

OPINION

At the 761st meeting (18 July 2001) of their Deputies, the Committee of Ministers addressed the following terms of reference to the PC-OC:

“To give an opinion on Parliamentary Assembly Recommendation 1527 (2001) on the operation of the Council of Europe Convention on the Transfer of Sentenced Persons and to submit it to the Committee of Ministers through the European Committee on Crime Problems (CDPC).”

The completion date of these terms of reference were fixed on: 31 March 2002

Introduction

On the basis of a Report (doc. 9117) adopted by its Committee on Legal Affairs and Human Rights, as well as an Opinion (doc. 9137) on that Report, adopted by its Social, Health and Family Affairs Committee, the Parliamentary Assembly of the Council of Europe adopted, on 27 June 2001, Recommendation 1527 (2001) on the Operation of the Council of Europe Convention on the Transfer of Sentenced Persons.

The Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) carefully examined the above mentioned papers. Having discussed the issues at its 43rd (24 – 26 September 2001) and 44th (25 – 27 February 2002) meetings, it adopted the following opinion that it submits to the Committee of Ministers through the European Committee on Crime Problems (CDPC).

General considerations

The Committee welcomes the Assembly’s recommendations.

The Committee points out that it had already identified and examined most of the points raised by the Assembly. Indeed, it devotes considerable time and energy to finding solutions to the difficulties encountered with the application of the Convention on the Transfer of Sentenced Persons. On the basis of its work, the following instruments have been adopted by the Committee of Ministers:

- Rec. R (84) 11 concerning information about the Convention on the Transfer of Sentenced Persons;
- Rec. R (88) 13 concerning the practical application of the Convention on the transfer of sentenced persons;
- Rec. R (92) 18 concerning the practical application of the Convention on the transfer of sentenced persons;
- ETS 167 - Additional Protocol to the Convention on the Transfer of Sentenced Persons (1997)

Moreover, the Committee has collected a considerable amount of information concerning the practical application of the Convention, that is regularly updated and published. This includes a major document that appears under the title “A guide to procedures on the transfer of sentenced persons in States Party to ETS 112”. It is expected that the impact of these materials on the effectiveness of the Convention will augment considerably as soon as it becomes possible to make them available on the Internet.

Finally, the records of the Committee meetings clearly show how often it discusses practical difficulties in the operation of the Convention that are brought to its notice by its members. Although such discussions are not brought to public attention, their effect is nevertheless considerable in opening the way to a softer, speedier and altogether more effective application of the Convention.

The Committee deems that the flexibility of the Convention is one of its major advantages. Any steps taken in order to meet difficulties encountered with its application must take into account the present advantages of flexibility and in particular the present possibility of applying the Convention on a case by case basis.

Considerations pertaining to the individual points in the Recommendation:

Point 9 i : *the Assembly recommends that the Committee of Ministers invite those member states which have not yet done so to ratify as soon as possible the Convention on the Transfer of Sentenced Persons;*

The Committee supports this recommendation.

Point 9 ii: *the Assembly recommends that the Committee of Ministers actively encourage those non-member states which have not yet done so, particularly those in which prison conditions are recognised as poor, to accede to the convention;*

The Committee held a thorough discussion on this issue that indeed conceals different facets. The starting point is that States represented in the Committee all share a very clear interest in transferring back their nationals imprisoned abroad. That interest is all the more acute where the the foreign State at stake is one in which prison conditions are poor. Hence the interest in encouraging accession of such States to the Convention. However, accepting the accession of a third State implies under international law that there is a bona fide readiness from all Parties fully to co-operate with that State under the Convention. This means inter alia that Parties are ready to transfer persons to such States. Here lie the difficulties because indeed, even if transfers must be consented to by the persons concerned, Parties are not always prepared to transfer persons under their jurisdiction to just any State, certainly not to a State where the prison conditions are poor beyond tolerable limits. Parties obligations' under the ECHR must be taken into account.

Bearing the above considerations in mind, the Committee follows the view that non-member States that are not a Party to the Convention should be encouraged to accede to it.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

The Committee thinks that three different avenues should be given consideration when examining responses to the difficulties raised by the Assembly.

The first consists in clarifying even further the conditions under which each Party interprets and applies the Convention and ensuring the dissemination of information in that respect. The Committee privileges this approach and requests from the Committee of Ministers the means to pursue its work in this way, in particular, the means to create and feed a web site of its own.

The second consists indeed in addressing recommendations to States on the interpretation and application of the Convention. The Committee supports that avenue, subject to the considerations ahead on the specific points raised by the Assembly.

The third consists in drawing up one or more additional protocols to the Convention. Having in mind the above considerations concerning the requirement of flexibility, legally binding texts such as protocols are not to be considered as a first option. However, the Committee does not exclude resorting to that solution in order to solve one or both of the following difficulties: (a) the transfer of mentally disordered offenders, and (b) the transfer of persons sentenced to prison who are otherwise under a duty towards the sentencing State to pay a fine or produce goods or money.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (a) *to streamline and harmonise the information member states seek when processing a transfer application and to state a maximum time-limit for every request for information;*

The Committee follows the understanding that the Convention's role is one of laying down the conceptual as well as the procedural framework within which national laws will apply in order to transfer a sentenced person and in that way achieve the purposes of rehabilitation, sometimes a humanitarian purpose, without defeating the end of justice. The national law, not the Convention, has the prime role. Transparency with regard to national laws and procedure, in particular easy access to information in that respect is the guiding principle to achieve the goal proposed by the Assembly. In this respect, the Committee intends to pursue its work of updating and completing the already abundant information, in particular in the Guide to Procedures. Again it must be stressed that the web is the ideal means to disseminate information in this respect.

Unlike other areas of international co-operation in criminal matters, the ends of justice do not require imposing time-limits in the area of transfer of sentenced persons. However, the Committee agrees that States should be recommended to give priority to critical humanitarian cases.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (b) *to state clearly that the convention is not designed to be used for the immediate release of prisoners on return to their own country;*

The Committee supports the view that the Convention is not primarily intended to be used for the immediate release of prisoners on return to their home countries. This is sufficiently clear to all. Should the need be recognised to re-state this view, then it should be further clarified by adding the following: the decision on the release of the person concerned belongs to the administering State alone. This rule cannot be changed. In particular, one should be aware that certain States use the conversion system provided under Article 11 of the Convention. In such cases, it is not possible to either State to anticipate on the result of the conversion procedure and thus to know *ex ante facto* whether or not the person transferred will be imprisoned or released once his sentence is converted.

The Committee wishes to add that the immediate release of a transferred prisoner is sometimes founded on humanitarian considerations.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (c) *to urge contracting states not to refuse transfers on the grounds that the prisoner might possibly benefit from earlier release in the administering state;*

The Committee can follow this recommendation subject to the proviso that States should have the possibility of refusing transfer on the basis of a set of reasons that may include the circumstance that the prisoner will possibly benefit from such early release in the administering state that the ends of justice are jeopardised.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (d) *to urge contracting states to interpret the nationality requirement broadly and in line with the convention's rationale;*

The Committee agrees with the Assembly that the rationale of the Convention does not include any consideration that would call for a strict interpretation of the concept of nationality. The latter was introduced into the Convention in the form of a self-sustained concept, freely determined by each Party, in order to limit the scope of the convention in terms of the persons concerned. It does not exclude a reference to other ties between a person and a State, such as habitual residence. Many States have in fact entered declarations extending the concept of nationality to include such other links. In particular, the reference to nationality must not prevent the Convention from being applied to persons who are not technically nationals according to the national law of the State concerned. Moreover, the Committee thinks that there should be no question in applying reciprocity in matters pertaining to the Parties liberty to define “national”.

The Committee recalls that, in Recommendation (88) 13, the governments of member States are already recommended to “*consider availing themselves of the possibility under Article 3.4 to define the term “national” in a wide sense, having regard to any close ties the persons concerned have with the administering State*”. The language of this recommendations could be changed in order to reflect better the ideas above.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (e) *to specify a minimum threshold for the sentence which must be served (for example, 50%), below which states can legitimately refuse a transfer, but above which states should facilitate a transfer;*

The cases in which the Convention is called upon to be applied fall under many different patterns. At the same time, the concrete purposes of each transfer, while obeying to the overall aim of rehabilitation, also vary considerably from one case to another. For these reasons, fixing thresholds would impinge on the flexibility which, as was mentioned above is a recognised value of the Convention. It would moreover preclude case by case solutions. However, the Committee is not disinclined to follow a line of action based on the idea of “a period of time compatible

with the ends of justice”.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (f) *to issue a clear statement that the convention applies to all mentally disturbed prisoners and that their transfer should be a matter of highest priority, and to recommend that all states parties implement Article 9 of the convention, which gives states discretion regarding how to continue the treatment of mentally disturbed prisoners after transfer;*

Some experts think that a pragmatic approach to this question, based on declarations made under Article 9.4 of the Convention, would suffice. The Committee however agrees on the utmost importance and priority of this question, which nevertheless is a most difficult one, as shown by the work it has already invested in it. That work has shown that a binding instrument appears to be necessary. Further work should integrate a multidisciplinary approach comprising expertise from the fields of (a) criminal law, (b) the transfer of sentenced persons, (c) the human rights dimension of the treatment of mentally disabled persons and (d) the national and international administrative regulations governing the treatment of mentally disabled persons. The Committee therefore suggests that a multidisciplinary group of experts be set up in order to study this and connected questions and make proposals.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (g) *to strongly discourage the blocking of transfers because of outstanding fines;*

The Committee agrees that this is an area of difficulties. It recalls that, in Recommendation (92) 18, member States already are recommended to “*take steps enabling them not to have to refuse a transfer on the sole grounds that fines imposed on the sentenced person in connection with his sentence remain unsatisfied, or that contrainte par corps has been imposed*”. Possibly more work has to be devoted to studying this question, in particular in establishing the differences, if at all relevant, between three situations, namely:

- criminal law fines to which the person was sentenced;
- other fines imposed on the person in connection with his sentence, and
- confiscation orders imposed on the person that remain unsatisfied (e.g. because the money or the goods have not been found).

The Committee does not exclude that, subject to the result of the further study of this problem, a protocol to the Convention might be the proper way to prevent the above situations from jeopardising the application of the Convention.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (h) *to urge contracting states to give utmost consideration to the family ties and personal relationships of the prisoner when considering a transfer request;*

As was mentioned above, the Committee believes on the virtues of a casuistic application of the Convention. While family ties might be an adequate criteria in many cases, it is not necessarily a

determining factor in all cases. Indeed the Committee thinks that the habitual residence should be the main criterion.

The Committee refers to its comments above, in respect of point 9 iii d.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (i) *to urge contracting states to respect the right of consent of prisoners, so as to prevent forced transfers that are contrary to the humanitarian spirit of the convention;*

The Committee cannot see how this recommendation can apply to the Convention proper, since there can be no doubt about the consent of the person concerned being a “conditio sine qua non” for its application; should however this recommendation make reference to the Protocol, then it must be recalled that it is the very purpose of the latter to make provision for cases in which transfer may be effected without the consent of the person concerned.

Point 9 iv: *the Assembly recommends that the Committee of Ministers explore the possibility of drawing up a new additional protocol to the convention in which some of the recommendations under sub-paragraph iii above would be included*

Most members of the Committee take the view that a new Protocol to the Convention is not necessary (save probably for the particular purpose of dealing with the transfer of mentally disturbed offenders, perhaps also to deal with the question of fines) since the difficulties highlighted by the Assembly can be dealt with by way of Committee of Ministers recommendations, domestic legislation and a broader use of the organisation and dissemination of information, in particular the Guide to Procedures.

Point 9 v: *the Assembly recommends that the Committee of Ministers organise a series of training seminars at which states parties could present their domestic transfer procedures, exchange information and explore how to improve their systems and make them more transparent*

The Committee recognises the value of internationally organised training activities in this field and therefore supports this recommendation. It points out that there is particular value in organising seminars that involve two or more countries in between which co-operation is particularly intense. It recalls however that a great volume of information on the Convention and its practical application is already made available by it through the Secretariat. Should – as it constantly calls for – that information become available on the net, the effectiveness of the information system would significantly grow, at relatively low cost.