Neutral Citation Number: [2011] IEHC 190

THE HIGH COURT

JUDICIAL REVIEW

2007 7061 P

BETWEEN

NOEL CALLAN

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Michael Hanna delivered the 15th day of April, 2011

The plaintiff was sentenced to death on the 3rd of December, 1985, for his part in the murder of a member of An Garda Síochána. Subsequently, the President of Ireland, acting on the advice of the Government, commuted the death sentence to penal servitude for 40 years. The plaintiff brings these plenary proceedings. He says that the President's decision does not contain any conditions in relation to remission and submits that he is therefore eligible to earn and apply for standard remission in accordance with law.

Background Facts

In June, 1985 the plaintiff, along with one Michael McHugh, committed a robbery of the Labour Exchange in Ardee, Co. Louth. During the course of the robbery, shots were discharged by both the plaintiff and Mr. McHugh in order to intimidate the people in the Labour Exchange. As the pair attempted to escape from the scene, they were involved in a traffic collision, in which the plaintiff was injured. The plaintiff made his way up an avenue to a farmhouse. Meanwhile, Mr. McHugh fired a shot at a Garda, Sergeant Morrissey, who was pursuing him, hitting Sergeant Morrissey in the leg. Mr. McHugh then walked up to the injured Sergeant Morrissey and, in effect, executed him by shooting him in the head as he lay helpless and injured on the ground.

At his trial before the Special Criminal Court, the plaintiff gave perjured evidence in which he denied any involvement in the robbery or any involvement with Mr. McHugh in the murder of Sergeant Morrissey. The Court accepted the evidence of the various Gardaí and rejected the plaintiff's denial. On the 3rd December, 1985, the plaintiff was sentenced to death for the capital murder of Sergeant Morrissey. The plaintiff appealed his conviction to the Court of Criminal Appeal and the Court dismissed the appeal.

On the 29th May, 1986, the President of Ireland, acting on the advice of the Government, commuted the death sentence to penal servitude for forty years. The President's decision does not contain any conditions in relation to remission.

The Criminal Procedure Act was enacted in 1993. This Act allows a person convicted of an offence to apply to the Court of Criminal Appeal to quash his/her conviction where it is alleged that a new or newly-discovered fact shows that there has been a miscarriage of justice or that the sentence imposed is excessive. The plaintiff sought new ways to reopen his case. He made several applications to the registrar of the Court of Criminal Appeal for access to the cabinet documents relating to the commutation of his death sentence but was informed on behalf of the Minister for Justice on the 15th March, 1994, that such documents were private and confidential and covered by cabinet confidentiality.

The plaintiff maintains that the admissions he was alleged to have made were falsified. He obtained linguistic evidence that these admissions had been fabricated and applied to the Court of Criminal Appeal on the 2nd October, 2000, for an order pursuant to ss. 2 and 3 of the Criminal Procedure Act 1993 quashing the order of the Special Criminal Court. The plaintiff sought to have admitted as a newly-discovered fact the evidence disputing the statements he was alleged to have made.

The plaintiff subsequently engaged new counsel and acknowledged for the first time his part in the events leading up to the death of Sergeant Morrissey. He was advised that he should admit his part in the events and challenge the order of the Special Criminal Court on the ground that there was a new fact, *i.e.* absence of common design to murder a disabled pursuer, and a reasonable explanation why that fact had not been adduced at trial. The plaintiff applied for leave to amend his grounds of appeal to include reference to this fact.

In his affidavit, the plaintiff acknowledged that he had committed perjury in his original trial, that he took part in the robbery and that there was a common design to use firearms to execute the robbery and escape, including, if necessary, to disable a pursuer. He further acknowledged that Mr. McHugh was acting as part of this common design in firing at and disabling Sergeant Morrissey, but denied that there was at any time any common design to murder Sergeant Morrissey after he had been disabled.

The application was refused by the Court of Criminal Appeal in a judgment delivered on the 9th October, 2002.

Application for Certificate

The plaintiff sought leave to appeal to the Supreme Court under s. 29 of the Courts of Justice Act 1924 on the grounds that the decision involved a point of law of exceptional public importance and it was desirable, in the public interest, that an appeal should be taken. The Court of Criminal Appeal refused the application in a judgment delivered on the 31st July, 2003. The Court did "not consider it to be in the public interest that the applicant should be permitted to use his own criminal behaviour in committing perjury to be the basis of an appeal to the Supreme Court." The Court also observed that "[i]t was not argued by the applicant that absence of common design was a newly discovered fact, and that was not decided by this court."

In or around 2007, the plaintiff applied to the Attorney General for a certificate pursuant to s. 29 of the Courts of Justice Act 1924. The Attorney General refused the application on the grounds that the decision of the Court of Criminal Appeal did not involve a point of law of exceptional importance and that it was in any event not desirable in the public interest that an appeal should be taken to

the Supreme Court.

Plaintiff's Arguments
The plaintiff first argues that the President's decision of the 29th May, 1986, commuting the death sentence to a term of penal servitude, is clear and does not contain any conditions in relation to remission. Therefore, the plaintiff submits that he is eligible to earn and apply for standard remission in accordance with law.

Secondly, the plaintiff submits that the provisions of the Criminal Justice Act 1990 (hereafter "the Act of 1990") in relation to remission apply to him. Alternatively, he argues that the unequal treatment with respect to remission afforded to him and that afforded to prisoners convicted of capital murder after the passing of the Act of 1990 is inconsistent with the Constitution.

Thirdly, the plaintiff claims that the power to commute or change the death sentence to a term of penal servitude was a judicial power. The plaintiff submits that, once the President had exercised the power to commute the death sentence to a term of imprisonment, the fixing of the actual term of penal servitude was part of the administration of justice. It is submitted that, as a result, the President was only entitled to substitute a penalty provided for by law.

Fourthly, the plaintiff submits that even if the power conferred by Article 13.6 of the Constitution was executive in nature, his constitutional guarantee of a right to a fair trial, including his right to have punishment imposed by a court, was superior to any power of the executive conferred by Article 13.6.

Fifthly, the plaintiff claims that, even if the power conferred by Article 13.6 was executive in nature, the plaintiff claims that the Government was bound to observe, and failed to observe, fair procedures before commuting the death sentence to penal servitude.

Finally, the plaintiff argues that s. 1 of the Offences Against the Person Act 1861, as amended, which grounds his imprisonment, is incompatible with the State's obligations under the European Convention on Human Rights.

Relevant Articles of the Constitution
Article 13.6 of the Constitution, at the time of the commutation of the plaintiff's sentence, stated as follows:-

> *"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, except in capital cases, also be conferred by law on other authorities."*

The twenty first amendment to the Constitution removed the words "*except in capital cases*" from the above article.

Article 13.9 of the Constitution provides as follows:-

> *"The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any person or body."*

President's Decision
The decision of the President of the 29th May, 1986, commuting the death sentence to penal servitude, constitutes the legal authority for the detention of the plaintiff. As it is brief, the relevant decision can be reproduced in full:-

> *"I, PÁDRAIG Ó HIRIGHILE, UACHTARÁN NA hÉIREANN, on the advice of the Government, hereby commute to penal servitude for forty years, the sentence of death imposed by the Special Criminal Court on 3 December 1985 on*
>
> *Noel Callan*
>
> *on his conviction of the capital murder of Garda Sergeant Patrick Morrissey.*
>
> _____
> *UACHTARÁN NA hÉIREANN*
>
> *An 29ú lá seo de Bhealtaine, 1986"*

Although the death sentence was originally commuted to a term of "penal servitude", the plaintiff's detention is now to be treated as a term of imprisonment under s. 11(5) of the Criminal Law Act 1997, which provides as follows:-

> *"Any person who, immediately before the commencement of this Act, was undergoing or liable to undergo a term of penal servitude shall, if that person is or ought to be in custody at such commencement, be treated thereafter as if he or she were undergoing or liable to undergo imprisonment and not penal servitude for that term."*

Remission Entitlements
The plaintiff submits that, as the President's decision contains no conditions in relation to remission, he is eligible to earn and apply for remission, parole or temporary release in accordance with law and inter alia in accordance with the provisions of the Prison Rules 2007, S.I. No. 252 of 2007 (hereafter "the Prison Rules").

The statutory power of remission is contained in s. 23 of the Criminal Justice Act 1951 (hereafter "the Act of 1951"), as amended by the Act of 1990, which is worded as follows:-

> *"The Government may commute or remit, in whole or in part, any punishment imposed by a Court exercising criminal jurisdiction, subject to such conditions as they may think proper."*

In order to examine whether the plaintiff is eligible for remission under s. 23 of the Act of 1951, the Court must look to the distinction between commutation and sentencing. A 'sentence' is defined by s. 1 of the Transfer of Sentenced Persons Act 1995 as:-

"any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a limited or unlimited period of time on account of the commission of an offence" [Emphasis added]

To 'commute', as defined by Murdoch's Dictionary of *Irish Law*, 5th Ed., (Dublin, 2009) is "*to substitute one punishment for another*." Commutation is an exercise in clemency whereby a more lenient form of punishment is substituted for a sentence. The power of commutation has its origins in the royal prerogative of mercy which existed at least up to 1922. Unlike a pardon, the commutation of a sentence does not nullify the conviction.

The plaintiff was sentenced by the Special Criminal Court to death, and this sentence was commuted by the President, acting on the advice of the Government, to penal servitude for 40 years. The statutory power of remission granted to the Government is in relation to any punishment "imposed by a Court exercising criminal jurisdiction". The plaintiff is not serving a sentence of imprisonment imposed by a court; he was sentenced to death by the courts and this sentence was subsequently commuted by the President to 40 years penal servitude. The plaintiff is, therefore, serving a 'commutation', rather than a 'sentence'. It follows that s. 23 of the Act of 1951 does not apply to the detention of the plaintiff as his punishment was not imposed by a criminal court, but by the President.

Section 11(5) of the Criminal Law Act 1997 does not alter the right of the plaintiff to remission. Section 11(5) changes the nature of detention from penal servitude to that of imprisonment; it does not transform a commuted punishment into a sentence imposed by a court.

Regulation 59 of the Prison Rules provides *inter alia*:-

"(1) A prisoner who has been sentenced to –

(a) a term of imprisonment exceeding one month, or

(b) terms of imprisonment to be served consecutively the aggregate of which exceeds one month,

shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate.

(2) The Minister may grant such greater remission of sentence in excess of one quarter, but not exceeding one third thereof where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community."

The position of the plaintiff in relation to remission under the Prison Rules is similar to that of the plaintiff under the Act of 1951. The plaintiff was not sentenced to a "*term of imprisonment exceeding one month*"; he was sentenced to death. The commutation by the President of that death sentence to penal servitude for 40 years does not constitute a sentence, and consequently does not fall within the four corners of the Prison Rules.

Remission under the Criminal Justice Act 1990
The plaintiff claims that he is entitled to remission under s. 5 of the Act of 1990. In order to examine this claim, the relevant provisions of the Act of 1990 must first be examined in detail.

Section 3(1) of the Act of 1990 provides that s. 3 applies, *inter alia*, to the "*murder of a member of the Garda Síochána acting in the course of his duty*." Such a murder, or attempted murder, is declared by s. 3(2) to be a distinct offence from murder.

Section 4 then states that:-

"Where a person (other than a child or young person) is convicted of treason or of a murder or attempt to commit a murder to which section 3 applies, the court—

(a) in the case of treason or murder, shall in passing sentence specify as the minimum period of imprisonment to be served by that person a period of not less than forty years"

Section 5 provides as follows:-

"(1) The power conferred by section 23 of the Criminal Justice Act, 1951, to commute or remit a punishment shall not, in the case of a person serving a sentence passed on him on conviction of treason or of murder to which section 3 applies or an attempt to commit such a murder, be exercisable before the expiration of the minimum period specified by the court under section 4 less any reduction of that period under subsection (2) of this section.

(2) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct shall apply in the case of a person serving a sentence passed on him on conviction of treason or of murder to which section 3 applies or an attempt to commit such a murder as if he had been sentenced to a term of imprisonment equal to the minimum period specified by the court under section 4, and that period shall be reduced by the amount of any remission which he has so earned."

The Act of 1990 abolished the death penalty, and s. 3 of the Act sets out special provision for the murder of *inter alia* a member of An Garda Síochána, replacing capital murder with the s. 3 offence. Section 4 provides for a minimum sentence of 40 years for a conviction of treason or murder under s. 3, convictions which prior to the Act would have attracted the death penalty. Section 5(1) provides for the exercise of remission in relation to murder under s. 3, and s. 5(2) sets out the regime of remission applicable where a person has been convicted of treason or murder under section 3.

I am not persuaded that s. 5 of the Act of 1990 is applicable to the plaintiff. Section 5 establishes a remission regime applicable to persons convicted of murder to which s. 3 applies. However, the plaintiff was not convicted of an offence under s. 3 of the Act of 1990 and nor was he sentenced under s. 4 of that Act. Further, as noted above, Article 13.6 of the Constitution, at the relevant time, stated as follows:-

"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, except in capital

cases, also be conferred by law on other authorities." [Emphasis added]

Article 13.6, as worded up until 2001, prohibited the conferring by law on other authorities the power of the President to commute or remit capital sentences. Even if the effect of the Act of 1990 was to purport to allow remission of sentence where a person was convicted of an offence of capital murder, the provisions of Article 13.6 would render such legislation plainly unconstitutional.

Unequal Treatment in Relation to Remission
Article 40.1 of the Constitution reads as follows:-

> *"All citizens shall, as human persons, be equal before the law.*
>
> *This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

As noted above, s. 5(2) of the Act of 1990 provides *inter alia* as follows:-

> *The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct shall apply in the case of a person serving a sentence passed on him on conviction of treason or murder to which section 3 applies…"*

The plaintiff submits that s. 5(2) of the Act of 1990 is inconsistent with Article 40.1 insofar as it introduces a distinction with respect to remission between the plaintiff and those persons who happen to have been convicted of capital murder after the coming into operation of the Act of 1990. The plaintiff claims that the distinction lacks any objective rationale and is discriminatory. However, in examining whether the plaintiff has been discriminated against, it would be anomalous to compare him to persons sentenced for murder under s. 3 of the Act of 1990, as he was not sentenced under that Act. In determining whether discrimination has occurred, the plaintiff can only properly be compared with those persons sentenced to death under the Offences Against the State Act 1861 (hereafter "the Act of 1861"), as amended by the Criminal Justice Act 1964, whose sentences have been commuted to imprisonment. The plaintiff has not been treated unequally, nor has he been subjected to unfair discrimination. The plaintiff has not identified any one person who was convicted of capital punishment prior to 1990 who has had his/her sentence commuted and has subsequently been given the benefit of remission.

The plaintiff argues that there was no fair or objective reason for the Government to advise the President to commute his death sentence to a 40 year term of penal servitude without remission and subsequently to enact legislation providing for remission in capital cases; and that this inequality of treatment violates his constitutional guarantee of equality. However, Article 13.6, as it was worded up until 2001, expressly prohibited the conferring of *inter alia* the President's power of remission in relation to capital sentences on other authorities and so the legislature in 1990 could not have provided for remission in relation to the plaintiff.

Power to Commute as Judicial Power
The plaintiff argues that the power to commute the death sentence to a term of imprisonment was a judicial power and that, once the sentence had been commuted, the fixing of the actual term of imprisonment was part of the administration of justice. The plaintiff relies on *Deaton v. The Attorney General and The Revenue Commissioners* [1963] I.R. 170 in this regard. The Supreme Court in *Deaton* considered the question of the separation of powers and the respective functions of the legislature and the judiciary in relation to punishment. The Court stressed that the legislature may choose in advance to prescribe a mandatory penalty for any particular offence, but that once there is an element of discretion, either by reference to alternatives or to a range of penalties, the executive cannot be permitted to select the punishment to be imposed. Ó Dalaigh C.J. stated (at p. 183) as follows:-

> *"In my opinion the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive…"*

The plaintiff goes on to submit that, as the power to select a punishment is a judicial power, all of the requirements and guarantees of the administration of justice should apply to the exercise of the power; a trial in due course of law should have been conducted, as required by Articles 34 and 38.1 of the Constitution; the trial should have been conducted in public and the principles of fair procedures, including the right to be heard and the right to representation, applied; and the punishment imposed should have been proportionate.

Under the separation of powers enshrined in the Constitution, the legislature, the judiciary and the executive have different functions in relation to the criminal justice system. The legislature is empowered to make laws, including laws imposing penalties for criminal offences. The judiciary, pursuant to Articles 34 and 38, has the function of administering justice in criminal cases, which includes the determination of guilt or otherwise and the power to impose sentences upon a finding of guilt. The executive, under Article 13.6, has powers of commutation and remission in respect of any criminal sentence. The President has the power of pardon and, up until the twenty first amendment to the Constitution in 2001, the power to commute capital sentence was a particular function of the President and could not be conferred on any other authority.

The role of the President in relation to commutation of a sentence is constitutionally enshrined and so enshrined by the will of the people. The power of commutation was at the relevant time reserved only for the President, acting on the advice of the Government. Kennedy C.J. in *Lynham v. Butler (No.2)* [1933] I.R. 74 at 99 stated as follows:-

> *"The controversies which fall to [the courts] 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 Constitution expressly empowers the President to pardon, commute or remit any sentence. In *State (O.) v. O'Brien* [1973] I.R. 50, Budd J. held that, although the power to commute was essentially judicial in character, it had been expressly conferred by the provisions of the Constitution upon the President and, in certain instances, upon the executive or members thereof. In this regard, Budd J. stated (at pp. 70 to 71) as follows:-

> *"It was, of course, quite open to the People when enacting the Constitution to confer powers of a judicial character upon the Executive or to provide by the Constitution means whereby it could be done by Act of the Oireachtas; but that does not alter the nature of the power. The fact that this power can be exercised in such a way as to determine the*

length of a sentence by ending it or reducing it, while in the nature of judicial power, does not mean that it amounts to a power which can be equated with determining in advance what the period of the sentence shall be, or determining from time to time how long it shall endure…"

McLoughlin J. delivered a dissenting judgment in which he expressed the view (at pp. 79 to 80) that the rights of pardon and the power to commute or remit punishments were "functions corresponding to what formerly was the royal prerogative of mercy which… was an executive function." McLoughlin J.'s view was preferred by Geoghegan J. in *Brennan v. Minister for Justice* [1995] 2 I.L.R.M. 206 at 218, where he stated that:-

"The power to determine an appropriate sentence and the power to remit or reduce a sentence on merciful grounds would seem to me to be two very different kinds of power and it does not necessarily follow that because one is a judicial power the other is also a judicial power."

Geoghegan J. went on to state that it seems to have been accepted in several Irish decisions that the power under Article 13.6 is executive in nature, citing *People (D.P.P.) v. Aylmer* (Unreported, Supreme Court, 18th December, 1985) and *People (D.P.P.) v. Cahill* [1980] I.R. 8. The learned judge referred to the list of characteristics of the administration of justice set out by Kenny J. in *McDonald v. Bord na gCon* [1965] I.R. 217 at 231. These characteristics are noteworthy and deserve to be cited in full:-

"1. A dispute or controversy as to the existence of legal rights or a violation of the law;

2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

4. The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;

5. The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."

I am not convinced that the exercise of the power of commutation was judicial in nature. In the case at hand, the judicial exercise of justice comprised the conviction of the plaintiff and the sentencing of him to death. The function of the executive in this regard was, in the words of Kennedy C.J., to "carry into effect" the sentence imposed by the courts. It is my view that the phrase used by Kennedy C.J. suggests more than merely administering the sentence, and that the function of the executive in this regard also consists of the power to commute or remit sentences. Further, the power to commute does not fit in with the characteristics of the administration of justice identified by Kelly J. in *Bord na gCon*. The power of commutation is an executive exercise of mercy, rather than a judicial power. The President, at the time, was the only person empowered by the Constitution to commute the plaintiff's capital sentence.

The Exercise of Fair Procedures in the Commutation

The plaintiff claims that, even if the power of commutation is an executive power, the principles of natural and constitutional justice still apply to the exercise of the power. The plaintiff relies on *Brennan* (cited above) for the assertion that accountability for the exercise of any power, whether constitutional or statutory, is essential. As Geoghegan J. stated in *Brennan* (at p. 221):-

"[A] proper judicial review would be frustrated unless there were stated reasons recorded for the exercise of the power together with all information on which it was based."

Two cases relating to temporary release are worth mentioning at this juncture. In *Ryan v. Governor of Limerick Prison* [1988] I.R. 198 at 200, Murphy J. distinguished between the termination of temporary release and the refusal of temporary release and held that no right to constitutional justice arose in relation to the latter. Murphy J. stated as follows:-

"The temporary release is a privilege or concession to which a person in custody has no 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 in custody 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."

The above dicta of Murphy J. was cited with approval by the Supreme Court in *Dowling v. Minister for Justice* [2003] 2 I.R. 535 at 538, where Murray J. (as he then was) stated that:-

"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…"

Although *Ryan* and *Dowling* concerned remission in the form of temporary release, the principles applied in both are similarly applicable to the power of commutation. A sentenced prisoner does not have any right to commutation. The commutation of a sentence is a privilege afforded to a prisoner at the discretion of the President, acting on the advice of the Government. The power of commutation does not attract the right to constitutional justice. The commutation of the plaintiff's death sentence by the President constituted an exercise of clemency. The question for the President was not whether to punish the plaintiff, which would have attracted the protection of constitutional justice; the question was whether or not to replace the plaintiff's death sentence with a sentence that was more lenient. The President had an unfettered discretion as to whether to grant a commutation or not, save that he acted upon the advice of the Government. The commutation of the plaintiff's death sentence was a privilege granted to him at the discretion of the President. It follows that the decision whether to commute the plaintiff's death sentence was not subject to constitutional justice and the plaintiff did not have any right to fair procedures in this regard.

Incompatability of Section of the Offences Against the Person Act 1861 with the E.C.H.R.

The plaintiff submits that s. 1 of the Act of 1861 is incompatible with the State's obligations under the European Convention on Human Rights (hereafter "the E.C.H.R.").

Article 2 of the E.C.H.R. provides as follows:-

> *"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."*

Protocol No. 13 to the E.C.H.R. was signed and ratified by the State on the 3rd May, 2002, and entered into force on the 1st July, 2003 and provides for the abolition of the death penalty in all circumstances. Article 1 of the Protocol provides as follows:-

> *"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."*

The E.C.H.R. was incorporated in Ireland at a sub-constitutional level by the European Convention on Human Rights Act 2003 (hereafter "the Act of 2003"). In determining whether the plaintiff can rely on the Act of 2003, it is necessary to examine the relevant provisions thereof. Section 2 of the Act provides as follows:-

> *"(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.*
>
> *(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."*

Section 5 gives the courts power to make a declaration of incompatibility:-

> *"(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration… that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.*
>
> *(2) A declaration of incompatibility—*
>
> > *(a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made…"*

The principle issue that arises in this respect is whether the Act of 2003 is retrospective in character, and therefore applicable to the Act of 1861.

The plaintiff first submits that s. 5 of the Act of 2003 applies to any statutory provision and is neutral as to whether the provision is in operation or repealed or otherwise. The plaintiff relies upon *Condon v. Minister for Labour* [1981] I.R. 62 in this regard. *Condon* concerned a challenge to the constitutional validity of the Regulation of Banks (Remuneration and Conditions of Employment) (Temporary Provisions) Act 1975. Before the issue could be tried, the defendant Minister took such steps as to cause the expiry of the Act and applied to have the case dismissed. The Supreme Court held that temporary legislation should not be immune from judicial review.

The plaintiff also claims, in relation to the jurisdiction issue, that a declaration of incompatibility under s. 5 does not have any retroactive effect and only operates prospectively. It is a well established principle of Irish law that statutes do not act retrospectively unless a contrary intention appears on the face of the legislation. Article 15.5 of the Constitution provides as follows:-

> *"The Oireachtas shall not declare acts to be infringements of the law which were not so at the time of their commission."*

In *Sloan v. Culligan* [1992] 1 I.R. 223, the Supreme Court held that Article 15.5 prohibits retroactivity in relation to both civil and criminal legislation. The Court held (at p. 272) that Article 15.5 constitutes:-

> *"an expressed and unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or the criminal law."*

Finlay C.J., however, expressly stated that Article 15.5 did not contain, nor was it to be interpreted as containing, any general prohibition on the retrospection of legislation in general; its application is confined to situations where apparently innocent actions are retrospectively construed as constituting infringements of the law.

In *Dublin City Council v. Fennell* [2005] 1 I.R. 604, the Supreme Court considered the temporal nature of the Act of 2003 Act. Kearns J. (as he then was) had regard to Article 15.5 of the Constitution and the fact that a victim may recover damages under s. 3 of the Act of 2003 and held as follows:-

> *"These consequences, which arise where a breach of the Act of 2003 is found to have occurred, strongly suggest that the Act of 2003 should, for the purpose of complying with the spirit of Article 15.5, be interpreted as having prospective effect only."*

Kearns J. examined in general the retrospective nature of legislation and stated (at p. 631) that:-

> *"In a matter of such far-reaching importance it would be a considerable omission on the part of the draftsmen not to include a provision for retrospective application to past events if such was the intention."*

The learned judge concluded (at p. 637) that "*the Act of 2003 cannot be seen as having retrospective effect or as affecting past events*."

Following the reasoning of Kearns J. in *Fennell* I do not believe that the Act of 2003 has retrospective effect. In relation to the retroactivity of s. 5 of the Act of 2003, that provision expressly states that regard should be had to s. 2 of the Act of 2003. Section 2(2) applies *inter alia* to "*any statutory provision or rule of law in force immediately before the passing of this Act".* Section 1 of the Act of 1861 was repealed by the Act of 1990 and so could not be said to be in force immediately before the passing of the 2003 Act.

The plaintiff argues that the plaintiff's death sentence is valid and extant, albeit commuted to penal servitude and suggests that the

Act of 1861 can be impugned on that basis. However, relief may not be sought in respect of the judicial act of imposing sentence as the courts are excluded from the definition of 'organ of the State' in s. 1 of the Act of 2003. Further, a declaration can only be granted in respect of a statutory provision or rule of law, and is not a suitable relief in respect of the imposition of a particular sentence. Moreover, the order of the Special Criminal Court is no longer the basis on which the plaintiff is imprisoned. The plaintiff is currently imprisoned on foot of a decision of the President commuting his death sentence to a term of penal servitude, now imprisonment under the Act of 1990. From the date of commutation, the plaintiff's death sentence ceased to exist and the plaintiff lacks the standing to impugn the Act of 1861 on that basis.

Conclusion
I do not believe that the plaintiff is eligible for remission under s. 23 of the Criminal Justice Act 1951 as he is not serving a "sentence" which could be subject to remission, but rather is serving a commutation. Similarly, the plaintiff is not entitled to remission pursuant to the Prison Rules because his imprisonment is based on a commutation order from the President, rather than a sentence imposed by a court.

The plaintiff is not entitled to remission under s. 5 of the Criminal Justice Act 1990. Section 5 of the Act of 1990 provides for remission for people convicted of murder to which section 3 applies, *i.e.* the murder of a member of An Garda Síochána acting in the course of his duty. However, the plaintiff was not convicted of an offence under s. 3 of the Act of 1990, nor was he sentenced under s. 4 of that Act. Further, at the time of enactment of the Act of 1990, Article 13.6 of the Constitution expressly prohibited the conferring of the power of the President to remit capital sentences on other authorities; so even if the Act of 1990 had purported to allow for remission of the plaintiff's sentence, Article 13.6 would render such provision unconstitutional.

Article 40.1 of the Constitution guarantees equality before the law. However, the plaintiff has not been treated unequally simply because there is a difference between his remission entitlements and those of persons sentenced under the Act of 1990; and nor has the plaintiff been subjected to unfair discrimination. It is the nature of legislation that it changes the legal landscape and the fact that the Act of 1990 altered the remission entitlements of people who had yet to be convicted and sentenced simply reflects the prospective nature of the legislation, and cannot amount to discrimination.

The power of commutation is executive, rather than judicial in nature. The function of the executive in this regard consists not only of administering the sentence imposed by the court, but also the power to commute or remit sentences. Further, the power to commute does not fit in with the characteristics of the administration of justice identified in *McDonald v. Bord na gCon* [1965] I.R. 217 and constitutes an executive administration of justice, rather than a judicial administration of justice.

In relation to the plaintiff's claim that the principles of natural and constitutional justice apply to the commutation by the President, it must be stressed that the commutation constituted an exercise in clemency by the President. The commutation was a privilege which was accorded to the plaintiff at the discretion of the President, acting on the advice of the Government, and therefore does not attract the protection of constitutional justice.

The plaintiff seeks a declaration pursuant to s. 5 of the Act of 2003 that s. 1 of the Act of 1861 is incompatible with the protection of the right to life under the E.C.H.R. Although it is decidedly unclear why the plaintiff would seek to impugn a provision of legislation which was repealed over two decades ago, I nonetheless find that the provision in question is not incompatible with the State's obligations under the E.C.H.R. The Act of 2003 is not retrospective in effect. Section 5 of the Act of 2003 states that regard should be had to s. 2, which latter provision states *inter alia* that the provision applies to any legislation or rule of law "*in force immediately before the passing of this Act*". Having been repealed by the Act of 1990, s. 1 of the Act of 1861 Act was not in force immediately before the passing of the Act of 2003 and so cannot be the subject of a declaration of incompatibility under s. 5 of the Act of 2003.

Where, therefore does all of this now leave the plaintiff? He can, no doubt, advance substantial arguments, at this remove from the crime for which he has been convicted, that his circumstances should be looked at afresh. Although not of particular relevance to the deliberations of this Court, evidence was advanced that the plaintiff has flourished both intellectually and artistically while in prison. Judging as best one can from photographs of his artwork, he displays outstanding talent. This speaks well of him. So too it exemplifies the dedication and commitment of prison staff who have helped nurture his gifts.

Skilful efforts were employed by the plaintiff's lawyers to diminish the plaintiff's role in this killing. However, the courts have pronounced his guilt, albeit by common design, and I may not and will not rewrite or otherwise look behind their orders. Thus, though some might persuasively invoke fairness and compassion in aid of the plaintiff's plight, others, understandably, may take the view, given the appalling nature of this crime, inflicted as it was upon a courageous servant of the State, that the plaintiff has already received his full quotient of mercy. This Court cannot call in aid such conflicting sentiments to attempt to shoehorn the plaintiff into or, indeed, out of a legal framework, statutory or regulatory. He simply does not fit. In my opinion, these matters and their potential resolution (if any there be) lie outside the walls of these courts.

For the reasons given, the plaintiff's claim is dismissed.