

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**  
**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY SAMUEL SURGENOR  
FOR JUDICIAL REVIEW**

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**WEATHERUP J**

The application

[1] This is an application for judicial review of decisions made on behalf of the Northern Ireland Prison Service and the Scottish Prison Service in relation to the applicant who is serving a sentence of imprisonment at HMP Magilligan. Leave to apply for judicial review was given on the papers and included leave to serve the notice of motion on the Scottish Prison Service out of the jurisdiction.

The background

[2] For the purposes of this application there have been five stages to the applicant's imprisonment –

First, on 6 October 1999 at Ballymena Crown Court the applicant was sentenced to 3 years imprisonment for drugs offences and commenced to serve that sentence in prison in Northern Ireland.

Secondly, on 3 April 2000 the Secretary of State for Northern Ireland made a restricted transfer order transferring the applicant to Scotland pursuant to paragraph 2 of Schedule 1 of the Crime (Sentences) Act 1997 “until completion of judicial proceedings at Kilmarnock High Court whereupon consideration will be given to his return to HMP Magilligan”.

Thirdly, on 18 May 2000 at Kilmarnock High Court the applicant was sentenced to 7 years imprisonment for drugs offences and was detained in prison in Scotland.

Fourthly, on 12 October 2000 Scottish Ministers made a restricted transfer order transferring the applicant to Northern Ireland pursuant to paragraph 1(1)(b) of Schedule 1 of the Crime (Sentences) Act 1997 subject to the conditions that (1) the applicant be treated for the relevant purposes of the 1997 Act as if he were still subject to the law of Scotland and (2) for all other purposes the applicant be subject to the rules and regulations governing prisons Northern Ireland.

Fifthly, on 27 January 2001 the applicant completed the Northern Ireland sentence. He remains in HMP Magilligan serving the Scottish sentence.

### The legislation

[3] The transfer of prisoners within the British islands is provided for by Schedule 1 of the Crime (Sentences) Act 1997. The restricted transfer of the applicant from Northern Ireland to Scotland was made pursuant to paragraph 2 of Schedule 1 of the 1997 Act ("Transfer of prisoners for trial") which provides -

"(1) If it appears to the Secretary of State that -  
(a) ...

(b) a person serving a sentence of imprisonment in any part of the United Kingdom

should be transferred to another part of the United Kingdom ... for the purpose of attending criminal proceedings against him there, the Secretary of State may make an order for his transfer to that other part ... and for his removal to a prison or other institution there.

(4) Where a person has been transferred under sub-paragraph (1)(b) ... above for the purpose of any proceedings, the Secretary of State may -

(a) if that person is sentenced to imprisonment in those proceedings, make an order under paragraph 1(1)(b) ... above (but without application on that behalf) transferring him back to

the country ... from which he was transferred under that sub-paragraph."

[4] The order transferring the applicant from Scotland to Northern Ireland provided that the order was made pursuant to paragraph 1(1)(b) of Schedule 1 of the 1997 Act ("Transfer of prisoners: general") which provides –

"(1) The Secretary of State may, on the application of –

(a) ...

(b) a person serving a sentence of imprisonment in any part of the United Kingdom

make an order for his transfer to another part of the United Kingdom ... there to ... serve the whole or any part of the remainder of his sentence, and for his removal to an appropriate institution there."

[5] Paragraph 6 of Schedule 1 of the 1997 Act provides that a "restricted transfer" is one that is subject to a condition that the person to whom it relates is to be treated for "the relevant purposes" as if he were still subject to the provisions applicable for those purposes under the law of the place from which the transfer is made.

"The relevant purposes" are defined by paragraph 6(2) in relation to the transfer of a person under paragraphs 1(1)(b) and 2(1)(b) as "the purposes of his detention under and release from his sentence and, where applicable, the purposes of his supervision and possible recall following his release."

Paragraph 5(3) provides that a condition for restricted transfer shall not be varied or removed except with the consent of the person to whom the transfer relates.

### Restricted transfers

[6] The effect of a restricted transfer is that the prisoner remains subject to the release provisions of the jurisdiction from which he has been transferred. In Scotland the statutory scheme for the release of prisoners provides that a prisoner may be released on parole after serving one half of the sentence and must be released after serving two thirds of the sentence. In Northern Ireland the statutory scheme provides that a prisoner is entitled to remission of one half of the sentence and is then released. Accordingly a restricted transfer prisoner from Scotland may serve a longer period of imprisonment than a prisoner sentenced to the same period of imprisonment in Northern Ireland. It would be to the applicant's advantage if he could establish that he was detained in Northern Ireland in circumstances that rendered him subject to

the Northern Ireland release provisions rather than the Scottish release provisions.

[7] The effect of restricted transfers has been considered by the Court of Appeal in Northern Ireland. In Faulkner's Application [1999] NIJB 151 the applicant had been serving a sentence of imprisonment imposed by a Scottish court and obtained a restricted transfer to Northern Ireland. He was convicted of disciplinary offences and the Governor made an award of loss of remission. On an application for judicial review of the Governor's decision the applicant contended that the award could not defer the date of the applicant's release set by the Secretary of State for Scotland. Carswell LCJ delivered the judgment of the court and set out the relevant statutory provisions relating to sentenced prisoners in Northern Ireland and Scotland to demonstrate that early release in Scotland operates less favourably to prisoners than the remission scheme in Northern Ireland. The court decided that the operation of Schedule 1 of the 1997 Act provided that the function of setting the release date was reserved to the transferor Secretary of State but that in matters relating to discipline the appellant was subject to the jurisdiction of the prison system to which he was transferred and accordingly the Northern Ireland prison authorities could exercise the power of awarding loss of remission under their disciplinary jurisdiction even though it had the effect of postponing the ultimate release of a transferred prisoner.

[8] Further, in Malcolmson's Application [2003] NICA 18 the applicant had been sentenced to imprisonment in Scotland and then granted a restricted transfer to Northern Ireland. The issue on appeal was whether the decision of the Northern Ireland Prison Service that the release date for the purposes of the home leave scheme was the half way point at which he was eligible to be considered for parole or the two-thirds point at which he was entitled to be released if not paroled earlier. The Court of Appeal held that for the purpose of home leave the release date was the two-thirds point of his sentence. In Pear't's Application [2003] NICA 26 the applicant sought judicial review of a decision of the Parole Board for England and Wales in relation to the operation of the scheme where the applicant had been sentenced to imprisonment both in Scotland and then in England. The Court of Appeal held that the Parole Board had been in error in treating the sentence passed in Scotland as a single term of imprisonment with the sentence passed in England.

[9] At stage 3 of the applicant's imprisonment, when he had been sentenced in Scotland, there were two measures that might have applied in relation to any potential transfer back to Northern Ireland. First, paragraph 2(4)(a) of Schedule 1 of the 1997 Act provided for transfer by the Secretary of State (for Northern Ireland) under paragraph 1(1)(a) – without application by the applicant. Secondly, paragraph 1(1)(a) provided for transfer by the

Secretary of State (for Scotland) (or upon devolution in Scotland, by Scottish Ministers) – upon application by the applicant.

[10] In relation to the first measure (paragraph 2(4)(a)) Northern Ireland operated a policy that the discretion to order a transfer back to Northern Ireland would not be exercised if the sentence imposed on the prisoner in the other jurisdiction would result in a release date that was later than that which applied to the Northern Ireland sentence. In the case of the applicant his release under the Scottish sentence of 7 years would arise after his release under the Northern Ireland sentence of 3 years so the application of the policy meant that the Secretary of State would not exercise his discretion under paragraph 2(4)(a) and the applicant would serve both sentences in Scotland. The reason for the operation of this policy appears to be that if the Secretary of State for Northern Ireland ordered the transfer back to Northern Ireland of a prisoner who had received a longer sentence in the other jurisdiction, the Northern Ireland Prison Service would have no authority to detain the prisoner in Northern Ireland after he was liable to release from the Northern Ireland sentence. Accordingly, an order would be required to authorise the detention of the prisoner in Northern Ireland on foot of the Scottish sentence.

[11] In relation to the second measure (paragraph 1(1)(a)) Scotland operated a policy in accordance with the criteria announced in the House of Lords by Lord Williams of Mostyn, as Parliamentary Under Secretary of State at the Home Office, on 28 October 1997. Transfers of prisoners to another jurisdiction could be on a restricted basis or an unrestricted basis and included in the matters the Secretary of State for the sending jurisdiction would take into account was whether, as a consequence of an unrestricted transfer, there would be likely to be any effect on the length of time that the prisoner would be required to serve. The effect of a transfer on an unrestricted basis from Scotland to Northern Ireland would extend to a prisoner the prospect of earlier release.

[12] When the applicant received a 7year sentence in Scotland the Northern Ireland Prison Service on behalf of the Secretary of State exercised its discretion under paragraph 2(4)(a) by applying the policy of not ordering a transfer back to Northern Ireland as the “dominant” sentence was in Scotland. As the applicant wished to be transferred back to Northern Ireland he applied to Scottish Ministers under paragraph 1(1)(a) and they exercised their discretion in accordance with the policy announced in Parliament to order a restricted transfer to Northern Ireland, on the basis that an unrestricted transfer would result in the applicant’s early release from the Scottish sentence.

## Jurisdiction

[13] Mr Montague for the second respondent, the Scottish Ministers, submitted that the court had no jurisdiction in respect of decisions made by the Scottish Ministers. While the 1997 Act provides for transfer orders to be made by the Secretary of State, that power in Scotland has been devolved to Scottish Ministers upon devolution in Scotland on 1 July 1999 under the Scotland Act 1998. Section 53 of the 1998 Act provides for the general transfer of functions, as far as they are exercisable within devolved competence, to Scottish Ministers instead of a Minister of the Crown. Prisons is a devolved matter, as it is not reserved by Section 30 and Schedule 5 of the 1998 Act. The Scotland Act 1998 (Functions Exercisable in or as Regards Scotland) Order 1999 specifies those functions of the Secretary of State for Scotland which were to be devolved and Article 4 and Schedule 2 of the 1999 Order specify the functions of the Secretary of State in relation to the transfer of prisoners within the British islands under the Crime (Sentences) Act 1997.

[14] The applicant contended that the Scottish Ministers are barred from raising an issue as to the jurisdiction of the court because their appearance before the court on the substantive hearing is the equivalent of the entry of an unconditional appearance to a writ of summons served out of the jurisdiction. Thus, the applicant contended, the second respondent ought to have applied to the court for an order setting aside the grant of leave to the applicant and the leave to serve the notice of motion out of the jurisdiction. The rule as to unconditional appearances does not apply to judicial review. In response to service of the notice of motion the second respondent gave notice that jurisdiction was an issue. It is necessary that the court be satisfied that it has jurisdiction to deal with the issues and the parties, and no claim of procedural bar can prevent consideration of the jurisdiction of the court. Accordingly I reject the applicant's submissions that the second respondent is barred from raising the issue of jurisdiction.

[15] Had the restricted transfer order from Scotland to Northern Ireland been made by the Secretary of State for Scotland then the issue of jurisdiction would not have arisen as in constitutional theory there is an office of Secretary of State throughout the United Kingdom. So in Grogan's Application [1993] 10 NIJB 18 the jurisdiction issue did not arise in relation to a challenge to a decision of the Secretary of State for the Home Department for refusing to order the applicant's permanent transfer to a prison in Northern Ireland under the provisions of the Criminal Justice Act 1961, being the relevant legislation that preceded the 1997 Act. In Peart's Application [2003] NICA 26 the Court of Appeal quashed a decision of the Parole Board of England and Wales. The issue of jurisdiction does not appear to have been raised. In any event the Parole Board is a statutory body connected to the decisions of the Secretary of State as it was established by section 32 of the Criminal Justice Act 1991 to advise the Secretary of State.

[16] In R (on the application of Majeed) v Immigration Appeal Tribunal & Secretary of State for the Home Department [2003] EWCA Civ 615 the Court of Appeal in England Wales considered the issue of jurisdiction on an application for judicial review of a decision of the Immigration Appeal Tribunal sitting in London to conduct an appeal by video-link from the decision of an immigration adjudicator sitting in Glasgow. The Court of Appeal declined jurisdiction on the basis that the application for judicial review should have gone to the Court of Session in Scotland.

At paragraph 13 Brooke LJ stated –

“It is fortunately not necessary for us to conclude finally that the High Court has no supervisory jurisdiction at all over decisions by the Immigration Appeal Tribunal relating to appeals from adjudicators in Scotland. It may be that in a real emergency it might be desirable for the High Court to exercise jurisdiction and make an appropriate order. But it would have to be a very exceptional case. As a matter of general everyday practice I have no hesitation in holding that it is to the Court of Session and not to the High Court to which applications of this kind should lie, on the basis of the general reasoning articulated by the Lord Ordinary in [Lord Advocate v R W Forsythe Limited 61 TC 1]”.

[17] The decision of the Lord Ordinary, Lord Wiley, in RW Forsythe Limited arose in the Court of Session upon a claim by the Crown for the payment of tax by a company in Scotland. The taxpayer had applied in England for judicial review of a decision not to postpone payment of the tax, made by the Special Commissioners sitting, for convenience, in London. The grant of leave to apply for judicial review by Farquharson J operated as a stay of the decision of the Special Commissioners. It was held that the Court of Session had jurisdiction. Lord Wiley stated –

“...the critical question is whether (the Special Commissioner) was acting in the context of purely Scottish proceedings. If he was there could only be one court with the pre-eminent supervisory jurisdiction, that is the Court of Session. The supervisory jurisdiction of that court, as the supreme civil court in Scotland, over inferior courts and tribunals has long been recognised ... and a decision of a Commissioner for the Special Purposes of the Income Tax Acts on a Scottish tax

case, albeit that he is sitting no doubt for administrative convenience in London, must in my view remain subject to the supervisory jurisdiction of the Scottish court. It is not difficult to imagine the confusion that could in certain circumstances result if more than one court had such a jurisdiction."

[18] After the decision of Lord Wiley the Crown applied to strike out the judicial review proceedings in England. In R v Special Commissioner, ex parte R W Forsyth Ltd (1986) STC 565 MacPherson J granted a stay of the proceedings. On the issue of jurisdiction it was stated (page 568j) -

"This court must guard its position so far as review of the activities of Special Commissioners carried on in England is concerned. In the instant case the only connection with England was the postponement application, but it seems to me in the light of the arguments and the cases cited to me that I should beware of ruling that this court is wholly without jurisdiction lest that might lead to later problems.

The cases cited were Rutherford v Lord Advocate(1931) 16 TC 145, and R v Industrial Disputes Tribunal, ex parte Kigass Ltd [1953] 1 WLR 411."

On the issue of a stay of proceedings it was decided that as a matter of comity and common sense and convenience all activity in the case should be in Scotland.

[19] In relation to a decision by Scottish Ministers as to a prisoner sentenced to a term of imprisonment in Scotland and concerning that prisoner's transfer out of the jurisdiction of Scotland I consider the position to be as follows -

(a) The primary supervisory jurisdiction should lie in the Scottish courts. The critical question is whether the decision-makers were acting in the context of purely Scottish proceedings. The obvious connection with Northern Ireland is that the applicant is detained in Northern Ireland. However it is necessary to consider the particular decision that raises the jurisdiction issue. That is the decision of Scottish Ministers that a prisoner sentenced in Scotland be transferred out of the jurisdiction of Scotland and that his release should remain subject to the Scottish system. The context of that particular decision is purely Scottish. The consequence of the decision is that the prisoner is located in a different jurisdiction but that does not diminish the purely Scottish

context of the transfer decision. Where issues arise about the outworking of the Scottish transfer decision involving the prison authorities in Northern Ireland, those issues would not arise in a purely Scottish context, as was the case in Faulkener's Application and Pear's Application.

(b) However I refrain from concluding that the Scottish courts have exclusive jurisdiction in all circumstances in relation to the transfer decision. There may be cases where there is a concurrent jurisdiction in the Northern Ireland courts in relation to the transfer decision and its impact on the detention and release of the applicant. As the applicant is a prisoner in detention within the jurisdiction of Northern Ireland this court must guard its position so far as the review of his detention and release are concerned. Of course the court will have jurisdiction to deal with this applicant in relation to any issue that does not involve the transfer decision of the Scottish Ministers. However, where the decision of Scottish Ministers has become intertwined with a decision made by the Northern Ireland Prison Service there may be cases where the Scottish Ministers could not be said to have acted in the context of purely Scottish proceedings. Further, there may be exceptional cases of real emergency where it might be desirable for this court to make an appropriate order. In the present case there are challenges to the decisions of the Scottish Ministers and the Secretary of State for Northern Ireland but those decisions remain distinct and have not become so intertwined that the transfer decision of the Scottish Ministers can no longer be considered to have been made in the context of purely Scottish proceedings. Similarly, there is no emergency arising in the present case that requires an order from this court in relation to the Scottish decision. I adopt the approach of MacPherson J in R v Special Commissioner, ex parte R W Forsyth Ltd and of Brooke LJ in R (On the application of Majeed) v IAT and Secretary of State for the Home Department.

(c) In cases of concurrent jurisdiction this court should adjudicate if it is the convenient forum. If I am wrong in the conclusion that there is no concurrent jurisdiction in the circumstances of the present case I would not consider Northern Ireland to be the convenient forum. The connection with Northern Ireland is that the prisoner is now serving his Scottish sentence in a Northern Ireland prison. The relevant decision as to the applicant's transfer remains that of Scottish Ministers and his release is governed by Scottish legislation and the decision of Scottish Ministers. There is no ingredient in the present circumstances that requires the Scottish decision to be adjudicated upon by this court. Comity requires that such decisions of Scottish Ministers be adjudicated upon by the Scottish courts.

#### The applicant's grounds

[20] Mr McCollum QC who appeared with Miss Askins for the applicant relied on four grounds of challenge.

The first was a challenge to the refusal of the Secretary of State for Northern Ireland to transfer the applicant back to Northern Ireland after the imposition of the Scottish sentence on 18 May 2000, which decision was said to be unlawful as it was based on the application of a policy without regard to the particular circumstances of the applicant's case.

The second ground concerned the decisions of the Scottish Ministers and the Northern Ireland Prison Service that the applicant be transferred by way of a Scottish restricted transfer order, which decisions were said to be irrational in their effect on the applicant's release date.

The third ground was that the decision of the Scottish Ministers was not based on the correct criteria as it was said to have been driven by the insistence of the Northern Ireland Prison Service policy that the applicant's return to Northern Ireland be by way of a restricted transfer from Scotland and further that regard had not been had to the operation of post release supervision.

The fourth ground concerned the decisions of the Scottish Ministers and the Northern Ireland Prison Service that the applicant be transferred from Scotland to Northern Ireland by way of a Scottish restricted transfer order, and in failing to recognise that the restricted transfer from Northern Ireland could not be varied without consent so that it applied to the Scottish sentence with the result that the applicant's release was subject to the Northern Ireland regime.

Although I have found that in the present circumstances this court does not have jurisdiction to adjudicate upon the decision of Scottish Ministers, or alternatively should not exercise jurisdiction, I will consider each of the applicant's grounds.

[21] The applicant's first ground concerned the refusal of the Secretary of State for Northern Ireland to transfer the applicant back to Northern Ireland after sentence in Scotland. That decision was said to be unlawful, as it was based on the policy that a prisoner transferred from Northern Ireland to another jurisdiction, who received a longer sentence of imprisonment in the other jurisdiction, should not be transferred back to Northern Ireland but should serve his sentence in the other jurisdiction. The applicant contended that the statutory discretion was fettered by applying this policy without regard to the applicant's circumstances.

[22] There were two different decisions in play in relation to the transfer of the applicant from Northern Ireland and the transfer of the applicant from Scotland. His transfer from Northern Ireland on foot of the Northern Ireland order was made until completion of judicial proceedings at Kilmarnock High Court "whereupon consideration will be given to his return to HMP Magilligan". When the applicant was sentenced at Kilmarnock High Court to a longer sentence than was to be served in Northern Ireland the Northern Ireland policy was that the applicant should remain in Scotland. The applicant's first ground of challenge contemplates that the Northern Ireland

Prison Service should have ordered that the applicant be transferred back to HMP Magillgan to serve his Northern Ireland sentence and his Scottish sentence. The difficulty with that position would have arisen when the Northern Ireland sentence had been served because the applicant's continued detention in Northern Ireland in respect of the Scottish sentence would have required the authority of Scottish Ministers. The applicant's complaint is misconceived because, when he became a prisoner subject only to a Scottish sentence, his detention in Northern Ireland could not be continued on foot of a Northern Ireland order transferring him back from Scotland. As appears from the Northern Ireland Prison Service letter of 11 October 2000, Northern Ireland Prison Service had authority to detain the applicant on the Northern Ireland warrant of imprisonment up to his Northern Ireland early release date, and it required an order from Scotland to enable the Northern Ireland Prison Service to detain the applicant under the Scottish warrant of imprisonment.

[23] The applicant's second ground of complaint was that the operation of the restricted transfer order from Scotland was irrational in the manner in which it adversely affected the applicants release from imprisonment. The applicant contended that his release date for his Northern Ireland sentence was 2001 and his release date for his Scottish sentence will be 2005, whereas if the dates on which the sentences had been imposed were to be reversed the release date from the Scottish sentence would be in 2004. The applicant contended that this result was irrational and that his release date depended upon the efficacy of the different court systems. However what the dates reflect is nothing more than if the Scottish sentence had been imposed a year earlier the applicant's release from the Scottish sentence would also be a year earlier. This is true of all sentences and does not arise from the operation of the restricted transfer order. The result was not irrational but a consequence of two different sentences being subject to two different release arrangements.

[24] The applicant's third ground of challenge is that the Scottish Ministers did not apply the statutory provisions to their decision but acted on the effective direction of the Northern Ireland Prison Service, and further failed to take account of the effect of a restricted transfer on post release supervision. It is apparent from the correspondence between the Scottish Prison Service and the Northern Ireland Prison Service that there was some uncertainty in relation to the proper basis for the applicant's transfer between one jurisdiction and another. Northern Ireland applied its policy to the exercise of the statutory discretion to transfer back to Northern Ireland and was entitled to do so. Scotland applied the national policy to the exercise of the statutory discretion to transfer out of the jurisdiction and was entitled to do so.

[25] As to post release supervision the applicant contended that the Scottish Ministers had not taken this into account and that no consideration had been given to the practicalities of post release supervision in Northern Ireland. It is

apparent from the references to “relevant purposes” in the restricted transfer order from Scotland and from the affidavit sworn on behalf of the Scottish Prison Service that the Scottish Ministers had regard to the effect of a restricted transfer in relation post release supervision. I was informed by counsel for the respondent that the practicalities of post release supervision for restricted transfer prisoners involve supervision by the Northern Ireland Probation Service. It is apparent that there are standing arrangements for such post release supervision as there a number of restricted transfer prisoners in Northern Ireland, one example being Malcolmson’s Application [2003] NICA 18 where the applicant was on a restricted transfer from Scotland.

[26] The applicant’s fourth ground of challenge related to the status of the applicant when he was first transferred to Scotland as a restricted transfer prisoner from Northern Ireland, which restriction, the applicant contends, could not be removed without the consent of the applicant, so that he remained and continues to be subject to the release arrangements applicable in Northern Ireland. Paragraph 5(3) of Schedule 1 to the 1997 provides that restricted transfer conditions may not be varied or removed except with the consent of the applicant. The conditions in the Northern Ireland order did continue to apply to the Northern Ireland sentence. However the applicant’s transfer from Scotland was effected under the Scottish order which applied to the Scottish sentence. That Scottish order did not impact on the Northern Ireland sentence and the Northern Ireland release provisions continued to apply to that sentence. Similarly the Northern Ireland order did not apply to the Scottish sentence and the Scottish release provisions continued to apply to that sentence. The Northern Ireland sentence has been completed. The Northern Ireland order has ceased to have effect. The absence of the applicant’s consent to the removal of any condition has no bearing on the continued application of the Scottish order to the Scottish sentence being served in Northern Ireland.

[27] The application for judicial review is dismissed.