended determinate sentence will have to serve at least two-thirds before they can be considered for release, and the more serious offenders will not be released at that point unless the Parole Board considers it safe to do so. Under our plans we expect that more dangerous offenders who commit a second serious crime will receive a mandatory life sentence. We believe this is a balanced reform, one where victims will have a clearer understanding of how long offenders will spend in prison and will be kept informed of progress and release plans. It is an attempt to deal with the real problem without compromising the public safety or ignoring legitimate concerns about serious offenders."

15. The Legal Aid, Sentencing and Punishment of Offenders Act was passed by Parliament in the United Kingdom on the 1st May, 2012.

16. On the evidence before us the statute does not apply retrospectively. Thus, the respondent would still be subject to an indeterminate sentence pursuant to the previous law of the United Kingdom. The appellant has not called this into question.

Issue

17. The issue in this appeal is whether the surrender of the respondent would, in the terms of s. 37(1)(a)(i) of the European Arrest Warrant Act, 2003, be contrary to the State's obligations under the European Convention on Human Rights. The issue which arises in this case is net. It is not necessary to conduct a broad ranging analysis of the Constitution or of sentencing practices in other European States. A broad analysis is not necessary in the circumstances of the case.

Arbitrary

18. In *James, Wells and Lee v. The United Kingdom*, (App. Nos. 25119/09, 57715/09 and 57877/09) (Unreported, European Court of Human Rights, 18th September 2012) the European Court of Human Rights referred to as "the ECtHR", stated that in order to assess

whether the applicants' detention post-tariff was arbitrary, the ECtHR must have regard to the detention as a whole. The ECtHR held at para 221:-

> "In these circumstances, the Court considers that following the expiry of the applicants' tariff periods and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses … their detention was arbitrary and therefore unlawful within the meaning of Article 5.1 of the Convention."

19. The ECtHR held that there had been a violation by the United Kingdom of Article 5.1 of the Convention in respect of the applicants' detention following the expiry of their tariff periods, and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses.

20. Thus, under the prior law of the United Kingdom there was a system of indeterminate sentencing, as identified by the ECtHR, which contravened Article 5.1 of the European Convention on Human Rights. It is a system which the United Kingdom has itself now abolished. However, the new statutory scheme in the United Kingdom does not apply retrospectively. Thus, the prior arbitrary law would apply to the respondent, if he was surrendered.

21. For clarity, I stress that this is a net decision based only on the prior law of the United Kingdom which has been abolished, and which was found to be arbitrary and contrary to the European Convention on Human Rights by the ECtHR.

22. In these circumstances, I am satisfied that the respondent should not be surrendered to serve a term of imprisonment in accordance with the former statutory regime of the United Kingdom which has been found to be in contravention of Article 5.1 of the European Convention on Human Rights. Accordingly, that prior statutory regime under which this particular respondent would be detained if surrendered constitutes a fundamental and systemic breach of the European Convention on Human Rights. To surrender the respondent to the United Kingdom in those circumstances would be a breach of Ireland's obligations under the European Convention on Human Rights. Accordingly, the surrender must be refused in accordance with s. 37(1)(a)(i) of the European Arrest Warrant Act, 2003, which provides that a person shall not be surrendered under the Act if his or her surrender would be incompatible with the State's obligations under the European Convention on Human Rights.

23. Thus, I would dismiss the appeal, for the reasons given.

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