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**Irish Council for Prisoners Overseas**

Supporting Irish Prisoners Overseas and their Families

**Briefing on Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021**

**Irish Council for Prisoners Overseas**

The Irish Council for Prisoners Overseas (ICPO) is a charitable organisation established by the Irish Catholic Bishops’ Conference in 1985. For over 35 years the ICPO has worked on behalf of Irish prisoners overseas to provide information and support to these prisoners and their families. We work for all Irish prisoners wherever they are, and do not make any distinction in terms of religious faith, the nature of the conviction or a prisoner’s status.  The ICPO works with approximately 1,100 Irish people imprisoned in almost 30 countries around the world. It provides information, support and advice to prisoners and their families.

The ICPO has a long involvement in the repatriation of Irish prisoners serving their sentences in other countries. Prior to the introduction of the Transfer of Sentenced Persons Act in 1995, the ICPO had campaigned for several years for the introduction of legislation to permit Irish prisoners overseas to return to Ireland to serve their sentence closer to their family and networks.  As part of the Transfer of Prisoners Group, the ICPO monitored and analysed the early operation of the Transfer of Sentenced Persons Act.[[1]](#footnote-1)[1]  Since then, the ICPO has provided information and advice to Irish prisoners worldwide and their families regarding repatriation as well as monitoring their application through regular contact with the Irish Prison Service.

Whilst the ICPO welcomes the Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021, it is nonetheless regrettable that it has taken so long to get this far. Ireland is the last EU country to transpose this Framework Decision into its domestic law - almost 10 years after the implementation deadline of the 05 December 2011. In December 2020, the European Commission referred Ireland to the Court of Justice of the EU for failing to transpose the Framework Decision into Irish law.[[2]](#footnote-2)[2]

**Transfer of sentenced persons – a brief overview**

The rationale for the transfer of sentenced persons is largely humanitarian and rehabilitative.  It has been shown that prisoners have a greater chance of successful rehabilitation in the words of the Convention on the Transfer of Sentenced Persons “within their own society” close to family and support networks and better access to rehabilitation programmes.

According to the United Nations Office of Drugs and Crime (UNODC): “All things being equal, sentenced persons who serve their sentences in their home countries can be rehabilitated, resocialised and reintegrated into the community better than elsewhere…”[[3]](#footnote-3)[3] The UNODC goes on to say that imprisonment in a foreign country, can be “counterproductive” as prisoners are far from their families who can provide them with “social capital and support which improve the likelihood of successful resettlement and reintegration.”[[4]](#footnote-4)[4]  Effective rehabilitation can reduce the rate of recidivism and as a result decrease the number of victims of crime and save the resources of criminal justice agencies such as the police and courts.

The most recent Report of the Minister for Justice on the operation of the Transfer of Sentenced Persons Acts states that “it has been long established Government policy that, whenever possible, prisoners should be permitted to serve their sentences close to their families.”  However in recent years the transfer scheme has been beset by delays, legal challenges and relatively high refusal rates and the numbers of prisoners being transferred back to Ireland have declined.  In the first five years after the implementation of the Transfer of Sentenced Persons 80 people were transferred.  In the 20 years since, only 74 inward transfers took place.

The number of Irish prisoners seeking to transfer is small – from November 1995 to December 2020 there were 563 applications for transfer, with over half of these applications being made in the first ten years after the scheme came into operation.  However, being able to serve their sentence in an Irish prison lessens some of the hardships faced by them but also by their families and benefits their rehabilitation and reintegration into society..

**Amendments to the Transfer of Sentenced Persons Acts 1995 and 1997**

All transfers of prisoners to and from Ireland are currently dealt with under the Transfer of Sentenced Persons Acts 1995 and 1997 which gave effect in Irish law to the 1983 Council of Europe Convention on the Transfer of Sentenced Persons. Transfers to and from all countries outside the European Union will continue to be dealt with under the Transfer of Sentenced Persons Acts 1995 and 1997 when the proposed Bill is passed into law.

The ICPO welcomes the Minister’s commitment to include amendments at Committee stage of this Bill to deal with the legal issues that have arisen as a result of Supreme Court judgments in *Sweeney v Governor of Loughan House Open Centre & Ors* and *O’Farrell &Ors v the Governor of Portlaoise Prison* in 2014 and 2016.  This has had a particularly negative impact on applicants from the UK.  The majority of Irish prisoners overseas are in the UK and in the 25 years since the transfer scheme came into force, 459 (out of 563) applications for transfer came from prisoners in the UK.

We are concerned that five years after the decision in *O’Farrell,* it appears that there remains a lack of clarity regarding how applications from non-EU countries particularly the UK will be dealt with.  This continued uncertainly causes considerable stress and anxiety to applicants, potential applicants and their families. Amendments both to the current legislation and to the Bill itself are necessary to ensure that prisoners can be repatriated to serve their sentence in Ireland in cases where the sentence handed down are not recognised in Irish law. Without these amendments, neither the Bill when enacted nor the Transfer of Sentence Persons Acts will fulfil their objective of facilitating the rehabilitation of sentenced persons by ensuring that a workable transfer system is in place for eligible prisoners who wish to return home to serve their sentence in an Irish prison.

**Criminal Justice (Mutual Recognition of Custodial Sentences) Bill 2021**

**Background**

Since the Transfer of Sentenced Persons Act came into force in 1995 until December 2020, 48 Irish prisoners in EU Member States (not including the UK) applied to transfer their sentence back to Ireland.  This averages less than two applications per year.   Less than a quarter of applicants (10 in total) have been transferred.   In the same period, 116 prisoners in Irish prison applied to return to a total of 16 EU Member States and of these just under one third (37) were transferred.[[5]](#footnote-5)[5]  While the reasons for the low number of applicants being transferred back to Ireland are not publically available, in some cases, to our knowledge the applicant has been released before a decision could be reached on their applications.  Some were refused by the sentencing country and others were refused by the Irish authorities on various grounds including that the sentence was not compatible with Irish law.

**The Bill – Key Concerns**

While the ICPO welcomes the Bill, in particular the focus on rehabilitation and we hope it will lead to an fairer and more expeditious transfer process between Ireland other EU States, in addition to the necessary referred to above, we have a number of concerns in relation to provisions of the Bill:

*Consent (Section 13)*

Since the implementation of the Transfer of Sentenced Persons Act 1995, Ireland has always maintained the position that the consent of the prisoner is a necessary prerequisite to a transfer taking place.  During the Dáil Debate on the Transfer of Sentenced Persons Bill 1995, the government position at the time was 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.”  Therefore the consent of the prisoner must be “voluntary and informed.”[[6]](#footnote-6)[6]

The ICPO recognises that the Framework Decision provides that the consent of the sentenced person is not required in certain circumstances specifically where the person to be transferred is a national of the receiving (or executing) country and also lives there or where the person will be deported there at the end of their sentence and that this is replicated in the Bill.  However, we are aware that some prisons in these circumstances may have very valid reasons for not wishing to transfer to a prison here including personal safety.  We do not believe that compulsory transfer facilitates the rehabilitation of a prisoner which is one of the main objectives of this Bill. We urge the Minister to continue the State’s laudable position of requiring the prisoner’s consent prior to transfer. If this provision is enacted, it should be applied in a restrictive manner with careful consideration of the impact in the person’s rehabilitation of transfer without consent.

*Mutual recognition and adaptation*

Sentences in other jurisdictions can differ considerably from those in Ireland.  This is most apparent when looking at the UK where release on licence and sentences of imprisonment for public protection do not exist in Irish law.  In many EU countries, prisoners become eligible for conditional release at half or two thirds way through their sentence.  Again, there are no similar provisions in Irish law.  In 2020, ¾ of applications processed to completion were rejected; many because their sentence was not recognised in Irish law.  The case of Anthony (name changed) below is typical of these cases.

**Case study**

*Anthony\* recently served a four year sentence in an EU country for a non-violent offence. Anthony applied to transfer his sentence back to Ireland.  In addition to being closer to him family, Anthony was keen to avail of training and education available in Irish prisons.  In the sentencing country, prisoners are eligible to be considered for conditional release at the halfway point of their sentence, however this does not happen often, especially in the case of foreign national prisoners and Anthony was not released at that stage.  Nearly two years after he had applied to transfer his sentence, Anthony’s application for transfer was refused on the basis that his sentence was not recognised in Irish law.*

It is essential that when the Bill becomes law, people like Anthony who are otherwise eligible for transfer and whose rehabilitation would benefit from transfer back to Ireland should not be refused transfer on the grounds that their sentence is not recognised in Irish law.  While the Bill is premised on the notion of mutual recognition of sentences between EU states and there are provisions for the adaptation of sentences that differ from Irish sentence, we understand that further amendments may be necessary to provide for Article 17 of the Framework Decision concerning the law governing enforcement of sentences.

*Opinion of sentenced person*

Section 12 of the Bill provides that a sentenced person shall be provided with the opportunity to give their opinion on the application.  This opportunity to provide an opinion is given in all circumstances whether consent to the application is required or not.  While this is a positive provision, it is unclear what weight is to be given to these opinions, nor what information will be provided to prisoners to enable them to give an informed consent or opinion as appropriate. Prisoners serving a prison sentence in another country will often be unfamiliar with prison conditions in their home country including remission and early release conditions. The Council of Europe 2012 Recommendations concerning foreign prisoners recommends that “Where foreign prisoners are to be transferred to another State to serve the remainder of their sentence, the authorities of the receiving State shall provide the prisoners with information on conditions of imprisonment, prison regimes and possibilities for release.”

It is therefore necessary that prisoners should be provided with sufficient information to enable them to give informed consent or opinion as required and that this should be specified in the Bill.

Where an opinion has been expressed, this must be forwarded to the Receiving Member State under the Framework Decision, however the Bill only requires the Minister to ‘notify’ the executing state (Section 12.4). This should be clarified in the Bill.

*Resources*

The clear timeframes for decisions on whether to enforce the sentence and for the transfer of the sentenced person (not later than 30 days after the decision to recognise the judgment and enforce the sentence except in “exceptional circumstances”) are welcome particularly in view of the excessively long processing time for transfers under the Transfer of Sentenced Persons Acts.  However, the resources must be put in place to ensure that transfers can take place expeditiously, without which these deadlines for transfers will not be met.

###### While acknowledging that processing times for applications for transfer have decreased in the last year in particular, some applicants are still waiting several years for a decision with delays of up to a year in the Chief State Solicitors Office (CSSO). It is vital for the effective working of the Bill when enacted that all agencies involved in the transfer process must be properly resourced.

###### *Conclusion*

In recent years the inward transfer of prisoners has effectively ground to a halt.  It is now over five years since the last Irish prisoner returned to serve their sentence here.  This Bill and the proposed amendments to the Transfer of Sentenced Persons Acts 1995 and 1995 which the Minister for Justice has committed to, provide an opportunity to put in place a fair, expeditious and transparent transfer system for all Irish prisoner overseas whether in the EU or in non-EU states and also for foreign national prisoners in Ireland who wish to return to their country.  A workable transfer system not only benefits prisoners but their families and wider society

1. [1] This group comprised in addition to the ICPO the Committee for the Administration of Justice (CAJ), National Association of Probation Officers (NAPO) and Northern Ireland Association for the Care and Resettlement of Offenders.  The Group published a report in 1997 entitled A Review of the Operation of the Transfer of Sentenced Persons Act 1995. [↑](#footnote-ref-1)
2. [2] European Commission, Criminal Justice: Commission decides to refer Ireland to the European Court of Justice for failing transpose EU rules concerning the rights of suspects and prisoners. Press release: 3 December 2020. ec.europa.eu/commission/presscorner/detail/en/ip\_20\_2190

NOTE: Ireland was also referred to the CJEU in relation to Framework Decision 2009/829/JHA which provides that persons awaiting trial in another EU state can return to their EU country of residence until their trial commences.  The Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) Act 2020 implementing this Framework Decision was passed in November 2020. [↑](#footnote-ref-2)
3. [3] United Nations Office for Drugs and Crime (UNDOC), *Handbook on the International Transfer of Sentenced Persons*, Criminal Justice Handbook Series, 2012, p.10. [↑](#footnote-ref-3)
4. [4] Ibid, p10. [↑](#footnote-ref-4)
5. [5] Report of the Minister for Justice and Equality, Charles Flanagan, T.D. to the Houses of the Oireactas on the Operation of the Transfer of Sentenced Persons Acts 1995 and 1997 for the period 01 January 2018 to 31 December 2018. [↑](#footnote-ref-5)
6. [6] Dáil Debates, 03 May 1995. [↑](#footnote-ref-6)