THE HIGH COURT

[2010 No. 804JR]

JONATHON CAFFREY

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE PAROLE BOARD

NOTICE PARTY

[2010 No. 1006JR]

JOHN COUGHLAN

APPLICANT

AND

MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

THE PAROLE BOARD

NOTICE PARTY

JUDGMENT of Kearns P. delivered the 20th day of July, 2012.

These cases come before the court by way of applications for judicial review. The applicants seek *inter alia*:

1. An order of *mandamus* by way of an application for judicial review, compelling the respondents to establish and put in place a review of the applicant's sentence and detention by a competent, impartial and independent Tribunal, separate and distinct from the executive branch of Government.

2. A Declaration that the Parole Board as currently constituted, and the mechanism for reviewing sentences in Ireland, is contrary to Ireland's obligations under the European Convention on Human Rights (hereafter referred to as 'the ECHR').

3. A Declaration that the applicant is entitled to an impartial and independent review of his sentence, by a competent and impartial Tribunal that is independent of the executive branch of Government or, in the absence of same, entitled to an order directing the respondents to terminate his detention.

4. A Declaration that the applicant's rights under Article 5 of the ECHR have been breached.

5. An Order prohibiting the Parole Board as currently constituted from taking any further steps in reviewing the applicant's detention.

6. Damages for breach of the applicant's rights under the Constitution and under the ECHR.

THE PARTIES

The first-named respondent is the member of the Government with responsibility for the areas of Justice, Equality and Law Reform and has overall responsibility for the administration of prisons and prisoner sentences in Ireland. The second-named respondent is Ireland. The third named respondent is the legal advisor to the Government and the Chief Legal Officer of the State. The notice party is a non-statutory body that is an adjunct of the Department of Justice and comes within the remit of the first named respondent. The notice party replaced the Sentence Review Group in April 2001, the latter having been established under an administrative scheme for the purpose of considering the cases of long-term prisoners in 1989. The notice party's principal function is to advise the first respondent on the administration of the sentences of persons whose cases the first respondent has referred to it. The final decision regarding the recommendations of the notice party rests with the first respondent.

The applicant in the first case (hereafter referred to as "the first applicant') was sentenced to life imprisonment on the 15th December, 1999 following a trial in the United Kingdom. He received a sentence of 8 years in respect of one count of causing grievous bodily harm with intent, same to be served concurrently with the sentence of life imprisonment imposed on count number 2 on the Indictment, being murder. The sentence upon which the applicant is now detained is one of life imprisonment in respect of which a tariff of 12 years imprisonment was recommended by the trial judge and by Chief Justice Bingham under the UK tariff process. These recommendations were accepted by the U.K. Home Secretary. In May 2005, he was transferred from the United Kingdom to Ireland to serve out the balance of that sentence pursuant to the Transfer of Sentenced Persons Act, 1995, as amended. The applicant is currently in custody at Portlaoise Prison.

The applicant in the second case (hereafter referred to as 'the second applicant') was sentenced on the 7th November, 1996 to life imprisonment in the United Kingdom following a trial at Luton Crown Court. The applicant received a sentence of life imprisonment in respect of murder. The trial judge and Lord Chief Justice recommended a tariff of 14 years, which recommendations were accepted by the U.K. Home Secretary. The sentence was backdated to the 18th March, 1996, the date upon which the applicant first went into custody. In May 2003, he was transferred from the United Kingdom to Ireland to serve out the balance of the sentence under the Transfer of Sentenced Persons Act, 1995, as amended. The applicant is currently in custody at the Training Unit in Mountjoy Prison having been transferred there on the 23rd November, 2010.

FACTUAL BACKGROUND

Documentation from the U.K. Ministry of Justice confirms that the minimum tariffs of 12 years and 14 years respectively were set for the purposes of punishment and deterrence. The same documentation confirms that the first and second applicants were initially remanded in custody on the 18th March, 1996 and on the 24th March, 1998 respectively. The tariffs accordingly expired on the 18th March, 2010 in the case of the first applicant (being 12 years from the date of the initial remand) and the 23rd March, 2010 in the case of the second applicant (being 14 years from the date of the initial remand). No application was made to adapt the sentence of either applicant into Irish law at the respective times of their transfer from prison in the U.K. to Ireland, notwithstanding the fact that the minimum tariff system which applies to certain sentences in the UK is a concept unknown to Irish law.

The first applicant brought proceedings under Article 40 of the Constitution of Ireland challenging the legality of his detention entitled *Jonathon Caffrey v. Governor of Portlaoise Prison* [2010] IEHC 213. On the 20th May, Charleton J. held that he was in lawful custody. The first applicant appealed to the Supreme Court, which appeal was heard on the 24th March, 2011 and the 15th March, 2011. The Court upheld the decision of the High Court by a majority judgment of 3 to 2 delivered on the 1st February, 2012, with Denham C.J., Hardiman and Macken JJ. concurring and Fennelly and Murray JJ. dissenting.

The second applicant did not challenge the legality of his detention as he was awaiting the outcome of the *Caffrey* litigation.

The first applicant's case was last considered by the third party on the 28th September, 2011, at which stage the applicant had served over 15 years of his sentence. I was informed that the first respondent has received recommendations from the third party in this regard but they are not before the Court.

The second applicant states that his case was to be heard by the third party during May 2011 but that this review did not take place and indeed has yet to take place. The second applicant has been in custody for in excess of 13 years.

SUBMISSIONS OF THE APPLICANTS
The applicants submit that the determination of the length of a sentence is a matter exclusively for the courts, and not for the executive. It is argued that the first respondent has a substantive role in determining the term of a sentence of life imprisonment, and that accordingly it is the executive which in practice carries out the administration of justice in this regard. The applicants point out that the first respondent determines the stage at which to grant early release on receipt of advice from the Parole Board which he may accept or reject.

The applicants refer to s. 3(1) of the European Convention on Human Rights Act, 2003 (hereafter referred to as 'the 2003 Act'), which provides that, subject to any statutory provision other than the 2003 Act or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights (hereafter referred to as 'the ECHR'). The applicants submit that a failure by an organ of the State to construe the rules governing it in a manner compatible with the ECHR constitutes an *ultra vires* act.

The applicants argue that the procedure for reviewing life sentences in Irish law is not compatible with Article 5 of the ECHR. The applicants state that Article 5 necessitates that prisoners serving a life sentence are entitled to periodic review by an independent body. The manner in which the first respondent administers sentences has regard to preventative and rehabilitative criteria (as specified by the Criminal Justice (Temporary Release of Prisoners) Act, 2003 and thus engages Article 5 of the ECHR such that the applicants are entitled to an ECHR-compliant review of their detention carried out by a competent and impartial body, independent of the executive, which entitlement arises irrespective as to whether the sentences imposed on the applicants are deemed to be wholly punitive in nature or otherwise. Where the respondent declines to release a prisoner on grounds that such a release may pose a threat to the public and/or that the person concerned has not rehabilitated to an extent sufficient to justify such release, that person's subsequent detention is other than punitive such that Article 5 of the ECHR is engaged and any decision made by the respondent which reflects those criteria must, as a matter of law, be reviewable by a competent, impartial and independent body.

It is submitted that the third party and the procedure for review of a sentence as provided for by the respondents is contrary to the requirements of Article 5 of the ECHR and to the jurisprudence of the European Court of Human Rights (hereafter referred to as 'the ECtHR') in that it does not envisage the involvement of a court or court-like body, that the third party is not independent of the executive, that the third party is not impartial and that the third party performs merely advisory functions and lacks competence to determine an applicant's detention.

The applicants also allege a breach of Article 3 of the ECHR. It is submitted that the respondents' failure to provide a proper, independent and impartial review of the applicants' detention leaves them in a state of indefinite uncertainty, potentially for the rest of their lives. The applicants argue that the respondents operate a system that confers no entitlement to commutation, remission or termination of their detention and instead regards such matters as privileges rather than as rights. It is contended that this state of affairs contravenes Article 3 of the ECHR since they are in effect being subjected to an irreducible life sentence. The applicants submit that the ECtHR has consistently held that the imposition of an irreducible life sentence is capable of engaging Article 3 ECHR. The applicants submit that the applicants' sentences are wholly punitive and consequently not subject to periodic review by a body established in accordance with Article 5(4) of the ECHR, and that the regime is accordingly contrary to Article 3 ECHR.

SUBMISSIONS OF THE RESPONDENTS
The respondents state that the applicants are both serving a sentence of life imprisonment which is being administered according to Irish law.

The respondents point out that under Irish law a term of imprisonment is entirely punitive in nature and that no tariff system whereby that sentence is divided into a punitive part and a preventative part exists as is the case in the U.K. It is submitted that a person sentenced to a mandatory life imprisonment does not have any legal right or expectation that he will be released before the expiration of the sentence, and that, although the Executive may decide to commute or remit the sentence, this is a matter within Executive discretion in deciding whether or not to exercise clemency. In this regard the respondents point to the separation of powers and submit that the Courts have the role, pursuant to Article 34 and Article 38 of the Constitution to determine guilt and to impose sentences. The State, however, has the powers of pardon, of commutation and of remission pursuant to Article 13.6.

The respondents state that the validity of the first applicant's detention was upheld by the High Court and the Supreme Court in *Caffrey*. The Supreme Court affirmed that the management of the first applicant's sentence is governed by Irish law.

The respondents refer to the Transfer of Sentenced Person Acts 1995 (hereafter referred to as 'the 1995 Act'), as amended, and argue that the legal nature of the sentences imposed on the applicants by the Central Criminal Court is a sentence of imprisonment, and the duration of the sentences is life imprisonment. The respondents refer to s. 7(4) of the 1995 Act which provides that a warrant for the bringing of persons into the State shall have the same force and effect as a warrant imposing a sentence following

conviction by that court. The respondents submit that the issue of future remission once a person had been transferred into the State under the 1995 Act is a matter for the domestic law of the administering state.

The respondents refer to the Council of Europe Convention on the Transfer of Sentenced Persons of 1983, and in particular to Article 9(3) of that Convention, which states that the enforcement of the sentence shall be governed by the law of the administering State and that the administering State shall be competent to make all appropriate decisions. The respondents submit that what is being enforced is the life sentence and that the manner in which the applicants come to be considered for release is a matter that relates to the management of the sentence.

The respondents note that the validity of the Irish sentencing regime was upheld in *Whelan*, where the Supreme Court held that the manner in which life sentences are imposed in this jurisdiction is in accordance with the Constitution and the ECHR.

It is claimed by the respondents that the legitimacy of the discretionary power to grant temporary release as conferred on the first defendant has been accepted in successive judgments of this and other courts. The respondents point in this regard to *Murray v. Ireland* [1999] I.L.R.M. 465 and *O'Neill v. Governor of Castlerea Prison* [2004] 1 I.R. 298. The respondents submit that there is no legal authority for the proposition that the applicants are entitled to an independent review of their decision.

The respondents also rely on the ECHR, and state that there is nothing contrary to the ECHR presented by a mandatory life sentence for murder, where accompanied by a discretion on the part of the Executive to grant remission or release.

It is further submitted by the respondents that the applicants should be denied the relief sought on the grounds of waiver and acquiescence. It is further denied that the applicants have been deprived of access to an effective remedy.

DECISION

The Original Decision in *Caffrey*

In *Caffrey v. Governor of Portlaoise Prison*, the first applicant herein sought his release on the basis that the original tariff of his U.K. sentence had expired and his detention was accordingly now on a preventative basis. Charleton J. in the High Court upheld the validity of the applicant's detention. He stated, at para. 20:-

> *"I have concluded that the nature of the sentence imposed on Jonathon Caffrey is one of imprisonment for life."*

Charleton J. went on to hold at para. 32:-

> *"To my mind, therefore, the nature of life imprisonment is not changed as between Ireland and England where a prisoner is transferred. Where a prisoner is transferred from England to Ireland, notwithstanding any recommendation made under the law of the sentencing state, the nature of the sentence is imprisonment for life."*

Charleton J. noted that the nature of the sentence being served by the applicant is not affected by the rationale of the sentencing court and, further, was not altered through his transfer to this jurisdiction:-

> *"There is nothing in the Convention which leads me to the conclusion that the nature of a sentence is changed by the motivation for imposing it, or the underlying rationale in administering it. Once a sentence is, of its nature, a sentence for life imprisonment, then, under Article 9.3., it is for the administering state to enforce it and 'to take all appropriate decisions'."*

On appeal, the Supreme Court affirmed the order of Charleton J., Denham J., delivering the judgment of the majority, held:-

> *"The appellant is serving a valid sentence of imprisonment for life, in Ireland. The management of that sentence is now governed by Irish law. The management scheme adopted in England is no longer relevant. Irish authorities could not apply the English law. It is inappropriate for the Irish State to make reference to any minimum period in the United Kingdom within which the appellant would be denied parole review. In this case, no issue of inappropriate considerations on the part of the State that detrimentally affect the appellant arise because the appellant was considered twice by the Parole Board before the twelfth year of his sentence, i.e. the Parole Board did not manage the sentence according to English practice, but managed his sentence in accordance with Irish law. I am satisfied that this is the correct approach in law to the management of the appellant's life sentence. Consequently, I would affirm the judgment and order of the High Court and dismiss the appeal of the appellant."*

THE TRANSFER OF SENTENCED PERSONS ACT 1995

The applicants were separately transferred into this jurisdiction from the U.K. pursuant to s. 7(2) of the 1995 Act, which provides:-

> *"Where an application is made to the High Court under subsection (1) of this section that court shall, if it is satisfied that the requirements specified in paragraphs (a), (b), (d), (e) and, where applicable, (c) of section 6 (3) of this Act have been fulfilled and that the Minister consents to the transfer concerned, issue a warrant authorising the bringing of the sentenced person into the State and the taking of the person to, and his or her detention in custody at, such place or places in the State as are specified in the warrant."*

Section 7(4) of the 1995 Act provides:-

> *"Subject to subsections (5) to (7) of this section, the effect of a warrant under this section shall be to authorise the continued enforcement by the State of the sentence concerned imposed by the sentencing state concerned in its legal nature and duration, with due regard to any remission of sentence accrued in the sentencing state, but such a warrant shall otherwise have the same force and effect as a warrant imposing a sentence following conviction by that court."*

Under s. 7(4), a warrant issued under s. 7(2) has the effect of authorising the State to enforce the sentence imposed by the U.K. courts, with regard to the legal nature and duration of the sentence imposed in the U.K. The legal nature of the sentences imposed on the applicants by the sentencing state here is one of imprisonment. The duration of the sentences is life imprisonment.

It follows from this that the management of the sentences of the applicants is to be a matter for the State. In that respect, the

State must have due regard to any remission accrued in the U.K., but the issue of remission became a matter for the State on the respective dates of the transfer of the applicants.

THE COUNCIL OF EUROPE CONVENTION ON THE TRANSFER OF SENTENCED PERSONS
Section 9(3) of the Convention of 1983 provides:-

> *"The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions."*

It is clear that the enforcement of the applicants' life sentences is accordingly a matter for Irish law. The manner in which the applicants come to be considered for release clearly falls within the ambit of 'all appropriate decisions' which the State is competent to make in relation to the sentences.

THE SEPARATION OF POWERS
The Constitution provides for a tripartite separation of powers between the Legislature, the Executive and the Judiciary. The Oireachtas has sole law-making power pursuant to Article 15.2.1 °.

Article 28.2 provides that the executive power of the State shall "*be exercised by or on the authority of the Government*". Article 13.6 provides:

> *"The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities."*

The State has the powers of pardon, which vests in the President, and the powers of remission and commutation, which powers vest in the President but may be conferred by law on other authorities. Section 23(1) of the Criminal Justice Act 1951 (hereafter referred to as 'the 1951 Act'), as amended, grants the power to the Executive to commute or remit, in whole or in part, any punishment imposed by a criminal court. By virtue of s. 23(3) of the 1951 Act, as substituted by s. 17 of the Criminal Justice (Miscellaneous Provisions) Act 1997, the Government may delegate this power to the Minister for Justice.

The Judiciary have the role, pursuant to Article 34.1 of the Constitution, of administering justice. In *Lynham v. Butler (No. 2)* [1933] I.R. 74, Kennedy C.J. stated at p. 99:-

> "The controversies which fall to it for determination may be divided into two classes, criminal and civil. In relation to the former class of controversy, the Judicial Power is exercised in determining the guilt or innocence of persons charged with offences against the State itself and in determining the punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of the Executive Department of Government to carry into effect."

The applicants argue that, in practice, the Minister plays a substantive role in determining the term of a life sentence. Section 2(1) of the Criminal Justice Act 1960 (hereafter referred to as 'the 1960 Act'), as amended, provides that the Minister may direct that a person who is serving a term of imprisonment shall be released for a temporary period. Section 2(2) of the 1960 Act sets out a list of factors which the Minister shall have regard to before granting temporary release and these are:-

> "(a) *the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates*.
>
> (b) *the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto*,
>
> (c) *the period of the sentence of imprisonment served by the person*,
>
> (d) *the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison*,
>
> (e) *any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates*,
>
> (j) *the risk of the person failing to return to prison upon the expiration of any period of temporary release*,
>
> (g) *the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied*,
>
> (h) *any report of, or recommendation made by-*
>
> > (i) *the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,*
> >
> > (ii) *the Garda Siochana*,
> >
> > (iii) *a probation and welfare officer, or*
> >
> > (iv) *any other person whom the Minister considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection (1) that relates to the person concerned.*
>
> (i) *the risk of the person committing an offence during any S.1 period of temporary release*,
>
> (j) *the risk of the person failing to comply with any conditions attaching to his temporary release, and*

(k) *the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment."*

The applicants submit that pursuant to this section, the Minister is required to evaluate and, as a matter of fact does consider, the preventative and rehabilitative element of the sentence, thus triggering Article 5 of the Convention.

THE VALIDITY OF THE IRISH LIFE SENTENCE REGIME

I turn now to the case-law on the validity of the manner in which life sentences are imposed and managed in this jurisdiction. In *Lynch and Whelan v Minister for Justice & Others* [2008] 2 I.R. 142, a declaration was sought that the mandatory life sentence for murder is incompatible with the Constitution and with the ECHR. The applicants essentially submitted in that case that the amount of time that a person upon whom a life sentence is imposed is effectively determined by the Government rather than by a Court. It was argued that the decision of the Minister to grant temporary release was analogous to a sentencing exercise and amounted to the Minister selecting the punishment which the person sentenced must undergo.

In the High Court, Irvine J. considered the manner in which the release of persons serving a mandatory life sentence was decided and held at p. 184:-

> *"The fact that the Parole Board or the first defendant may consider the issue of potential dangerousness of the individual upon whom a mandatory life sentence has been imposed prior to deciding upon their release does not mean that if the prisoner is not thereafter released they are being detained against this risk. Such an individual is being detained as a penalty for his or her crime and the first defendant, in incorporating within his decision any potential risk to the public which might arise upon release, is merely acting in accordance with his statutory obligations and in a manner consistent with the public interest when exercising clemency or affording temporary release.*
>
> *Further, the fact that a prisoner sentenced to a life sentence for murder may have an expectation that he will qualify for release at a future date does not alter the nature of the initial sentence which, having regard to present case law, must be deemed to be entirely punitive."*

Irvine J. held that the mandatory life sentence in Irish law is wholly punitive and contains no preventative aspects. She stated at pp. 184- 185:

> *"It must not be forgotten that in Ireland the Parole Board considers the cases of those serving lengthy custodial sentences after the expiry of the periods set out in their rules. Those serving a life sentence may apply to the Parole Board to have their release considered once they have served seven years of their sentence. In the United Kingdom the intervention of the Parole Board is directly related to the tariff fixed in respect of the retributive aspect of any sentence. Hence, it can be asserted with some ease that in the United Kingdom the continued detention of a prisoner after the expiry of the tariff period is in pursuance of a preventative sentence. This is not the position in Ireland where the courts have rejected any concept of preventive detention and where no tariff period is set at the time of sentence. On the plaintiff's submission, assuming that most prisoners serving a life sentence apply for early release having served seven years, the court would have to conclude that all such prisoners as were not released at that time had served the retributive/punitive element of their sentences and were being detained purely for preventative reasons. This would mean that the court would impliedly have to accept that each such prisoner who remained in detention had been given an unannounced punitive sentence of seven years at the time of their initial sentence. This clearly cannot be correct."*

On appeal to the Supreme Court, Irvine J.'s judgment was upheld in *Lynch and Whelan v. Minister for Justice, Equality and Law Reform* [2010] IESC 34. Murray C.J. delivered the majority judgment of the Court. He stated:-

> *"First of all the life sentence imposed by a court is exclusively punitive. As Walsh J, pointed out in The People v. O'Callaghan [1966] I.R. 501 preventative justice 'has no place in our legal system'.*
>
> *In The People (The Director of Public Prosecutions) v. Jackson (Unreported, Court of Criminal Appeal, 26th April 1993) Hederman J, said:*
>
> > *'It is submitted on behalf of the applicant that what in fact the Central Criminal Court did in this instance was that it imposed a preventative sentence on the accused, a sentence of life in order, as the trial judge said, to protect women from the applicant. The Court is satisfied that preventative detention is not known to our judicial system and that there is no form of imprisonment for preventative detention. '*
>
> *The fact that the Constitution has been amended with regard to the grounds for refusing bail for a person awaiting trial does not affect the principle that a convicted person may not be sentenced by a court or detained by an executive order for a preventative or non punitive purpose."*

Murray C.J. went on to analyse the nature of a life sentence in Irish law and the manner in which a person sentenced to life imprisonment may be temporarily released:-

> *"In the Court's view a life sentence imposed pursuant to s. 2 of the Act of 1990 is a sentence of a wholly punitive nature and does not incorporate any element of preventative detention.*
>
> *It is a sentence which subsists for the entire life of the person convicted of murder. That person may, by virtue of a discretionary power vested in the executive, be temporarily released under the provisions of the relevant legislation on humanitarian or other grounds but he or she always remains liable to imprisonment on foot of the life sentence should the period of temporary release be terminated for good and sufficient reason.*
>
> *It may be appropriate at this point to note that in the event of a prisoner's privilege of temporary release being withdrawn by virtue of a breach of the conditions of that release the Minister, or any person acting on his behalf, is bound to observe fair procedures before withdrawing the privilege of temporary release as was held by this Court in The State (Murphy) v. Kielt [1984] I.R. 459 and Dowling v. Minister for Justice, Equality & Law Reform. Should the Minister fail to observe such procedures or otherwise act in an unlawful, arbitrary or capricious manner in terminating the release for a breach of his conditions or otherwise, the prisoner may seek to have that decision set aside by way of judicial review before the courts.*

In all these circumstances the Court does not consider that there is anything in the system of temporary release which affects the punitive nature or character of a life sentence imposed pursuant to section 2. In particular a decision to grant discretionary temporary release does not constitute a termination let alone a determination of the sentence judicially imposed. Any release of a prisoner pursuant to the temporary release rules is, both in substance and form, the grant of a privilege in the exercise of an autonomous discretionary power vested in the executive exclusively in accordance with the constitutional doctrine of the separation of powers (Finlay C.J in Murray v. Ireland, cited above)."

THE RIGHT OF THE EXECUTIVE TO GRANT TEMPORARY RELEASE

The Executive has a discretionary right to grant temporary release pursuant to s. 2 of the Criminal Justice Act, 1960, as amended. In *Murray & Murray v. Ireland*, [1991] ILRM 465, Finlay C.J. stated:-

"The length of time which a person sentenced to imprisonment for life spends in custody and the extent to which, if any, such person obtains temporary release is a matter which under the constitutional doctrine of the separation of powers rests entirely with the executive. The exercise of these powers by the executive is subject to supervision by the courts which should intervene only if it can be established that such powers are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way."

The Supreme Court reiterated this position in *O'Neill v. Governor of Castlerea Prison*, [2004] 1 IR 298, where Keane C.J. stated at p. 313:-

"The power to release itself, whether exercised on what might be called conventional grounds of a compassionate or humanitarian nature or for purely political considerations, as in the case of releases effected for the purpose of giving effect to the Belfast Agreement, is a quintessentially executive function and one which is discharged by it, in the words of Finlay C.J speaking for this court in Director of Public Prosecutions v. Tiernan [1989] I.L.R.M 149 at p. 153, as:-

'A matter of policy pursued by the Executive at given times and subject to variation at the discretion of the Executive."'

Temporary release is a privilege, and no person is entitled as of right to the exercise of the discretion of the Minister to grant such release. In *Whelan*, Murray C.J. stated:-

"[T]he exercise of that discretion to grant release by the Minister is not one to which any prisoner is entitled as of right. It is a privilege which may be withdrawn at any time by the Minister for good and sufficient reason. In that respect the appellants' submissions are based on the misconception that the punitive element of the life sentence terminates on temporary release. Temporary release may and is granted subject to conditions including conditions to the effect that the released prisoner must keep the peace and observe the law. Apart from the fact that such a release may at the time it is granted be for a defined or limited period, even where the temporary release is open-ended, so to speak, the released prisoner remains liable to arrest and return to imprisonment to continue serving the life sentence should he be in breach of the conditions. In Dowling v. Minister for Justice, Equality and Law Reform Fennelly J, (nem diss) cited with approval Murphy J, in Ryan v. Governor of Limerick Prison and Anor [1988] I.R. 198 to the following effect:

'The temporary release is a privilege or concession to which a person in custody has not a right and indeed it has never been argued so far as I am aware that he should be heard in relation to any consideration given to the exercise of such a concession in his favour. That being so, it seems to me that the only right of the applicant or any other person is to enjoy such temporary release as may be granted to him for whatever period is allowed and subject to such conditions as are attached to it. '

Later in his judgment Fennelly J, confirmed:

'It is, of course, true that temporary release decisions are entirely within the discretion of the Minister acting in the exercise of executive clemency on behalf of the State. '

In the same case Murray J, as he then was, in a judgment with which other members of the Court also agreed, stated:

'It follows that the temporary release of a prisoner before the sentence imposed by a court has expired is a privilege accorded to him at the discretion of the executive. The liberty which a prisoner enjoys while on temporary release, being a privilege, is clearly not on a par with the right to liberty enjoyed by an ordinary citizen. '

Later in the same judgment, in referring to a decision to terminate a prisoner's temporary release he stated:

'Such a decision is an administrative one for the purpose of withdrawing a discretionary privilege to a convicted prisoner whose sentence has not expired'."

Murray J. subsequently stressed the Executive nature of the decision to grant temporary release:-

"Finally, on this aspect of the matter the appellants have attached significance to the fact that in exercising his power to grant temporary release under s. 2 of the Act of 1960 the Minister must, inter alia, have regard to the gravity of the offence and the potential threat which the person's release might pose to the safety of members of the public (including the victim of the offence for which he was imprisoned). That does not mean that the Minister is exercising a judicial function when making such a decision and in particular it does not mean that a decision not to release because of a risk of safety to the public converts the punitive sentence for murder into a preventative one. The Act specifies a range of grounds upon which a Minister may consider granting temporary release. They include preparing him for release upon the expiration of his sentence, the re integration of a rehabilitated prisoner in society, release on grounds of health or other humanitarian grounds. It is a necessary incident to the exercise of a purely executive discretion that the decision-maker would be bound to have, before directing a person's release on any of the possible grounds, have regard to a whole range of matters of which some twelve are specified in s. 2 subs. 2 of the Act of 1960. Inevitably two of those

considerations which ought to be taken into account in the making of any such decision are the gravity of the offence and the risk which the temporary release would pose to the public. A decision to grant temporary release even for a short period such as to permit a prisoner to attend a family funeral would necessarily involve a consideration of any potential risk that that would have for the safety of members of the public. Such a consideration is incidental to the discretionary power and its purpose. It is not a decision on the sentence to be served. Refusing temporary release is a decision not to grant a privilege to which a prisoner has no right. Any such decision or policy on which it is based must serve the purpose or objects of the provision of the Act of 1960 only. It cannot be seen in any sense as converting a subsisting punitive sentence into some form of preventative detention."

THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003

Section 3(1) of the 2003 Act provides:-

> *"Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."*

Section 1(1) of the Act defines 'Convention provisions' as including Articles 2 to 14 of the ECHR. Accordingly, every organ of the State is under a positive obligation to carry out its functions in a manner compatible with the ECHR if at all possible.

Article 5(1) of the ECHR provides:-

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *(a) the lawful detention of a person after conviction by a competent court."*

Article 5(4) of the ECHR provides:-

> *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

Article 3 of the ECHR provides:-

> *"No one shall be subjected to torture or to inhuman and degrading treatment or punishment."*

The applicants in the case at hand submit that the Parole Board, who are charged with review of his detention, is not compliant with the requirements of the ECHR. In *Weeks v. United Kingdom*, [1987] ECHR 3, the ECtHR held:-

> *"The 'court' referred to in Article 5 para. 4 (art. 5-4) does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country (see the above mentioned X v. the United Kingdom judgment, Series A no. 46, p. 23, para. 53). The term 'court' serves to denote 'bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case ..., but also the guarantees ' - 'appropriate to the kind of deprivation of liberty in question' - 'of a judicial procedure', the forms of which may vary from one domain to another (see the above-mentioned De Wilde, Ooms and Versyp judgment, Series A no. 12, pp. 41-42, paras. 76 and 78). In addition, as the text of Article 5 para. 4 (art. 5-4) makes clear, the body in question must not have merely advisory functions but must have the competence to 'decide' the 'lawfulness' of the detention and to order release if the detention is unlawful. There is thus nothing to preclude a specialised body such as the Parole Board being considered as a 'court' within the meaning of Article 5 para. 4 (art. 5-4), provided it fulfils the foregoing conditions (see the above-mentioned X v. the United Kingdom judgment, Series A no. 46, p. 26, para. 61)."*

The applicants cited the cases of *Thynne, Wilson & Gunnell v. United Kingdom*, (1990) 13 EHRR 666 and *Wynne v. United Kingdom*, (1995) 19 EHRR 333, where the ECtHR held accepted that the U.K. drew a clear distinction between a mandatory life sentence and a discretionary life sentence, with the former being wholly punitive and intended to last for life and the latter being partially preventative and to last for as long as the prisoner was considered a danger to the public. The ECtHR held that a discretionary life sentence accordingly entailed a right to periodic review by a court or court-like body under Article 5(4), but that no such obligations arose in respect of a mandatory life sentence.

The ECtHR subsequently changed its view on this matter and found in *Stafford v. United Kingdom*, [2002] 35 EHRR 1121, that the distinction it had drawn between mandatory and discretionary life sentences was insubstantial, and that prisoners serving mandatory life sentences are also entitled to periodic review.

In *Whelan*, the appellants put forward broadly similar arguments to those submitted by the applicants in the case at hand. Murray C.J. observed:-

> *"The essence of the appellant's claim is that s. 2 of the Act is incompatible with Article 5 of the European Convention in that the length of time actually served in prison by the appellant is left to be determined by the executive.*
>
> *In particular the appellants rely on their assertions that the mandatory life sentence is an indeterminate sentence since it is ultimately left to the Minister to weigh up the range of prison terms possible and select the appropriate length of time to be served. In other words the Ministers carry out a judicial function and determines the limits of the sentence imposed by the Court since the sentence is not in substance a fixed penalty and confers on the executive the power to determine the actual length of imprisonment. Moreover the manner in which the length of the sentence which the appellants undergo is determined in an arbitrary fashion by a Minister many years after sentencing in a social and political context that may be entirely different from what it was at the time of the sentencing. The effect of s. 2 of the Act of 1990 is to submit the appellants to such a sentencing regime and constitute a breach of Articles 5(1) and 5(4) of the European Convention on Human Rights."*

Murray C.J. reviewed the relevant ECtHR case law and held:-

> *"In the light of the foregoing the Court is satisfied that the learned High Court judge was correct in her conclusion that that case-law of the European Court of Human Rights relied upon by the appellants in their application pursuant to s.*

5(1) of the Act of 2003 has no material application to the circumstances of this case where the sentences imposed under s. 2 of the Act are wholly punitive and bear no relationship to the system in the United Kingdom which was scrutinised by the Court of Human Rights. The Court of Human Rights continues to recognise that a mandatory life sentence as a punitive measure for a serious crime imposed in accordance with national law does not as such offend against any provision of the Convention provided at least that national law affords the possibility of review with a view to its commutation or conditional release."

In *Kafkaris v. Cyprus*, (2009) 49 EHRR 35, the ECtHR held that the imposition of a life sentence is not incompatible with any Article of the ECHR and, further, that the ECHR does not grant a right to release or to have a sentence reconsidered by a national authority. The Court stated at paras. 97-99:-

"97. The imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see, inter alia, among many authorities, Kotalla v. the Netherlands, no. 7994/77, Commission decision of 6 May 1978, Decisions and Reports (DR) 14, p. 238; Bamber v. the United Kingdom, no. 13183/87, Commission decision of 14 December 1988; and Sawoniuk v. the United Kingdom (dec.), no. 63716/00, ECHR 2001-Vl). At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see, inter alia, Nivette v. France (dec.), no. 44190/98, ECHR 2001-VII; Einhorn, cited above; Stanford v. the United Kingdom (dec.), no. 73299/01, 12 December 2002; and Wynne v. the United Kingdom (dec.), no. 67385/01, 22 May 2003).

98. In determining whether a life sentence in a given case can be regarded as irreducible the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court's case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. The Court has held, for instance, in a number of cases that where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, that it could not be said that the life prisoners in question had been deprived of any hope of release (see, for example, Stanford, cited above; Hill v. the United Kingdom (dec.), no. 19365/02, 18 March 2003; and Wynne, cited above). The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited (see for example, Einhorn (cited above,§§ 27 and 28). It follows that a life sentence does not become 'irreducible' by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is de jure and de facto reducible.

99. Consequently, although the Convention does not confer, in general, a right to release on licence or a right to have a sentence reconsidered by a national authority, judicial or administrative, with a view to its remission or termination (see, inter alia, Kotalla and Bamber, both cited above; and Treholt v. Norway, no. 14610/89, Commission decision of 9July 1991, DR 71, p. 168), it is clear from the relevant case-law that the existence of a system providing for consideration of the possibility of release is a factor to be taken into account when assessing the compatibility of a particular life sentence with Article 3. In this context, however, it should be observed that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at European level, provided that the system chosen does not contravene the principles set forth in the Convention (see, mutatis mutandis, Achour v. France [GC], no. 67335/01, §51, ECHR 2006-IV)."

The Court also found that issues of early release fall uniquely within the jurisdiction afforded to Member States in relation to criminal justice and penal policy:-

"104. In his submissions, the applicant has placed great emphasis on the lack of a parole board system in Cyprus. However, the Court reiterates that matters relating to early release policies including the manner of their implementation fall within the power member States have in the sphere of criminal justice and penal policy (see, mutatis mutandis, Achour, cited above, § 44). In this connection, the Court observes that at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release.

105. In view of the above, the Court considers that the applicant cannot claim that he has been deprived of any prospect of release and that his continued detention as such, even though long, constitutes inhuman or degrading treatment. However, the Court is conscious of the shortcomings in the procedure currently in place (see paragraph 91 above) and notes the recent steps taken by the Government for the introduction of reforms.

106. Furthermore, with regard to the applicant's second complaint, the Court finds that although the change in the applicable legislation and consequent frustration of his expectations of release must have caused him a certain anxiety, it does not consider that in the circumstances this attained the level of severity required to fall within the scope of Article 3. Bearing in mind the chronology of events and, in particular, the lapse of time between them, it cannot be said that the applicant could justifiably harbour genuine expectations that he would be released in November 2002. In this connection, the Court notes that apart from the clear sentence passed by the Assize Court in 1989, the relevant changes in the domestic law happened within a period of approximately four years, that is, between 1992 and 1996, thus about six years before the release date given by the prison authorities to the applicant came up. Therefore, any feelings of hope on the part of the applicant linked to the prospect of early release must have diminished as it became clear with the changes in domestic law that he would be serving the life sentence passed on him by the Assize Court.

107. It is true that a life sentence such as the one imposed on and served by the applicant without a minimum term necessarily entails anxiety and uncertainty related to prison life but these are inherent in the nature of the sentence imposed and, considering the prospects for release under the current system, do not warrant a conclusion of inhuman and degrading treatment under Article 3.

108. Accordingly, the Court finds that there has been no violation of that provision."

The applicant in *Kafkaris* subsequently submitted a second application to the ECtHR, which was unsuccessful at the admissibility stage. The Court restated its position, holding at para. 58:-

"The Court firstly reiterates that no right to release on parole can be derived from Article 5 § 4 of the Convention.

Secondly, it reiterates that where a person is deprived of his liberty pursuant to a conviction by a competent court, the supervision required by Article 5 § 4 is incorporated in the decision by the court at the close of judicial proceedings (see De Wilde, Ooms and Versyp, cited above,§ 76). No further review is therefore required. As far as life sentences are concerned, the Court has found this to be so in the case of mandatory life sentences which were purely punitive in nature because of the gravity of the offence (see, as the most recent example, Iorgov v. Bulgaria (no. 2), no. 36295/02, §§ 73-77, 2 September 2010). However, in cases where the grounds justifying the person's deprivation of liberty are susceptible to change with the passage of time, the possibility of recourse to a body satisfying the requirements of Article 5 § 4 of the Convention is required. In several cases against the United Kingdom, therefore, the Court has found that Article 5 § 4 guaranteed prisoners sentenced to life imprisonment the right to a remedy to determine the lawfulness of their detention once they had served the "tariff' (the retributive and deterrent part of their sentence), since under English law, on expiry of that initial punitive period further detention depended solely on circumstances that were subject to change, such as how dangerous the individual was considered to be, or the risk of his reoffending (see, among other authorities, Wynne v. the United Kingdom (no. 2), no. 67385/01, § 24, 16 October 2003; Stafford, cited above, § 87, and Waite v. the United Kingdom, no. 53236/99, §56, 10 December 2002)."

It is clear from the authorities that a sentence of life imprisonment in this jurisdiction is on wholly punitive grounds, and that no part of such sentence is for preventative purposes. Consequently, the decision by the first respondent whether to exercise his discretion whether to release either of the applicants cannot be said to be a judicial function and is wholly administrative in nature. As such, the exercise of the aforementioned discretion is not subject to the requirements of Article 5(4) of the ECHR. The ECHR confers no general right to release or to have a sentence reviewed by an organ of the State. It is not the case that life sentences in this jurisdiction are irreducible with no possibility of release. Such sentences are capable of review by the first respondent, on the advice of the third party, and persons serving life sentences are *de facto* granted remission and commutation. It is accepted that the review of sentence regime does not involve a court or court-like body, nor is it independent of the executive. Similarly, the third party performs merely advisory functions and lacks competence to bring to an end a person's detention. However, the ECHR does not confer any general right to an alternative method of sentence review. Accordingly, I am satisfied that the applicants have failed to demonstrate a breach of the ECHR and refuse the relief sought in that regard.

WAIVER
The respondents further submit that the applicants should be denied relief by reason of waiver and acquiescence.

In *Brennan v. Governor of Portlaoise Prison*, [2008] 3 IR 364, Geoghagan J stated:-

"In The People (Director of Public Prosecutions) v. Kehoe [1985] I.R. 444, if the dicta of McCarthy J. were to be interpreted literally, it could be suggested that his view was that any objection to jurisdiction had to be taken on the very first day that the accused came before the court. There can be all sorts of circumstances where this could not reasonably be expected and I do not think that McCarthy J. ever intended the literal interpretation which has been given to his words. An unrepresented accused, for instance, could not be expected to raise jurisdictional objections until he had legal advice. This view coincides with the view of the Court of Criminal Appeal as expressed in the judgment of that court delivered by McCracken J. in The People (Director of Public Prosecutions) v. Gilligan (Unreported, Court of Criminal Appeal, 8th August, 2003). There is no doubt that under long established jurisprudence of the courts a jurisdictional objection must be taken as soon as is reasonably possible. Some judges have spoken of the parties effectively conferring a jurisdiction. I would prefer a slightly different formulation. Jurisdiction is conferred by law rather than by persons and, therefore, I think that it is somewhat more accurate to say that by law a bona fide exercise of jurisdiction is deemed to be a good exercise if objection is not taken at the appropriate time. That would, of course, be very much in line with the judgments in A. v. Governor of Arbour Hill Prison [2006] !ESC 45, [2006] 4 I.R. 88 though that case covered a somewhat different factual situation and the principle applicable here long predated it."

In *State (Byrne) v. Frawley*, [1978] 2 IR 326, Henchy J. stated:

"Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: see the decision of this Court in Corrigan v. Irish Land Commission. The prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal. It was not until some five months after his trial that he first put forward the complaint that the jury had been formed unconstitutionally. Such a volte face is impermissible. Having by his conduct led the Courts, the prosecution (who were acting for the public at large) and the prison authorities to proceed on the footing that he accepted without question the validity of the jury, the prisoner is not now entitled to assert the contrary. The constitutional right to a jury drawn from a representative pool existed for his benefit. Having knowingly elected not to claim that right, it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

In *W.Q. v. The Mental Health Commission*, [2007] 3 IR 755, O'Neill J. stated at p. 771:-

"The principle that a legal or statutory provision which is subsequently found to be invalid may be sheltered from nullification and thus accorded the continuance of legal force and effect, where its invalidity is not asserted at the appropriate time, and where those affected by it and concerned with it, in good faith, have treated it as valid and acted accordingly, is now well established in our jurisprudence following the judgments of the Supreme Court in A. v. Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 I.R. 88."

In *Caffrey*, Charleton J. rejected the State's argument that the applicant was guilty of waiver or acquiescence, holding that the doctrine of waiver could not operate to defeat an Article 40 application. The Supreme Court upheld this finding. However, the within proceedings are by way of application for judicial review and, as such, the doctrine of waiver can apply.

In the instant case, the applicants were fully informed of the legal consequences of transferring their sentences to this jurisdiction. In fact, it was requirement under the 1995 Act that the effects of the transfer be explained to the applicants prior to the issuing of the respective warrants for the transfer of the applicants. Section 6(5) provides:-

"(5) The Minister may not consent to a request under subsection (1) or subsection (2) of this section, unless the

Minister is satisfied that all reasonable steps have been taken to inform the sentenced person concerned in writing in his or her own language-

(a) of the substance, so far as relevant to the person's case, of the international arrangements in accordance with which it is proposed to transfer him or her,

(b) of the effect in relation to the person of any warrant which may be issued in respect of him or her under section 7 of this Act, (c) of the effect in relation to the person of the law relating to his or her detention under such a warrant, and

(d) of the powers of the Minister under section 9 of this Act."

It was at all times made clear to the applicants that the management of their sentences would be governed by the law of this State and at no stage did the applicants raise any query or objection to the regime. Having taken the benefit of the transfer procedure, the applicants are not at this late stage permitted to turn around and seek to challenge the validity of the management of their life sentences. For these reasons I am of the view that, even had the applicants been entitled to succeed on their primary arguments, the relief sought would still have to be denied on grounds of waiver and acquiescence.

CONCLUSION
The applicants herein are currently serving sentences of imprisonment for life. These sentences are wholly punitive in nature, and in no way are the sentences based on preventative grounds. The management of the sentences is a matter of Irish law, as held in *Caffrey* and pursuant to provisions of the 1995 Act.

The validity of the Irish life sentence regime has been upheld on numerous occasions by the courts, most recently by the Supreme Court in *Whelan*, and I am compelled to accept that decision and the reasoning therein.

It must be stressed that the powers of commutation and remission vested in the executive constitute administrative acts, and do not encroach on the administration of justice by the courts. Further, the applicants have failed to demonstrate any breach of the provisions of the ECHR.

The applicants have also acted in such a way as to have precluded themselves from relief through the doctrine of waiver and acquiescence.

For these reasons, I would refuse the relief sought.