Neutral Citation Number: [2007] IEHC 374

THE HIGH COURT

[2004 No. 38 J.R.]

BETWEEN

PETER WHELAN

PLAINTIFF

AND

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

DEFENDANTS

THE HIGH COURT

[2005 No.4326 P]

BETWEEN

PAUL LYNCH

PLAINTIFF

AND

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

DEFENDANTS

Judgment delivered by Ms. Justice Irvine on the 5th day of October, 2007.

The parties

1. The plaintiff in the first action, Peter Whelan ("the first named Plaintiff"), was charged with the murder of a young woman named Nicola Sweeney and the attempted murder of her friend Sinead O'Leary whom he had confronted in the Sweeney household on the evening of 27th April, 2002. Both young women were savagely stabbed in the absence of any provocation and regrettably Nicola Sweeney died. Sinead O'Leary was badly injured.

2. The first named plaintiff pleaded guilty to both of the aforementioned charges on the 27th April, 2002. At his trial in December, 2002 the first named plaintiff received a mandatory life sentence in respect of his plea of guilty to the murder of Nicola Sweeney. The trial judge further imposed a sentence of fifteen years on the first named plaintiff in respect of his attempted murder of Sinead O'Leary with the latter sentence directed to run consecutively to the former.

3. The Court of Criminal Appeal in June, 2003 reversed the structure of the sentences so that the life sentence would be consecutive to the fifteen years sentence imposed in respect of the attempted murder offence.

4. Paul Lynch, the plaintiff in the second action ("the second named plaintiff") was charged with murder and robbery in respect of events involving a taxi driver, namely, William Campbell on 22nd September, 1995. Mr. Campbell was known by the second named plaintiff to have had a significant amount of cash on his person on the evening concerned. The second named plaintiff, charged with this knowledge, went home to his house, retrieved a frying pan and then proceeded to Mr. Campbell's home where he struck his victim seven to eight times prior to robbing him of £65. Mr. Campbell died as a result of this assault.

5. The second named plaintiff having been sentenced to life imprisonment following upon his plea of guilty to the charge of murder then appealed to the Court of Criminal Appeal on the grounds that his legal team had coerced him to so plead. The appeal was rejected in July, 1998 and the second named plaintiff continues to serve his sentence in respect of the aforementioned conviction.

6. The second named plaintiff's continued detention was considered by the Parole Board in 2004, and in July, 2004 the first named defendant, having considered the report of the Parole Board, determined that the second named plaintiff should not be released from prison and that any further application in respect of his sentence would not be considered for a further period of three years.

The nature of the proceedings

7. The statement of claim of the first named plaintiff was delivered on 15th March, 2004, and the statement of claim of second named plaintiff on 8th February, 2006. Whilst there are significant differences in the pleadings, particularly in respect of the reliefs sought by these plaintiffs, the substantial issues of law that this Court is asked to engage with overlap to the extent that it is appropriate that the issues of law arising in both claims be dealt with together.

8. The plaintiffs complain that s. 2 of the Criminal Justice Act, 1990 which provides for a mandatory life sentence for murder is unconstitutional. In particular it is claimed that this section offends Articles 6, 34.1, 38.1, 40.4.1, 40.3.1 and 40.3.2 of the Constitution.

9. The plaintiffs allege that any individual sentenced to a mandatory life sentence for murder is unlikely to serve out such sentence. The plaintiffs contend that it is almost a certainty that at some point in time in the course of their respective lifetimes, following upon a report from the Parole Board, that the first named defendant will direct their release thus ultimately deciding upon the duration of their imprisonment.

10. In terms of Irish domestic law the principle complaints made by the plaintiffs are as follows:-

> 1. That s. 2 of the Criminal Justice Act, 1990, insofar as it mandates a judge to impose a mandatory life sentence for murder, amounts to a sentencing exercise on the part of the Oireachtas and that the same offends the doctrine of the separation of powers enshrined in the Constitution.
>
> 2. That insofar as s. 2 of the Criminal Justice Act, 1990 leaves the trial judge no discretion whatsoever as regards the sentence to be imposed that the same offends the doctrine of proportionality which it is alleged is enshrined in the Constitution.
>
> 3. That insofar as it is the first named defendant who is likely to ultimately release the plaintiffs from their imprisonment during their lifetime that the first named defendant in exercising such power is carrying out a judicial function and that his actions in this regard offend the doctrine of the separation of powers enshrined in the Constitution.

11. In relation to the European Convention on Human Rights Act, 2003 the plaintiffs allege:-

1. That s. 2 of the Criminal Justice Act, 1990, which mandates a mandatory life sentence for all convictions of murder, offends Article 3 of the European Convention on Human Rights ("the convention"). The plaintiffs also submit that they have further been subjected to inhuman and degrading treatment by virtue of the fact that whilst mandatory life sentences have been imposed upon them they know that at some period during their lives they are likely to be released but have no way of assessing how or when release will occur in contravention of Article 3 of the Convention.

2. That the role of the Parole Board as operated since its establishment in 2001 and the exercise by the Minister of his power to commute or remit sentence or to direct the temporary release of prisoners serving mandatory life sentences is incompatible with Articles 5(1) and 5(4) of the European Convention. The plaintiffs submit that the decision of the Minister made, following upon a report of the Parole Board, in any individual case amounts to a sentencing exercise on the part of the Executive contrary to Article 5(1) of the Convention. It is further alleged that they have been denied an appropriate mechanism to review their continued detention in breach of Article 5(4) of the Convention. In particular it is alleged that the decision of the Minister made in July, 2004 that he would not consider any further submissions by the second named plaintiff regarding his continued imprisonment for a further period of three years was in breach of his alleged right to have his continued detention reviewed on a regular and frequent periodic basis in accordance with Article 5(4) of the Convention.

3. That the role of the Parole Board and the process whereby the Minister considers the continued detention of an offender serving a mandatory life sentence for murder contravenes the rights of the plaintiffs as provided for in Article 6 (1) of the Convention. It is alleged that such continued detention may only be decided by an independent judicial body which will conduct a hearing in public and at which hearing the plaintiffs will be afforded, *inter alia*, adversarial rights.

12. Fundamental to the plaintiffs' claim under the Convention are a number of pleas which are all premised upon an assertion that a mandatory life sentence in Ireland comprises both a penal and preventative component the former being a period in respect of retribution for the offence committed and the latter being a period of detention justified to protect the public against the notional dangerousness of the offender. It is this latter period which is the focus for the plaintiffs' claims made under Articles 5(4) and 6(1) of the Convention. It is these Articles that have been held to guarantee to an offender who has served the retributive part of his sentence a right to have his continued detention reviewed regularly by an independent body so that the circumstances and factors relevant to assessing his continued dangerousness can be reviewed as they are likely to vary and fluctuate over time.

The defence

13. The defendants deny that s. 2 of the Criminal Justice Act, 1990 is unconstitutional. The defendants argue that a mandatory life sentence is proportionate and that the mandatory nature of the life sentence provided for in legislation does not offend the doctrine of the separation of powers. The defendants deny that the role of the first named defendant in exercising his power to commute or remit a sentence under ss. 23 and 23(a) of the Criminal Justice Act, 1951 or his power to grant temporary release pursuant to the provisions of the Criminal Justice Act, 1960 as amended by the Criminal Justice (Temporary Release of Prisoners) Act, 2003 offends the doctrine of separation of powers provided for in the Constitution.

14. The defendants in their defence deny that any life sentence imposed in respect of a charge of murder has both penal and preventative components as contended for by the plaintiffs. The defendants further deny that there is anything offensive about the Oireachtas selecting a mandatory life sentence to reflect the gravity with which the offence of murder is viewed.

15. The defendants deny all alleged breaches of the Convention. The defendants submit that a mandatory life sentence for murder is entirely punitive in nature and does not offend Article 3 of the Convention and deny that the imposition of such sentence or the uncertainty as to the potential date for the prisoner's likely release amounts to inhuman or degrading treatment. The defendants contend that the decision making process whereby a mandatory life sentence may be commuted or remitted by the decision of the first named defendant in exercising his discretion under ss. 23 and 23(a) of the Criminal Justice Act, 1951 (as amended) following a consideration of the continued detention of any prisoner by the Parole Board does not amount to a sentencing exercise so as to enable the plaintiffs to contend for any alleged breach of Article 5(4) or Article 6(1) of the Convention. The defendants assert that the plaintiffs are not entitled to have their continued detention periodically reviewed in the manner provided for by Article 5(4) of the Convention in circumstances where their life sentences are entirely punitive in nature. The defendants formally object to the plaintiffs' entitlement to rely upon the Convention save to the extent that the same is provided for by the European Convention on Human Rights Act, 2003. The defendants rely upon s.2 of the said Act, which requires the Court to interpret any legislation or rule of law under challenge insofar as possible in a manner compatible with the state's obligations under the Convention, in support of their assertion that s. 2. of the Criminal Justice Act, 1990 does not offend the plaintiffs' Convention rights. Finally the defendants submit that the only relief open to the plaintiffs is that conferred by s.5 of the European Convention on Human Rights Act, 2003 namely, a declaration of incompatibility in respect of a statutory provision or rule of law which in this case is s.2 of the Criminal Justice Act,1990.

Relevant historical material

16. Prior to considering the constitutionality of s. 2 of the Criminal Justice Act, 1990 it is relevant to set out, by way of historical background, a number of the constitutional and legislative provisions relevant to the matters in dispute in these proceedings.

17. Murder, treason and piracy carried the death penalty at the time of the establishment of the Irish Free State in 1922. The Criminal Justice Act of 1964 abolished the death penalty for all offences except treason and certain categories of offences under the Defence Act, 1954, the Offences against the State Act, 1939 and capital murder. The Criminal Justice Act of 1990 abolished the death penalty in its entirety but provided instead for the imposition of a mandatory life sentence. In 2001 the Constitution was amended at Article 15.5.2 to impose a constitutional ban on the death penalty. It is important, in circumstances where all legislation must be presumed to be constitutional, that the plaintiffs' claim that s. 2 of the Criminal Justice Act, 1990 is unconstitutional is viewed against the backdrop of this constitutional amendment.

18. The precursor to the mandatory life sentence for murder was the death penalty. The death penalty was imposed by s. 1 of the Offences against the Person Act, 1861 which provided as follows:-

"Whosoever shall be convicted of murder shall suffer death as a felon."

19. Section 2 of the Offences Against the Person Act, 1861, mandated the trial judge to pronounce a death sentence upon any individual convicted of murder and s.5 provided that an individual convicted of manslaughter would be liable, at the discretion of the court, to imprisonment for life.

20. Section 1 of the Criminal Justice Act, 1964, provided for the removal of the death penalty save in respect of the offences of

treason, capital murder and a number of other designated types of murder:-

21. Section 2 of the Criminal Justice Act, 1964 provided that:-

> "A person who but for this Act would be liable to suffer death shall be liable to penal servitude for life".

22. Section 2 of the Criminal Justice Act, 1990 provides that:-

> "A person convicted of treason or murder shall be sentenced to imprisonment for life."

23. Section 4 of the same Act directs that the court must, when passing sentence in relation to certain types of murder set out at s. 3 of the Act, which includes for example the murder of a member of An Garda Síochána, specify that the minimum period of imprisonment to be served by that person will be not less than forty years.

24. The Twenty - First Amendment of the Constitution Act, 2001 prohibited the death penalty and provided for the removal of references to the death penalty. Article 15.5.2 of the Constitution now provides:-

> "The Oireachtas shall not enact any law providing for the imposition of the death penalty".

25. As a result of the provisions set forth above the death penalty has been abolished for all classes of murder albeit more recently for cases of capital murder and those other forms of murder provided for by s.3 of the Criminal Justice Act, 1990. It is also manifest from the mandatory life sentence provided for in substitution for the death penalty that the legislature was intent upon continuing to note society's abhorrence to the deliberate and intentional infliction of injury upon another fellow citizen so as to intend to kill or cause serious bodily harm to them. Given the plaintiffs' complaint regarding the proportionality of a mandatory life sentence it is important to set out the text of s. 4 of the Criminal Justice Act, 1964 which defines the murder in the following terms:-

> "4(1) Where a person kills another person unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not."

26. Apart from mandatory life sentences in respect of murder charges it is of course open to a court in other types of serious offences such as those of manslaughter or rape to impose a life sentence upon a convicted individual but the court in so doing will be exercising its own discretion in determining the appropriate sentence to be one of life imprisonment.

The power of the first named defendant to commute or remit punishment or grant temporary release to prisoners.
27. Irrespective of the sentence prescribed by a trial judge in respect of any offence, the first named defendant has powers to commute or remit that punishment or alternatively to grant the person convicted of any such offence temporary release from prison. The power of the first named defendant in this respect has its origins in the constitutional and legislative provisions set out below.

28. Article 13(6) of the Constitution provides 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 also be conferred by law on other authorities."

29. Section 23(1) of the Criminal Justice Act, 1951 provided as follows:-

> "Except in capital cases, 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."

30. Section 9 of the Criminal Justice Act, 1990 amended s. 23(1) of the Criminal Justice Act, 1951 referred to above by deleting the words "except in capital cases" thereby extending the government's right to commute or remit a prisoners sentence in any type of case.

31. The government's right to delegate the power to commute or remit a sentence to the Minister for Justice was provided for in s. 23(3) of the Criminal Justice Act, 1951 which provided as follows:-

> "The government may delegate to the Minister for Justice any power conferred by this section and may revoke any such delegation."

32. Section 17 of the Criminal Justice (Miscellaneous) Provisions Act, 1997 provided for the deletion of s. 23(3) of the 1951 Act and for the same provision to be replaced by the following namely:-

> "23A(1) The Government, may by order, delegate to the Minister for Justice any power of the Government under section 23 of this Act."

33. The Prison Rules 1947, made under the authority of the Prisons (Ireland) Act, 1907 provide in rule 38(1):-

> "A convicted prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences, for a period exceeding one calendar month, shall be eligible, by industry and good conduct, to earn a remission of a portion of his imprisonment, not exceeding one-fourth of the whole sentence, provided that the remission so granted does not result in the prisoner being discharged before he has served one month."

34. Both the Criminal Justice (Miscellaneous Provisions) Act, 1997 and the Prisons Act of 2007 give power to the Minister for Justice to make rules for the regulation and good government of prisons. Section 35(2)(f) of the Prisons Act, 2007 provides that such rules may provide for the remission of a portion of a prisoners sentence. The Prisons Rules, 2007 have been implemented in S.I. No. 252 of the 2007, but R. 59 which deals with the rights of certain categories of prisoners to remission is stated at R. 59(3) not to apply to a prisoner sentenced to life imprisonment.

35. Section 2 of the Criminal Justice Act, 1960 provides as follows:-

> "The Minister may make rules providing for the temporary release, subject to such conditions (if any) as may be imposed

> in each particular case, of persons serving a sentence of penal servitude or imprisonment, or of detention in Saint Patrick's Institution."

36. Section 2 of the Criminal Justice Act, 1960 was substantially amended by the Criminal Justice (Temporary Release of Prisoners) Act, 2003 which set out in some detail (*inter alia*) the matters that the Minister should have regard to before giving a direction for temporary release pursuant to the Act. Section 110 of the Criminal Justice Act, 2006 also amended s. 2 of the Criminal Justice Act, 1960 but the terms of this amendment are not significant in the context of these proceedings.

37. The Parole Board was appointed by the Minister for Justice on 4th April, 2001, and this body has not as yet been placed on any statutory footing. The role of the Parole Board is stated to be to advise the Minister in relation to the administration of lengthy custodial sentences. The first named respondent refers the cases of prisoners sentenced to lengthy periods of incarceration to the Parole Board for review. In general, prisoners sentenced to fourteen years or more, including those serving a mandatory life sentence for murder (with the exception of those convicted of murder under s. 3 of the Criminal Justice Act, 1990), have their sentence reviewed after seven years have been served. The Parole Board thereafter makes a recommendation to the first named respondent.

38. It is clear from the provisions set out above that the life sentences imposed upon each of the plaintiffs in this action derive from legislation enacted by the Oireachtas and in particular s.2 of the Criminal Justice Act, 1990. The mandatory sentences were only imposed by the trial judge in each case following pleas of guilty by the plaintiffs to the respective murder charges and only after they had availed of the full panoply of rights accorded in this jurisdiction to persons accused of such offences. Notwithstanding their respective life sentences, it is accepted by the plaintiffs and defendants alike that at some time in the course of their lifetimes, the plaintiffs are likely to be released from incarceration and that they may ultimately enjoy a commutation or remission of their life sentences or temporary release therefrom in accordance with the constitutional and legislative provisions set out above.

39. From a consideration of the legislative and constitutional provisions referred to above it appears that there is something of a distinction to be drawn between the exercise by the Minister of his right to remit or commute a sentence as envisaged by Article 13.6 of the Constitution and as provided for in ss. 23 and 23(a) of the 1951 Criminal Justice Act, (as amended) as opposed to his right to grant temporary release to a prisoner under the provisions of s. 2 of the Criminal Justice Act, 1960 as amended by the Criminal Justice (Temporary Release of Prisoners) Act, 2003. The former is a general executive power which enables the Minister to engage with the continued detention of all prisoners sentenced by the courts whilst the later provides for the temporary release of prisoners under a specific statutory regime.

40. In *Kinahan v. The Minister for Justice* [2001] 4 I.R. 454 Hardiman J. considered the nature of temporary release provided for under the Criminal Justice Act, 1960 and the Prisoners (Temporary Release) Rules, 1960. In so doing, Hardiman J. held that temporary release was not a specific exercise of the general power of commutation or remission envisaged in the Constitution but rather appeared to be a statutory creation under specific legislation. He stated:-

> "It is clear from the above – mentioned Statute and Rules that temporary release is envisaged as a release from custody for a limited period during the currency of a sentence, subject to conditions and carrying an obligation to return to the prison at its conclusion. In this it seems quite distinct from the general executive power of remission."

41. It appears to this Court that the first named defendant can grant remission or commutation of any prison sentence. When executive clemency is granted then the sentence formerly imposed is at an end. Any subsequent adverse behaviour on the part of the former offender has to be dealt with afresh in new criminal proceedings and the prisoner cannot be taken back into custody on foot of his former custodial sentence. On the other hand, temporary release as provided for in s. 2 of the Criminal Justice Act, 1960 as amended by the Criminal Justice (Temporary Release of Prisoners) Act, 2003 and s. 110 of the Criminal Justice Act, 2006 is designed to cover a definite period when the prisoner is permitted to be at large subject to compliance with conditions which, if broken, will lead to the revocation of such release.

42. In the course of the hearing, little emphasis was placed upon the distinction that the court should draw between temporary release as provided for under statute and the rights of the first named defendant to remit or commute sentence as envisaged in Article 13.6 of the Constitution. However, the plaintiffs, for the purposes of supporting their case on each of the issues referred to above rely upon the fact that the first named defendant uses the temporary release legislation for the purposes of deciding upon the continued detention or otherwise of prisoners serving life sentences for murder and also as the basis upon which they may ultimately be released. In particular, great reliance has been placed on a statement made by the then Minister for Justice on 24th March, 2006, wherein he made reference to how prisoners serving life sentences were likely to be dealt with by the executive. He stated as follows:-

> "Even when released life sentence prisoners remain subject to supervision indefinitely. This supervision is carried out on behalf of my Department by the Probation and Welfare Service. In all such cases there is the condition that the person released must be of good behaviour. If he or she comes to the attention of the authorities for any breach of temporary release conditions, he or she may be arrested without warrant and taken back into custody without the need for fresh proceedings and may be held in custody thereafter at my discretion."

43. It appears therefore to be the practice of the first named defendant to use the Parole Board to assist him in coming to his decision as to whether he should afford to those serving lengthy prison sentences, including those serving mandatory life sentences, any relief whatsoever from the punishment prescribed by the courts. All of these prisoners are in the same position, namely, they enjoy no legal right to the commutation or remission of their sentences. On the other hand, all prisoners, irrespective of the duration of their sentences appear to enjoy the right to apply for temporary release on the grounds specified in s.1 of the Criminal Justice (Temporary Release of Prisoners) Act, 2003 and in considering these applications regard by the Minister must be had to the matters set out in s.2 of the said Act. Even though the wording of s. 1 seems to envisage that temporary release will be granted for a definitive period, there does not appear to be anything offensive in the Minister granting temporary release for a period up to an including the remaining lifetime of an individual subject to their continued compliance with any given set of conditions.

The Irish Dimension

44. The plaintiffs propound their challenge to the constitutionality of s. 2 of the 1990 Criminal Justice Act on three major grounds namely:-

> (a) An assertion that by removing from the trial judge any discretion regarding the sentence to be served by an individual pronounced guilty of murder that the legislature is carrying out a sentencing exercise in breach of the doctrine of the separation of powers.

(b) That insofar as the mandatory life sentence is the same for every murder irrespective of its gravity and individual circumstances, that such a sentence is offensive to the doctrine of proportionality allegedly enshrined in the Constitution.

The plaintiffs complain that the inability of the trial judge to give any guidance as to the length of sentence he believes ought to be actually served by an individual, the date at which the continued detention of the individual should be reviewed or indeed an indication as to how he perceives the gravity of the offence in comparison to other cases involving the same offence, offends the concept of proportionality.

(c) That the exercise by the first named defendant of his power to determine the date upon which the mandatory life sentences will conclude amounts to a sentencing exercise on the part of the executive in breach of the doctrine of the separation of powers.

A. Separation of powers: Does the mandatory life sentence for murder provided for in s. 2 of the Criminal Justice Act, 1990 amount to an unconscionable interference by the legislature with the judicial function such as to offend the doctrine of the separation of powers?

45. Section 2 of the Criminal Justice Act, 1990 enjoys the presumption of constitutionality and the onus is on the plaintiffs to displace this presumption. The plaintiffs must also prove their assertion that the provisions of s. 2 of the Criminal Justice Act, 1990 are unconstitutional notwithstanding the fact that the section enjoys the protection of the double construction rule which requires the court to construe the section in accordance with the Constitution if there are two interpretations available, one of which favours the validity of the Act. See *East Donegal Cooperative Society v. The Attorney General [*1970] I.R. 317.

46. Article 6 of the Constitution provides as follows:-

> "1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good."

47. The Constitution specifically envisages that the democratically elected representatives of the public will enact laws for the benefit of society and the public good. Constitutional and legislative change inevitably occurs by reason of changes in society and public opinion carried through by the country's publicly elected representatives. One example of such constitutional and legislative change was provided for in s. 1 of the Criminal Justice Act, 1964 which abolished the death sentence for murder and the subsequent constitutional change in 2001 when, by the passing of the Twenty - First Amendment to the Constitution of 1937 it was provided that the death penalty would be prohibited and all references to the death penalty removed therefrom.

48. In considering the plaintiffs' contention that s. 2 of the Criminal Justice Act, 1990 offends the Constitution in so many respects the court must consider the distinct functions which are performed by the judiciary, the Oireachtas and the executive. It is clear from the Constitution that the Oireachtas, as the democratically elected body representing the public, has the power to make laws which prescribe a variety of penalties for various criminal offences. The right of the Oireachtas to make such legislative provisions has never been doubted and one of the main issues in this case is whether or not, in providing for a mandatory life sentence in respect of all convictions for murder, the Oireachtas has strayed beyond the boundary which protects the role of the judiciary as enshrined in the Constitution.

49. The Constitution, in Article 34 requires justice to be administered in courts and gives the court jurisdiction in all criminal matters. Article 38 guarantees that no person will be deprived of their liberty save by trial before a court. Thus, the Constitution envisages that a court will be the body to determine the guilt of an individual and also to impose sentence consequent upon that guilt. The Constitution itself, nonetheless affords to the executive a role in relation to the administration of justice. This role is to be found in Article 13.6 of the Constitution which provides as follows:-

50. Article 13.6:-

> "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 a power of commutation or remission may also be conferred by law on other authorities."

51. As referred to earlier in this judgment the powers vested in the President to commute or remit punishment are now exercised by the Minister for Justice.

52. Whilst the plaintiffs assert that the Oireachtas, in providing that a mandatory life sentence be imposed in respect of the offence of murder, has usurped the powers of the judiciary, the plaintiffs have not been in a position to support this assertion by reference to existing case law. Indeed, such case law as exists undermines the assertion that the legislature is precluded from prescribing a mandatory sentence for a particular class or type of offence.

53. The issue of the separation of powers and the boundaries between the legislature and judiciary in relation to sentencing were considered in *Deaton v. Attorney General* [1963] I.R. 170.

54. In *Deaton* the court condemned the trespass by the executive into the judicial domain when considering the constitutionality of s. 186 of the Customs (Consolidation) Act, 1876. That legislation conferred on the Revenue Commissioners the power to select between two penalties provided for in the legislation namely:-

> (i) treble the value of the goods concerned or
>
> (ii) a charge of £100.

55. O'Dalaigh C.J. made it clear that legislation could provide for a fixed penalty but that if a range of penalties was available the selection of such a penalty could not be left to any arm of the executive such as the Revenue Commissioners but would have to be exercised by the court. At p. 181, O'Dalaigh C.J. stated that:-

> "It is common ground that it is for the Legislature, when it creates an offence, to prescribe what punishment shall attach to the commission of such offence. It is also common ground that the Legislature may for a particular offence prescribe a

single or fixed penalty, or a maximum penalty, or a minimum penalty, or alternative penalties, or a range of penalties."

56. O'Dalaigh C.J. in contiuning to analyse the boundaries between the legislature and judiciary in the area of criminal justice and sentencing stated at p. 182 as follows:-

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. It is here that the logic of the respondents' argument breaks down. The [l]egislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain."

57. The boundaries between the role of the legislature and the judiciary in the context of mandatory sentencing was again visited by the Supreme Court in the recent case of *Osmanovic v. Director of Public Prosecutions, Ireland and the Attorney General* [2006] I.E.S.C. 50. In that case the plaintiff sought to challenge s. 89(b) of the Finance Act, 1997 which provided for the imposition of a fine of £1,000 on summary conviction or on indictment a fine of treble the value of goods or £10,000, whichever was the greater on conviction of the relevant customs offence. The appellants argued that insofar as a fine might be imposed that the same was a fixed penalty contrary to the principles of the separation of powers under the Constitution. The court determined that the section concerned provided for a multiple choice of sentence and hence the issue as to whether or not there was any infringement of the doctrine of separation of powers did not fall to be considered. However, Murray C.J. whilst considering the case both in the context of mandatory sentencing and the proportionality of sentence did not give any indication that the court found the concept of mandatory sentencing of any nature offensive to the constitutionally enshrined role of the judiciary. He stated as follows:-

> "There is no necessity in this judgment and indeed it would be wholly undesirable to consider what the limits might be (if any) on the power of the Oireachtas to provide for fixed sentences or mandatory sentences. One could postulate extreme situations where the sentencing powers of judges were removed altogether and every offence had a mandatory sentence. The constitutionality of such a law would obviously be questionable. But it has always been accepted and indeed it was accepted in *Deaton* that, within reason at least, the Oireachtas has powers to lay down those parameters."

58. There is nothing constitutionally unacceptable, on the present case law, in the Oireachtas deciding to prescribe general rules which reflect its views, as democratically elected representatives of the public, as to the degree of seriousness to be attributed to different types of offences. The legislature gives indications as to the degree of seriousness with which it views various offences by specifying in many cases the maximum, minimum or as in the present case, the mandatory sentence to be imposed following conviction.

59. If one is to admit of the argument that mandatory sentencing in relation to any criminal offence is unconstitutional, one would have to give serious consideration as to the extent to which the legislature would be in a position to provide either maximum or minimum sentences in any legislation dealing with criminal offences without risking constitutional infringement. Further, the same argument would have to raise questions as to the role of the executive, post sentence, where, as outlined above, the executive effectively has power to alter the sentence imposed by the trial judge through a range of measures including commutation, remission or early release of prisoners because of good behaviour or on foot of a Temporary Release Order. Once again, it could be alleged that for the executive to invoke any of these measures must be unconstitutional because de facto the prison sentence initially imposed is likely to be varied somewhat by executive intervention of one type or another.

60. At para. 6.1.124 of *J.M. Kelly: The Irish Constitution*, the author considers the fact that legislation often encroaches upon the courts discretion in terms of sentencing and other matters and that such legislative provisions are within the competence of the Oireachtas. The mere fact that a statute obliges the court, once a certain stated fact has been traditionally established, to make a particular order, is not, according to the author an encroachment on the judicial function. An example of this type of legislation was considered in *The State (O'Rourke) v. Kelly* [1983] I.R. 58 where the court dealt with the constitutionality of s. 62(3) of the Housing Act, 1966 which provided that a district justice was required to issue a warrant if satisfied that the demand for possession had been made. The court said:-

> "It is only following the establishment of specified matters [i.e. by a judicial consideration of the relevant evidence] that the subsection operates. This is no different to the many statutory provisions which, on proof of certain matters, make it mandatory on a court to make a specified order. Such legislative provisions are within the competence of the Oireachtas."

61. The court accepts the defendants argument in the instant case that the Oireachtas, in a vast array of legislative provisions, intrudes upon the discretion of the court. In this particular case the intrusion is the provision of the mandatory sentence. In other cases, the Oireachtas intrudes by requiring mandatory consequential orders to be imposed following upon conviction. One such example is where a holder of an intoxicating liquor licence is convicted of certain offences contrary to Part IV of the Intoxicating Liquor Act, 1988. In such a case the District Court must, in addition to any penalty imposed, make a temporary closure order. In other cases the legislature provides that particular statutory consequences will automatically attach to a judicial decision without the requirement of an order of the court, one such example being the twelve month disqualification from holding a driving licence where a driver is convicted of drink driving offences under s. 26 of the Road Traffic Act, 1961.

62. If the plaintiffs are correct that any mandatory provision in legislation transgresses upon the constitutional role of the judiciary, it is difficult to see how the legislature can legitimately, as it does in so many cases, direct the court in legislation as to how certain evidence must be treated by the court at trial. In this respect the defendants refer to a number of the legislative provisions which provide that on proof of certain factual evidence, the burden of proof to disprove an offence may well shift to an accused person such as with various firearms offences.

63. Clearly s. 2 of the Criminal Justice Act, 1990 enjoys the presumption of constitutionality. This being so, and taking into account the jurisprudence of the courts in relation to the separation of powers between the legislature and judiciary in relation to mandatory sentencing as set out in *Deaton* and *Osmanovic*, the plaintiffs have failed to convince the court that the mandatory life sentence for murder provided for by s. 2 of the Criminal Justice Act, 1990 amounts to an interference by the legislature with the role of the judiciary in relation to sentencing matters such as to offend the doctrine of the separation of powers.

B. Proportionality: Does s. 2 of the Criminal Justice Act, 1990 offend the alleged Constitutional doctrine of proportionality?

64. The plaintiffs in this case plead and submit that s. 2 of the Criminal Justice Act, 1990 is unconstitutional because it gives the trial judge no opportunity to exercise any discretion as to the length of the sentence to be imposed. The plaintiffs contend that a curtailment which removes from the trial judge any possibility of matching the sentence to the facts of an individual case offends the doctrine of the proportionality. However, the plaintiffs concede in argument that the constitutionality of the section would not be in doubt if the trial judge enjoyed even the slightest discretion including one which would be confined to the right of the trial judge to advise as to when, in his opinion, the continued detention of the individual concerned might be reviewed by the first named defendant having regard to the facts of the individual case when compared to other cases within the same class of offence.

65. The defendants robustly assert that the mandatory punitive life sentence for murder meets any test of proportionality with or without the potential for remission or commutation of sentence in the manner previously described.

66. Prior to considering the origins of the constitutional doctrine of proportionality it is important to refer to those decisions relied upon by the plaintiffs in support of their contention that s. 2 of the 1990 Criminal Justice Act offends such doctrine.

67. The plaintiffs firstly rely upon the judgment of Flood J. in *Director of Public Prosecutions v. W.C.* [1994] 1 I.L.R.M. 321. The trial judge in that case was required to impose a sentence upon a young man who pleaded guilty to raping his girlfriend on New Years Eve on 31st December, 1991. The trial judge imposed a suspended sentence of nine years and in support of the apparent leniency of that sentence emphasised the importance of a trial judge being in a position to act independently and impartially in the exercise of his judicial discretion. The learned trial judge stated:-

> "The role of legislation, subject to some exceptions, has been to provide a power to sentence an accused person, and to set the minimum limit of its use. The sentence to be imposed on an accused person in a particular case is solely a matter for a trial judge in the independent and impartial exercise of judicial discretion. To suggest otherwise would be to countenance the constitutionally impermissible invasion of judicial independence and the doctrine of separation of powers as provided by Articles 6 and 34.1 of the Constitution."

68. Later on in his judgment Flood J. at p. 325, stated as follows:-

> "In my view the selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality. By this I mean that the imposition of a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person sentenced. It is not open to a judge in a criminal case when imposing sentence, whether for a particular type of offence, or in respect of a particular class of offender, to fetter the exercise of his judicial discretion through the operation of a fixed policy or to otherwise pre-determine that issue."

69. Flood J. went on to refer to the judgment of Finlay C.J. in *Cox v. Ireland* [1992] 2 I.R. 503 which dealt with the mandatory nature of s. 34 of the Offences against the State Act 1939, which provided that a person convicted of a scheduled offence under that Act was disqualified from holding any public office or employment for a specific period. In that case Finlay C.J. stated:-

> "A citizen charged with one of the less serious offences coming within a category scheduled at a time when a Special Criminal Court is in existence, and tried for such offence by such court and convicted, if he happens to be the holder of office or employment funded by State, has no protection against the mandatory imposition of the forfeiture provisions contained in s. 34. This is so even though he might be in a position to establish, not his innocence of the particular offence charged, but the fact that his motive or intention in committing it, or the circumstances under which it was committed, bore no relation to all or any question of the maintenance of public peace and order or the authority or stability of the State."

70. The aforementioned decision of Finlay C.J. was adopted by Flood J. as illustrating the acceptance by the Irish courts of the doctrine of proportionality. However, what was being discussed by Finlay C.J. in that case was, in the opinion of this Court, a somewhat different concept to that being considered by Flood J. in relation to the sentence which he was about to impose. Finlay C.J. was seeking to assess whether the curtailment of an individual's right to employment was disproportionate to the objectives which the Oireachtas hoped to achieve in terms of security when enacting the Offences Against the State Act, 1939. Finlay C.J. found there was little nexus between the objective that the Oireachtas hoped to achieve and the right which was being curtailed by the offending provision.

71. The plaintiffs further rely upon the judgment of Denham J. in *Director of Public Prosecutions v. M.* [1994] 3 I.R. 306, where she considered the importance of sentences being proportionate to the gravity of offences. In dealing with an appeal against the severity of a sentence passed upon a teacher and member of a religious order who pleaded guilty before the Central Criminal Court to a number of counts of buggery and indecent assault, Denham J. stated at p. 316:-

> "However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court."

72. Denham J. further went on to quote Walsh J. from his decision in *The People (Attorney General) v. O'Driscoll* (1972) 1 FREWEN 351 at p. 359 where he stated:-

> "The objects of passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him insofar as possible to turn from a criminal to an honest life and indeed the public interest would be best served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal."

73. Denham in the *Director of Public Prosecutions v. M*. went on to say at p. 317:-

> "Thus, having assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered."

74. In dealing with the general principles of sentencing the doctrine of proportionally has also been commented upon by Hardiman J. in the *Director of Public Prosecutions v. Kelly* [2005] 2 I.R. 321 at p. 332 where he stated as follows:-

> "It is not, of course, suggested that these principles are immutable or that others might not be adopted. In fact, as will appear below, some other comparable jurisdictions have, by statute, adopted significantly different and more rigid principles such as the well known 'three strikes' principle adopted in parts of the United States whereby a third felony conviction, regardless of its nature or its triviality, attracts a minimum sentence usually of twenty five years. It is not for the court to say whether that or any other innovation should be adopted in this country."

75. It is clear that in respect of each of the cases referred to above, with the exception of that of *Cox v. Ireland*, that the court was faced with the imposition of sentence where the court had within its power significant discretion and was therefore in a position to construct sentences which it felt were proportionate to the individual circumstances of the case. The court has already held in *Deaton* that mandatory sentences do not offend the Constitution and it is difficult to see therefore how the doctrine of proportionality discussed in the above cases avail the plaintiffs in any case where a mandatory sentence is prescribed. This Court considers that the type of proportionality as discussed by Flood J., Denham J. and Hardiman J. was the need for proportionality as part of sentencing policy where a trial judge is vested with a discretion as to the sentence that may be imposed. That concept of proportionality seems somewhat different to the concept of constitutional proportionality which truly arises for consideration in this case. Constitutional proportionality in the context of the mandatory life sentences imposed upon the plaintiffs herein necessarily involves the court in determining whether the offence of murder, irrespective of its gravity in any particular case, can justify the legislature fixing a punitive mandatory life sentence to apply in all cases. In other words, can the deprivation of liberty provided for in s. 2 of the Criminal Justice Act, 1990 be justified in every single case by virtue of the objectives which the legislature seeks to maintain by the enactment of such provision?

76. The doctrine of constitutional proportionality in Ireland has its origins in the decision of Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593 in which case the constitutionality of s. 52 of the Offences against the State Act, 1939 was considered. That section required persons arrested to give an account of their movements. The court was asked to consider whether such a provision amounted to a legitimate restriction on the constitutional right against self incrimination. Costello J. applied what is now referred to as the rationality test when he said:-

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proprtionality test. They must:-
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective."

77. The Supreme Court in *Re Article 26 and the Employment Equality Bill*, [1997] 2 I.R. 321 described the proportionality test in the following terms at p. 383:-

> "In effect a form of proportionality test must be applied to the proposed section.
>
> (a) Is it rationally designed to meet the objective of the legislation?
>
> (b) Does it intrude into constitutional rights as little as is reasonably possible?
>
> (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?"

78. In this case the Court must consider the objective which was sought to be achieved by the legislature when implementing s. 2 of the Criminal Justice Act, 1990. The court must also consider how this section infringes upon the rights of liberty of the citizen and whether or not the infringement is proportionate to the objectives of the legislation.

79. Given that the court has no discretion in a murder charge the only question is whether or not a mandatory life sentence, with the only prospect of remission being that which might be exercised on a discretionary basis by the first named defendant, is proportionate to the public good to be achieved by the deprivation of liberty so provided for.

80. Section 2 of the Criminal Justice Act, 1990, is clearly designed to reflect the constitutional significance which is attached to the right to life which has been placed at the top of the hierarchy of constitutional rights as determined in *The People (DPP) v. Shaw* [1982] I.R. 1.

81. The starting point thus, must be the right to life as enshrined in Article 40 of the Constitution. Article 40.3.1 provides as follows:-

> "40.3.1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 40.3.2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

82. When a citizen is murdered not only is their right to life taken away but the offender has in the most devastating manner imaginable fundamentally undermined the family unit group to which that citizen belonged, the importance of which is recognised by the special position afforded to it in Article 41 of the Constitution.

> "41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."

83. The aforementioned provisions provide a sound basis for upholding the constitutionality of s. 2 of the Criminal Justice Act, 1960 on any proportionality test. It is difficult to see how such legislation could be stated to be irrational or indeed arbitrary.

84. Further in favour of the constitutionality of the provisions of s. 2 of the Criminal Justice Act, 1990 is the unique nature of the offence of murder. The Criminal Justice Act, 1964 at s. 4 sets out the "malice" which must be established as a prerequisite to conviction. Section 4 provides as follows:-

Section 4(1)

> "Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not."

85. The criminal law in this jurisdiction reserves the mandatory life sentence to only the most serious type of criminal offence. Death which occurs in circumstances other than those provided for in s. 4 above are dealt with in a much more lenient fashion. Where death occurs as a result of dangerous driving the court has a wide ranging discretion as to the type of sentence it may decide to impose. Similarly, where death can be categorised as manslaughter such as in a case where the individual convicted may have acted whilst lacking self-control by reason of provocation, the court can take such factors into account and provide a more lenient sentence. The legislature provides further safeguards for those who may have brought about the death of another whilst acting in self defence or those whose mental capacity to form the criminal intention required to be convicted of murder can be doubted.

86. It is clear that the legislature takes a very strong view that society ought to be protected from the class of person who will intentionally kill or cause serious bodily harm and that this may well best be achieved by providing for a sentencing regime which will act as a significant deterrent to anybody who might be considering an act of such reprehensible violence. Having regard to the nature of the offence, the defences available and the trial procedures available to an accused, this Court does not accept that the legislature in providing for a mandatory life sentence for all classes murder has encroached upon the constitutional doctrine of proportionality.

87. The plaintiffs' argument that s. 2 is unconstitutional for want of proportionality is gravely weakened by the fact that the Constitution itself required amendment by the insertion of Article 15.5.2 to preclude the Oireachtas from enacting any law which would impose the death penalty. Given that the death penalty was perceived to be proportionate and be rooted in the Constitution itself it is difficult to see how the plaintiffs can contend that the lesser penalty of a mandatory life sentence in some way offends the concept of proportionality protected by the same Constitution.

88. In considering the constitutional doctrine of proportionality in the context of this case the recent decision of Charleton J. in the *D.P.P. v. Cash* [2007] I.E.H.C 108 is informative. In that case the learned trial judge was involved in a consideration of improperly obtained evidence in the course of a garda investigation. Starting at para. 42 of his judgment the learned trial judge discussed the competing interests which arise when any crime is being prosecuted. Charleton J. referred to the fact that:-

> "…that more rights than those of the accused are involved in every criminal prosecution."

89. The learned trial judge stated as follows at para. 43 of his judgment:-

> "The rights of a victim of a crime are subsidiary to those of the community. When a crime is committed, it is the legal rights of the entire people of Ireland that are being attacked: hence, crimes are prosecuted in the name of the people under Article 30.3, '… is in ainm an Phobail … a dhéanfar an cúiseamh'."

90. The learned trial judge further went on to discuss the balance that needed to be struck when the competing rights of the accused have to be weighed against the interests of the community in having social order maintained. The maintenance of social order under the Constitution as provided for in the preamble weighs heavily on the courts determination in this regard. The preamble to the Constitution reads as follows:-

> "We, the people of Éire, Humbly acknowledging all our obligations to our Devine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our county restored and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution."

91. Apart from the purely legal issues referred to above, the plaintiffs' argument regarding proportionality falls down significantly in two respects on practical analysis. Firstly, the plaintiffs at one point of their submissions contended that a judge must have the opportunity of differentiating between the most serious types of murder and those at the lesser end of the spectrum of murder and must be in a position to reflect a guilty plea in fixing a sentence. The maximum sentence that can be imposed by the court having regard to the constitutional ban on the death penalty is a life sentence. If the court must give those who are guilty of the most heinous murders a life sentence it follows that all of the other lesser murders must be given something less than a life sentence. If each particular type of murder has to be graded it is clear that the preponderance of murders will not receive a life sentence and certainly those who plead guilty to one of the less horrific types of murder would have to be given something closer to a mid - range prison sentence. This being so it is the opinion of this Court that there can be nothing offensive in the Oireachtas promoting the respect for life by concluding that any murder even at the lowest end of the scale, is so abhorrent and offensive to society that it merits a mandatory life sentence and the question of proportionality can never arise so as to weigh the right of the offender to liberty above the right of the legislature to forfeit liberty for life as a penalty for the lowest order of murderous activity. Proportionality as between sentences of the same nature does not in the opinion of this court apply to those convicted of murder.

92. In oral submission, it was conceded on behalf of the plaintiffs that had s.2 of the Criminal Justice Act, 1990 left even the slightest discretion to the trial judge, even one limited to affording him the right to recommend when, in his opinion on the facts of the case, the offender might be considered by the Minister for release that the section would have to be considered to be constitutional. On this alternative argument it is difficult to see how such marginal discretion would avail the judge of individualised type of sentencing envisaged by Denham J. and Flood J. in the cases quoted above. Again, for this reason this Court rejects the arguments on proportionality advanced insofar as they are alleged to pertain to the mandatory life sentence for murder as provided for in s.2 of the Criminal Justice Act, 1990.

93. Having regard to all of the above this Court is not satisfied that s. 2 of the Criminal Justice Act, 1990 is unconstitutional by reason of any want of constitutional proportionality.

C. Does the exercise by the first named defendant of his power to commute or grant remission in respect of a mandatory life sentence for murder amount to the sentencing of the offender by the executive so as to offend the doctrine of the separation of powers?

94. Approaching this issue from the point of view of Irish domestic law the plaintiffs submit that the first named defendant has complete control over a prisoner's sentence. The plaintiffs allege that the mandatory life sentence is anything but what it purports to

be as it is invariably foreshortened by executive intervention during its currency. The plaintiffs submit that the first named defendant is the organ of the State, which de facto imposes the sentence given that it ultimately determines the length of time to be served by an offender sentenced to life imprisonment for murder. The plaintiffs submit that because a mandatory life sentence never materialises that the sentence of the offender in reality must be made up of a period which reflects the punitive aspect of the crime committed and a further period to reflect the potential risk to the public of releasing the offender from his life sentence.

95. The plaintiffs contend that only the trial judge can determine a sentence and that the Minister's intervention in foreshortening the sentence amounts to a breach of the separation of powers provided for in the Constitution. In particular, the plaintiffs implicate the first named defendant's actions as being contrary to the provisions of Article 34.1, Article 38.1, Articles 40.1, 40.3.1, 40.3.2 and 40.4.1.

96. The defendants assert that the role of the first named defendant amounts to executive clemency which has its roots in the Constitution and that when the Minister exercises this power that he is not involved in the sentencing process which occurred when the trial judge imposed the mandatory life sentence. The defendants specifically plead that the Irish courts have rejected the concept of any sentence having a deterrent or preventative element and that all sentences imposed in Ireland are purely punitive. The defendants at all stages deny that the Irish courts could countenance any sentence comprising a deterrent element and this aspect of the plaintiffs' argument is dealt with later.

97. In the course of argument the plaintiffs referred to the Parole Board which was established by the Minister for Justice, Equality and Law Reform to review the cases of prisoners with longer term sentences and to provide advice in relation to the administration of those sentences which was set up in April, 2001. In particular the plaintiffs rely upon the general principles adopted by the Parole Board which permit persons convicted of murder, with certain specified exceptions, to have their cases reviewed after seven years imprisonment. In support of their argument that the first named defendant is engaged in a sentencing exercise in breach of the doctrine of the separation of powers, the plaintiffs have placed reliance upon a speech made by the then Minister for Justice on the 24th March, 2006. The following extract from that speech has been used by the plaintiffs in support of two assertions, the first of which is that the Minister is carrying out a sentencing function at the time of his review of a prisoner's continued detention. Secondly, the plaintiffs contend that the Ministers speech is evidence of the fact that sentences include a tariff in respect of the offence committed and also a period in respect of preventative detention. The relevant extract from the aforementioned speech is as follows:-

> "The Parole Board's principal function is to advise me in relation to the administration of long term prison sentences. This, of course, includes persons serving life sentences for murder who are eligible to have their cases reviewed by the Board after seven years. Sometimes the timeframe for the first review of a life sentenced prisoner by the Parole Board after a seven year period of detention has led – wrongly - to an assumption that life sentence prisoners are then released. This is entirely without foundation.
>
> Since becoming Minister for Justice, Equality and Law Reform in 2002, I have on numerous occasions, both in the Houses of the Oireachtas and elsewhere, sought to dispel this notion. I want again today to reiterate that while I will consider each and every case individually and on its merits, nobody should expect even in the absence of aggravating factors and where guilt has been admitted, remorse shown, good behaviour demonstrated during imprisonment and a capacity for rehabilitation proven that there is a likelihood that he or she will be set at liberty on licence at least before the expiry of 12 to 14 years. I want to send that message out loud and clear. Respect for human life must be a cornerstone of our society. When a person commits a murder, often in a cold blooded fashion, then he or she must be in no doubt of the consequences – he or she will serve a long prison sentence following conviction for such a heinous and despicable crime.
>
> In cases characterised by aggravating factors such as cruelty, the use of firearms, political, paramilitary or gangland motivation, or significant premeditation, I believe much longer sentences of at least 15 to 20 years should be served. Likewise, where the perpetrator, by his crime or by his personality or behaviour remains an obvious risk to the safety of others, the public good will be protected by extended imprisonment.
>
> The length of time spent in custody by offenders serving life sentences can vary substantially. I can tell you that, of those prisoners serving life sentences who have been released over the past ten years, the average sentence served in prison is approximately thirteen and a half years. However, this is only an average and there are prisoners serving life sentences who have served in excess of thirty years in custody. Even when released life sentenced prisoners remain subject to supervision indefinitely. This supervision is carried out on behalf of my Department by the probation and welfare service. In all such cases there is the condition that the person released must be of good behaviour. If he or she comes to the attention of the authorities for any breach of temporary release conditions, he or she may be arrested without warrant and taken back into custody without the need for fresh proceedings and may be held in custody thereafter at my discretion."

98. Whilst the plaintiffs contend that the Minister's role in the commutation or remission of a mandatory life sentence for murder offends the doctrine of separation of powers enshrined in the Constitution, they have referred to no line of Irish authority which casts any doubt upon the constitutionality of the executive's role in this regard. The plaintiffs have failed to distinguish between the role of the first named defendant in relation to the commutation/remission of a mandatory life sentence from the identical role which he performs in relation to other lengthy sentences of a determinate length. If the plaintiffs are correct in their submission it must follow that every time the Minister foreshortens a determinate sentence that his actions offend the doctrine of the separation of powers. Further, if the plaintiffs' arguments are taken to their logical conclusion it must also be the case that the foreshortening of any sentence imposed by the court by any third party constitutes an interference with the role of the judiciary. On the plaintiffs submission the provisions of the Criminal Justice (Miscellaneous Provisions) act, 1997 and the Prisons Act, 2007 insofar as they provide Rules for the remission of a prisoners sentence for good conduct, must also be deemed to offend the doctrine of separation of powers.

99. In the course of the hearing all parties appeared to accept that prisoners have their sentences foreshortened for good behaviour. A prisoner's sentence may also be foreshortened in the interest of the good government of a prison. This topic has received much attention and is commonly described as the "revolving door" syndrome. In such cases the sentence prescribed by the court is in effect varied by the Governor of the prison with the authority of the Minister. In all such cases the sentence imposed by the trial judge is foreshortened and it has never been suggested that such intervention on the power of the executive or the prison Governor in any way infringes the doctrine of separation of powers.

100. Because of the distinct roles ascribed to the judiciary, legislature and executive under the Constitution the role of the court is at an end once sentence has been passed. It is then up to the executive to carry out the sentencing imposed and, if appropriate, to

exercise its rights of clemency by granting remission or otherwise commuting or granting temporary release from any individual prison sentence.

101. In exercising his right to commute or remit punishment, the Minister is merely fulfilling the role afforded to him, in Article 13.6 of the Constitution. Clearly there can be no question of the Minister, in such circumstances, offending the doctrine of the separation of powers. Further, the court does not accept that the Minister is involved in a sentencing exercise if he exercises his statutory right to grant temporary release to any prisoner thereby suspending for a period or even indefinitely a sentence imposed by the court. The Constitution has provided for a distinct and separate role to be carried of by the Executive, the Oireachtas and the Judiciary in relation to the rights of citizens to be protected from criminals. The Oireachtas through legislation provides for the creation of offences and the range of penalties appropriate thereto. The courts and the Judiciary then ensure that a conviction is only arrived at following upon due process after which a sentence is imposed. The executive then is charged with the implementation of the sentence prescribed and the exercise of this power has been held in many cases not to constitute interference with the doctrine of separation of powers.

102. From Article 13.6 it is clear that the Constitution itself expressly contemplates a body other than the court itself foreshortening sentences imposed by a trial judge. As already stated the same power was vested in the Government pursuant to s. 23 of the Criminal Justice Act, 1951 with the Government's right to delegate this power to the Minister for Justice being provided for in s. 17 of the Criminal Justice (Miscellaneous Provisions) Act, 1997.

103. The somewhat different and less terminal concept of temporary release, as already stated, is provided for in the Criminal Justice Act, 1960 and the first named respondent's powers to grant temporary release is now provided for with significant particularity in the Criminal Justice (Temporary Release of Prisoners) Act, 2003.

104. The assertion that the exercise by the first named defendant of any of the powers afforded to him, be they of commutation, remission of sentence or of temporary release amounts to the sentencing of prisoners or an unwarranted interference by the executive with the constitutional rights of the judiciary as an organ of the state is simply not borne out by the authorities. There is ample authority which supports the role of the executive in the commutation or remission of sentences and in these authorities the respective roles of the judiciary and the executive in relation to sentencing have been discussed. In *D.P.P. v. Michael Cahill* [1980] I.R. 8 the accused was convicted of burglary and sentenced to seven years imprisonment. The trial judge directed the suspension of the balance of the sentence and ordered that the accused be brought before the court 36 months after sentence indicating that if at that time he had obeyed normal prison discipline the court would consider suspending the balance of a sentence. Henchy J. gave some guidance at to the respective roles of the executive and the judiciary when he stated:-

> "Thirdly, a sentence such as this has the defect that it gives the appearance of trenching on what is a function of the Executive. It is part of the judicial function to determine the nature and extent of the sentence, whenever the general rule laid down by statue or common law gives a range of choice. Thereafter it is within the power of the Government, or the Minister for Justice as its delegate, to commute or remit, in whole or in part, 'any punishment imposed by a Court exercising criminal jurisdiction' – see the provisions of s. 23 of the Criminal Justice Act, 1951. A direction that a prisoner is to be brought back to the court of trial for a review of his sentence after three years impliedly seeks to freeze the Executive discretion as to remission during that period, and then to vest in the court a power of review which is not readily compatible with the powers withheld from the courts and vested in the Executive by s. 23 of the Act of 1951."

105. The decision of Henchy J. enforces and supports the doctrine of separation of powers referred to in Deaton where consideration was given to the interference by the legislature with the role of the judiciary. In *Cahill* the court considered the alleged interference by the judiciary with the right of the executive to commute or remit punishment as provided for in Article 13.6 of the Constitution. Henchy J. made it clear that the independence of the executive in this respect could not be intruded upon by the trial judge whose role was at an end once he had passed sentence.

106. The use of partly suspended sentences by trial judges has been deemed by the Supreme Court to be an interference with the power of commutation or remission vested in the executive. The court in *The People (Director of Public Prosecutions) v. Finn* [2001] 2 I.R. 25 considered at length the practice of partly suspending sentences of imprisonment. Keane C.J. having considered the decisions in *The People v. Cahill* [1980] I.R. 8 and *The People (Director of Public Prosecutions) v. Aylmer* [1995] 2 I.L.R.M. 624 described an order made by the court at the review date in the following terms:-

> "…it is clearly an order which releases the convicted person before the completion of the sentence which the judicial arm of the government consider appropriate at the sentencing stage and must, accordingly, be regarded as, in all but name, the exercise by the court of the power of commutation or remission which, during the currency of the sentence imposed by the court, is vested exclusively in the executive."

107. In *The People v. Tiernan* [1988] I.R. 250, the separate role of the executive in relation to the duration of a sentence was once again explored. In that case the appellant had pleaded guilty to rape and was sentenced to a period of 21 years penal servitude against which sentence he appealed to the Court of Criminal Appeal. The Court held that the fact that the sentence imposed in the case was in excess of the conventional period which a person who was sentenced to life imprisonment might expect to serve could not be taken into consideration by the Court in imposing sentence, since the extent of that period was a matter of policy to be decided by the executive. Whilst the Court of Criminal Appeal reduced the sentence to one of seventeen years penal servitude, Finlay C.J. stated that even though there was a conventional period which a prisoner who was sentenced to life imprisonment might expect to serve because of the role adopted by the executive in terms of remission of sentence that this could not be taken into account when the court was considering the severity of the sentence imposed for rape in that particular case.

108. The decision in the *D.P.P. v. Tiernan* is clear authority for recognition of the role of the executive in terms of the commutation/remission of those subjected to a life sentence whether it be of a mandatory or discretionary nature.

109. The aforementioned line of authority is consistent with the earlier views of the Supreme Court as outlined in *Murray and Murray v. Ireland and the Attorney General* [1991] I.L.R.M. 465, where the plaintiffs who were husband and wife and were serving a life sentence for murder sought to have the court direct the executive to grant them temporary release for the purposes of endeavouring to start a family. On appeal from a refusal of the High Court to make the direction sought the court held that the length of time which a person sentenced to imprisonment for life spends in custody and the extent to which, if any, such a 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 those powers by the executive would only be subject to supervision by the courts if it could be established that such powers were being exercised in the manner which were capricious, arbitrary or unjust.

110. Finally, in *Brennan v. The Minister for Justice, Ireland and the Attorney General* [1995] 1 I.R. 612 the court was asked to consider the role of the executive when exercising a power to remit sentence and whether s. 23 of the Criminal Justice Act, 1951, was invalid having regard to Article 13.6 and Article 34 of the Constitution.

111. In that case Geoghegan J. was asked to consider whether the Minister for Justice, at the time of considering four applications to commute or remit punishment, was carrying out a judicial function such that it required to be carried out in public and in consultation with the applicants. The learned trial judge determined that the power to commute or remit a sentence as conferred upon the Government by Article 13.6 of the Constitution was an executive, not a judicial power. He accordingly held it was unnecessary for the first named respondent to exercise this power in public but found that the first named respondent could be subject to judicial review as to the manner in which such power was exercised. In particular he held that there was no obligation upon the first named respondent to consult the judge who had imposed the sentence when considering whether or not to exercise his executive function and stated that such a practice might well be "regarded as a dubious practice". Geoghegan J. went on to advise:-

> "The power to determine an appropriate sentence and the power to remit or to 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."

112. Geoghegan J. went on to find that the power to grant remission to a prisoner in respect of his sentence was an executive administration of mercy rather than the judicial administration of justice as it did not fit with the characteristics of the administration of justice set out by Kenny J. in *McDonald v. Bord An gCon No. 2* [1965] I.R. 217. At p. 231 Kenny J. set out the essential characteristics of the administration of justice as being:-

> 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 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 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.

113. There is no authority available to the court to support the assertion that the regime whereby a prisoner maybe released prior to the completion of a sentence imposed by the court is one which rests solely within the courts prerogative. Neither is there any authority for the proposition that the imposition by a court of a particular sentence means that the offender will stay in custody for the entire duration of that sentence. Indeed, a provisions as such as s. 3 of the Criminal Justice Act, 1990 which provides that those convicted of murder of a specific gravity should not be considered for release until after they have served forty years in prison, demonstrates clearly that the legislature envisages that in most cases, even those where the offender receives a mandatory life sentence for murder, the offender will probably be released by the executive before the expiry of their sentence. It is common case, and accepted by all parties to this litigation that the greater majority of persons sentenced to imprisonment have their detention foreshortened otherwise then by the courts.

114. There is nothing in the existing case law which encourages this Court to the view that the executive, acting through a Minister, when commuting or remitting a sentence or granting temporary release to any prisoner is acting in any way which can be considered to be in breach of the Constitutional boundaries such as exist between the judiciary and executive so as to offend the doctrine of the separation of powers.

The European Convention on Human Rights

115. As already stated in this judgment the plaintiffs claim that certain rights which they enjoy by virtue of the Convention are infringed by s. 2 of the Criminal Justice Act, 1990 and by the role of the Parole Board and first named defendant in reviewing a prisoner's continued detention following upon a mandatory life sentence for murder. In particular reliance is placed upon Articles 3, 5(1) and (4) and 6(1) of the European Convention on Human Rights ("European Convention").

Article 3.

116. The first complaint made by the plaintiffs in reliance upon the Convention is that the mandatory life sentence provided for by s. 2 of the Criminal Justice Act, 1990, which, by its nature, permits only of reduction through executive clemency is one which should be considered to constitute inhuman or degrading treatment so as to offend Article 3. Article 3 of the European Convention provides as follows:-

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

117. The second named plaintiff relies upon the fact that he was nineteen years of age at the relevant time to support his submission that a whole life sentence in his particular case amounts to inhuman or degrading treatment so as to offend Art. 3 of the Convention.

118. The possibility of a challenge to s.2 of the Criminal Justice Act, 1990 on the basis that the severity of the mandatory life sentence thereby imposed might be sufficiently extreme so as to offend Article 3 of the Convention was potentially flagged in *Weeks v. The United Kingdom* [1988] 10 E.H.R.R.293.

119. In that case the applicant, then aged seventeen years, had been sentenced to life imprisonment for an offence of armed robbery. He had threatened the owner of a pet shop with an unloaded starting pistol and stole from him thirty five pence. The trial judge imposed a discretionary life sentence because of the applicant's dangerousness and not because of the gravity of the offence. Whilst the Court was principally concerned with the distinction to be drawn between sentences imposed solely to reflect the gravity of the offence from those imposed on persons who were sentenced in such a way as to reflect the prisoners likely susceptibility to change from the point of view of constituting a danger to the public, the possibility that a wholly punitive sentence of life imprisonment for a person of a young age might offend Article 3 was muted in the following fashion at p.311:

> "Having regard to Mr.Weeks' age at the time and to the particular facts of the offence he committed, if it had not been for the specific reasons advanced for the sentence imposed, one could have serious doubts as to its compatibility with Article 3 of the Convention…"

120. The plaintiffs can take little comfort from the above statement as the facts of the Weeks case in terms of violence or injury to the victim are so far removed from the facts of the cases under scrutiny in this judgment that it is hard to envisage the Court of Human Rights making any similar pronouncement on the facts of these cases.

121. Some further support for the plaintiffs' contention, in particular that of the second named plaintiff, is to be found in the decision of the European Court of Human Rights in *Hussain v. United Kingdom* [1996] 22 E.H.R.R. 1 where a juvenile aged sixteen years of age was sentenced to detention during Her Majesty's pleasure in respect of the murder of his two year old brother. The Court was principally asked to decide whether or not the offender was entitled to have the lawfulness of his continued detention determined by a court in accordance with Article 5(4) of the Convention. In the course of the case the applicant had submitted that if his detention was regarded as equivalent to a mandatory life sentence fixed punitively to reflect the gravity of the offence that the same would fall foul of Article 3 of the Convention.

122. The Court did not consider it necessary to examine this issue in depth in circumstances where it found that the applicant's detention was primarily based upon considerations of a preventative rather than punitive character which entitled him, in any event, to periodic reviews of his detention. However, the court did comment that:

> "… an indeterminate term of detention for a convicted young person, which may be as long as that person's life, can only be justified by considerations based on the need to protect the public."

123. The same issue was revisited by the European Court of Human Rights in the case of *John Ryan v. The United Kingdom* (1999) 27 E.H.R.R. CD 204. In that case the Commission considered a complaint made by the applicant who at the age of twenty was convicted of murder and sentenced to custody for life pursuant to s. 8 of the Criminal Justice Act, 1982. The applicant asserted breaches of Article 5(4) of the Convention and also Article 3. The court in that case equated the sentence of imprisonment for life imposed upon the appellant under the Criminal Justice Act, 1982 as being equivalent to the mandatory life sentence applicable to those over the age of twenty-one convicted of murder and therefore found that he was not entitled to avail of Article 5(4) of the Convention. The Court went on to consider the applicants contention that to impose on young adults a mandatory life sentence would constitute inhuman punishment in violation of Article 3 of the Convention. The Court rejected this submission and held that the imposition of a life sentence as a purely retributive measure was not incompatible with Article 3 of the Convention. The Court reviewed the decision in *Weeks* but considered that the remarks of that court referable to life sentences as potentially offending Article 3 might more appropriately be applied to life sentences imposed on children under eighteen to whom special consideration ought to be given. The court did not find that the imposition of a mandatory life sentence in respect of the offence of murder committed by young adults between the ages of eighteen and twenty-one amounted punishment in contravention of Article 3 of the Convention.

124. A further decision of some significance in the context of Article 3 is the decision of the European Court of Human Rights in *Leger v. France (Unreported, European Court of Human Rights, 11th April, 2006.*) a decision which principally concerned a consideration of whether or not the applicant's rights to have his detention reviewed under Article 5(4) had been breached. At the time relevant to the proceedings the applicant had been in detention for some 40 years and had been refused parole on a number of occasions. The Court observed in the course of its judgment that it was not its task to review the appropriateness of the original sentence which should be served by an individual once they were convicted by a competent court. It recognised that the position invariably adopted by the European Court of Human Rights was that it was for the domestic court to decide on what was the appropriate term of detention applicable to a particular offence. In relation to the applicant's submission that an irreducible life sentence was in breach of Article 3 the Court stated:

> "The court has previously stated that 'one could have… doubts' as to the compatibility with Article 3 of an 'indeterminate sentence' imposed on a minor, if it had not been for the specific reasons advanced…. Furthermore, in the case of adults the court has not ruled out the possibility that in special circumstances an irreducible life sentence might also raise an issue under the Convention where there is no hope of entitlement to a measure such as parole."

125. This Court does not accept that either of the plaintiffs in this case have made out any valid case to establish that on the facts of their respective cases, their rights under Article 3 of the Convention have been infringed by the imposition on them of mandatory life sentences under s. 2 of the Criminal Justice Act, 1990. Further, whilst both of the plaintiffs have been sentenced to imprisonment for life, central to the plaintiffs' argument on the domestic law aspect of this case is an acknowledgement that the plaintiffs will not serve out their life sentence and that at some stage they will be released by direction of the first named defendant and hence enjoy more than the hope of an entitlement to parole envisage by the court in *Leger v. France*. This being so it is difficult for the plaintiffs to contend that their sentences are likely to be of such duration or of such unwarranted severity that they can legitimately advance any argument that the operation of s. 2 of the Criminal Justice Act, 1990 has brought them into the category of person entitled to submit that their rights under Art. 3 of the European Convention have been breached.

126. Finally, whilst the plaintiffs complain that they have no way of anticipating their likely release date and that they have thereby been subjected to inhuman and degrading treatment, the plaintiffs are in fact in no different position than any other prisoners who are serving lengthy prison sentences who merely enjoy the prospect of having their sentences reviewed in accordance with the guidelines of the Parole Board.

Articles 5 and 6

127. The provisions of the European Convention relevant to the plaintiffs' arguments are as follows:-

> "Article 5(1):
>
> 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):
>
> 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 6(1)

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

128. The plaintiffs urge that s.2 of the Criminal Justice Act, 1990 and the mandatory life sentence thereby imposed is incompatible with the above provisions of Article 5 in a number of material respects namely:-

> (I) The plaintiffs assert that they are entitled to have their continued detention reviewed under Article 5(4) on a frequent basis. The plaintiffs allege that the review of their continued detention cannot be carried out by the executive following upon the advice of an entity such as the Parole Board but that the body concerned must be a "court like body".
>
> (II) That the frequency of the review decided upon by the first named defendant in the case of the second named plaintiff namely an interval of three years from last review in July, 2004, is in breach of his right to have his liberty reviewed within a reasonable time as required by Art. 6(1).

129. Prior to embarking upon any analysis of the plaintiffs' claim based upon Articles 5 and 6 of the European Convention on Human Rights it is important to note that the defendants in the action have conceded that if the plaintiffs are entitled to a review of their continued detention under Article 5(4) that the exercise by the Minister of his power to consider their continued detention on foot of a report from the Parole Board would not comply with the plaintiffs' rights under Articles 5(4) and 6 (1) of the Convention. It is accepted that the mechanism operated by the first named defendant to review lengthy sentences does not provide the offender with a hearing before what can properly be described as "an independent and impartial tribunal". The relevant Articles of the Convention have been construed as requiring such a determination to be reached by a court like body which must make its decisions following a public hearing at which the offender is afforded adversarial rights. In particular, the hearings before the Parole Board are not adversarial, the Parole Board has no right to make its own decision and the proceedings leading to the Minister's decision are not heard in public.

130. Without doubt, the European Court of Human Rights has held that in certain circumstances persons in custody and serving life sentences are entitled to regular reviews of their sentences by an impartial and independent court like body. Unfortunately, most of the case law from the European Court of Human Rights relates to life sentences, be they mandatory or discretionary, imposed upon citizens of the U.K. where at any given time the domestic law and sentencing system diverged sharply from the prevailing law and practice in this jurisdiction. Apart from the very significant fact that Irish law differs from U.K. law by virtue of the separation of powers provided for in the Irish Constitution, the law in the two jurisdictions in relation to sentencing has never been comparable.

131. Sentencing practices in the UK have evolved and changed over the last several decades partly due to changes in policy but also as a result of legislative change and intervention from the European Court of Human Rights. Simply put, since approximately 1983 the Courts in the UK have in respect of both mandatory life sentences and discretionary life sentences made provision for the sentences to be divided into two parts. The first part of the sentence is fixed to reflect the punishment of the offender for the offence committed and this period is variously described in the relevant case law as being the retributive or tariff period. The mechanism whereby the tariff was initially fixed in respect of mandatory and discretionary life sentences was different. Once the retributive period of a sentence had been served by a prisoner, he was then considered to be in custody serving the preventative aspect of his sentence. This latter period of detention existed solely because of deterrent considerations i.e. the need to asses the potential risk to the public of releasing any individual prisoner from custody. Once a prisoner had completed the tariff/retributive portion of his sentence, irrespective of whether that tariff had been fixed by the court or the Secretary of State, the Prisoner had a right under Article 5(4) of the European Convention to have his continued detention reviewed regularly. Such a review was solely concerned with the assessment of the prisoners characteristics which might render them dangerous to the public if released and thereby might justify their continued detention.

132. The defendants in this case assert that as the mandatory life sentence provided for in s. 2 of the Criminal Justice act, 1990 is entirely retributive/penal in nature that all of the plaintiffs rights are satisfied by their trial under Article 5(1) of the European Convention and that they enjoy no rights to a review of their respective sentences under Article 5(4) thereof.

133. The plaintiffs contend that their rights are not satisfied by the trial which was afforded to them prior to their respective guilty pleas. The plaintiffs assert that the statement made by the first named defendant, referred to earlier in this judgment, regarding the risk to the public of granting temporary release to prisoners serving life sentences for murder and the provisions of the Criminal Justice (Temporary Release of Prisoners) Act, 2003 which provide that the Minister in deciding upon whether or not to grant temporary release should take into account the risk to the public of granting such release ,demonstrates that, in reality, the mandatory life sentence for murder has both penal and preventative components thereby entitling them to a review of their sentence under Article 5(4).

134. In opposing the plaintiff's submissions counsel for the defendants contend that European case law goes no further than to require any domestic legal system that embraces the concept of preventative detention to have a system to review such detention. According to the defendants submission it is only because new matters arise to be inquired into, post the punitive period of a sentence, that such a review is mandated. The defendants assert that Article 5(4) does not require every life sentence or every mandatory life sentence to be reviewed and emphatically assert that the Irish courts have ruled it impermissible to include any preventative element in any such sentence. The defendants further submit that the Minister, when reviewing a prisoner's continued detention is not carrying out a sentencing exercise in breach of the plaintiff's alleged rights to have his sentence determined by a court under Article 5(1) and that in commuting a sentence or granting Temporary Release he is exercising clemency whereby he either brings to an end or suspends, subject to certain conditions, an entirely punitive sentence.

135. Prior to considering the fundamental differences in sentencing in this jurisdiction and in the U.K., it is necessary to assess whether or not the Irish courts have embraced or rejected the concept of preventative detention.

136. In the *D.P.P. v. Jackson* (Unreported, Court of Criminal Appeal, 26th April, 1993) the applicant sought leave to appeal against two life sentences imposed for two rapes to which the applicant pleaded guilty. Counsel on behalf of the applicant submitted that the trial judge had effectively imposed a preventative sentence on an offender on the basis of the speech he made at the time of passing sentence which referred to the need to protect women from the applicant. Hederman J. held that:-

> "… preventative detention is not known to our judicial system and there is no form of imprisonment for preventative detention."

137. Carney J. in the *D.P.P. v. Bambrick* [1996] I.R. 265 also considered the possibility of a sentence taking into account the concept of preventative detention when sentencing a man who pleaded guilty to the manslaughter of two women in brutal circumstances. The

court was satisfied, on the evidence adduced, that the accused had a propensity to re-offend. Carney J. however held that even if he wished to construct a sentence which would allow for the possibility of preventative detention following a substantive punitive period that he was not constitutionally entitled to do so. He stated:-

> "Interpretations of the Constitution which are binding on me persuade me that I am not free under the law as it stands to approach the case from this prospective."

138. Later the trial judge stated:-

> "The law is the same today as it was then and I am precluded from approaching the case on the basis that over and above any considerations of punishment this dangerous accused should be preventatively detained until in the opinion of the most qualified experts he is safe to be let back into the community."

139. The plaintiffs in this action asks the court to infer that notwithstanding the decisions above that preventive detention is embraced by the Irish Courts. The plaintiffs rely upon the fact that the Minister will take into account, when deciding upon any recommendation of the parole board regarding the potential release of a prisoner serving a life sentence, any possible risk to the public as evidence of the existence of a mandatory life sentence incorporating a period of preventative detention.

140. The fact that the Parole Board or the Minister 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 that they are being detained against this risk. Such an individual is being detained as a penalty for their crime and the Minister 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.

141. Further, the fact that a prisoner sentenced to a life sentence for murder may have an expectation that they will qualify for release at a future date does not alter the nature of their initial sentence which, having regard to present case law, must be deemed to be entirely punitive.

142. The court believes that it is appropriate that the Minister and/or the Parole Board should operate a somewhat formalised system when assessing applications for early release, particularly having regard to the need to provide an incentive to all who are in custody to engage in the rehabilitative process. It is clearly in the public interest that when considering the potential early release of a prisoner that the Minister may look at the potential risk to society which might arise on that release. The Minister, when considering an application for temporary release under the Criminal Justice (Temporary Release of Prisoners) Act, 2003 must take into account all of the matters provided for by statute when deciding whether or not to approve the recommendation of the Parole Board. It is however a quantum leap for the plaintiffs suggest, as they must do to establish a right to have their sentences regularly reviewed under Article 5(4), that if a prisoner is not released following a recommendation of the Parole Board that they can firstly be deemed to have served the retributive portion of their sentence and secondly that their continued detention is solely for preventive reasons.

143. 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 U.K. 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 UK 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.

144. Almost all of the decisions relied upon by the plaintiffs in relation to their assertion that their human rights have been infringed under Art. 5 and 6 of the Convention relate to sentencing policy and legislative changes implemented in the U.K. and which became the subject matter of scrutiny by the European Court of Human Rights over several decades. Most of these cases are of no relevance if it is accepted that a mandatory life sentence is entirely punitive in nature. The right to engage Art. 5(4) only arises if the plaintiffs can establish that they have served the retributive parts of their sentences and are now being deprived of liberty by reason of characteristics which may be susceptible to change which need to be reassessed on a regular basis to justify their continued detention.

145. In relation to the plaintiffs' claims that they are entitled to have their sentences reviewed in the manner required by Art.5(4) of the Convention the decision earlier referred to the judgment of *Weeks v. United Kingdom* [1987] 10 E.H.R. 293 is of some relevance. In that case the seventeen year old was given a discretionary life sentence because the trial judge expressly found that the accused was considered a danger to the public and that it was not possible to forecast at that time how long his instability would endure. An indeterminate life sentence was the only means available under the British sentencing machinery to achieve such objective. The court differentiated between a life sentence imposed because of the gravity of an offence from an indeterminate life sentence imposed, not because of the gravity of the offence, but because of personality traits of the prisoner which were susceptible to change. The court concluded that having regard to the basis upon which he had deprived of his liberty that he was entitled to the benefit of Art. 5(4) of the Convention in terms of the review of his detention and further went on to determine that the procedures of the Parole Board were deficient and did not meet the procedural fairness required by Art. 5(4).

146. Much the same issues were dealt with by the European Court of Human Rights in *Thynne, Wilson and Gunnelll v. The United Kingdom* [1991] 13 E.H.R.R. 666 where the court reviewed U.K. domestic law and practice in relation to discretionary life sentences. As already stated such sentences were reserved for cases where the offence concerned was very grave and where it appeared that the accused was of unstable character and likely to commit offences in the future unless there was a change in their condition. The use of this type of discretionary sentence was distinguished from the practice of the English Courts when using a determinate or fixed sentence of imprisonment where the determinate sentence was fixed by reference to the gravity of the offence with an acknowledgement that the same might be remitted for good behaviour.

147. The applicants in *Thynne, Gunnell v. Wilson* had all been sentenced for violent and/or sexual offences to an indeterminate life sentence stated by the trial judge to have been imposed partly as a preventive measure in view of their dangerousness to the public. At paragraph 76 of the Court's judgment, the Court considered the applicants' assertion, the punitive periods of their life sentences

having expired, that they had a right to have their continued detention reviewed by the Court. The court observed as follows:-

> "Having regard to the foregoing, the Court finds that the detention of the applicants after the expiry of the punitive periods of their life sentences is comparable to that at issue in the *Van Droogenbroeck* and *Weeks* cases: the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at that phase in the execution of their sentences, the applicants were entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court."

148. The defendants in the present case submit that such considerations as are referred to in the above decision can have no relevance to a mandatory life sentence in Ireland which must be seen as wholly punitive in nature.

149. The defendants assert that the plaintiffs' claims in the present proceedings are entirely undermined by the decision in *Wynne v. The United Kingdom* (1995) E.H.R.R. 333. In that case the applicant was convicted of murder in 1964 and received a mandatory life sentence. Following release on life licence in 1980 he killed again, was convicted of manslaughter and received a discretionary life sentence and his life license in respect of the first murder was revoked. At that point in time the applicant was being detained both on foot of the mandatory life sentence and the new discretionary life sentence. Having served the tariff portion of the discretionary life sentence the applicant alleged a violation of Article 5(4) of the Convention claiming that he was unable to have the continued lawfulness of his detention reviewed by the court.

150. In rejecting the applicant's claim the Court drew a clear distinction between discretionary life sentences which were considered to have a protective purpose and the mandatory life sentence which was essentially punitive in nature. The court held that as a regards the mandatory life sentence the guarantees provided by Article 5(4) were satisfied by the original trial and conferred on him no additional right to challenge the lawfulness of his continued detention. The Court further held that to review the applicant's detention on the basis of his discretionary life sentence for manslaughter would be devoid of purpose because of the continuance of his mandatory life sentence.

151. The defendants in this case submit that once this court is satisfied that the life sentences imposed upon the plaintiffs in this case can be properly categorised as entirely punitive in nature, the decision in *Wynne v. The United Kingdom* makes the plaintiffs' assertion that they are entitled to have their sentences reviewed under Article 5(4) of the Convention untenable. As far as the defendants are concerned given that the life sentences are entirely punitive in nature no new issues regarding the lawfulness of the plaintiffs' continued detention arise justifying any right to a review of their continued detention utilising the rights provided for in Art. 5(4) of the Convention. Further, given that any intervention by the Parole Board or the Minister in relation to an entirely punitive sentence cannot be considered to be a sentencing exercise their intervention in this respect cannot be stated to offend the plaintiffs' rights under Art. 5(1) of the Convention.

152. In *Wynne v. The United Kingdom* the Court noted the emergence of some similarities in practice between the determinate and indeterminate life sentences insofar as sentencing practice and policy was concerned. In dealing with the domestic law in the U.K. the Court noted that Leon Britten, the then Home Secretary, had made a statement in Parliament on the 27th July, 1983, explaining his practice in relation to mandatory life prisoners wherein he emphasised that before any mandatory life prisoner would be released he would consider

> (a) whether the period served by the prisoner was adequate to satisfy the requirements of retribution and deterrence and,
>
> (b) whether it was safe to release the prisoner, but also
>
> (c) the pubic acceptability of the early release.

153. The Secretary of State advised that he would only exercise his discretion if he was satisfied that in doing so he would not threaten the maintenance of public confidence in the system of criminal justice. This statement led to a submission that the theory and practice as applied to mandatory life sentences were out of tune with practice and that, in considering the potential release of the mandatory life prisoner, that the mandatory life sentence should be considered to contain both a punitive and preventative element. The court went on to hold as follows:

> "35. As observed by the House of Lords in *R. v. Secretary of State, ex-parte Doody,* while the two types of life sentence may now be converging there remains nonetheless, on the statutory framework, the underlying theory and the current practice, a substantial gap between them. This is borne out by the very facts inter alia relied on by the applicant to support his case, namely that in mandatory life sentences the release of the prisoner is entirely a matter within the discretion of the Secretary of State who is not bound by the judicial recommendation as to the length of the tariff period and who is free under English law to have regard to other criteria than dangerousness, following the expiry of the 'tariff' period, in deciding whether the prisoner should be released. It is further reflected in the decision of Parliament to limit the application of the new procedures in the 1991 Act to discretionary life sentences only, even in cases like the present where the prisoner is serving both a mandatory and a discretionary life sentence.
>
> 36. Against the above background, the Court sees no cogent reasons to depart from the finding in the *Thynne, Wilson and Gunnell* case that, as regards mandatory life sentences, the guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-detention following revocation of the life licence. Accordingly, in the circumstances of the present case, there are no new issues of lawfulness which entitle the applicant to a review of his continued detention under the original mandatory life sentence."

154. The paradox thereby arose that whilst a tariff was fixed by the Home Secretary in respect of both mandatory and determinate life sentences the tariff could be higher than that recommended by the trial judge where the life sentence was mandatory. Further difficulties with this process were encountered due to the fact that the judicial view as to the appropriate tariff that should apply was communicated to the Home Secretary in private, unknown to the prisoner and in circumstances where the prisoner had no right of appeal. This practice had later to be changed because the fixing of the tariff was considered a sentencing exercise which had to be carried out by the court.

155. The plaintiffs submit that the more recent decisions of the European Court of Human Rights require all life sentences for murder, be they discretionary or mandatory to be reviewed on a regular basis. They rely upon firstly the decision in *Stafford v.The United*

Kingdom (2002) 35 E.H.R.R. 32. In that case the applicant had been convicted of murder. Accordingly the Home Secretary set the applicant's tariff in accordance with domestic practice of the time. Following his release on licence the applicant committed fraud and his licence was revoked. Following completion of his fraud sentence the Parole Board recommended the applicant's release but the Home Secretary decided that the public were at risk and that the applicant would commit further fraud offences if released. By the year 2000, as result of the Case Law of the European Court of Human Rights and subsequent reactionary policy and legislative changes in the UK., the power of the Home Secretary to set the tariff for life prisoners was limited to mandatory life sentences.

156. The applicant challenged the right of the Home Secretary to fix the tariff contending that the same was a sentencing exercise which had to be carried out by a court under Art. 5(1). The applicant was successful in this objection. Further, the court carefully examined the tariff/fixing process and the role of the Home Secretary in this process over the previous decades and concluded that the position in domestic law had changed in light of the cases such as *R. (Lichniak) v. Secretary of State for the Home Department* [2001] 3 W.L.R., such that a mandatory life sentence could no longer be considered to be entirely punitive. The European Court of Human Rights stated:-

> "The court considers that it now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The court concludes that the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner."

157. It is accepted that the decision in Stafford reflects the fact that the practice of tariff fixing had become common case, even in relation to mandatory life sentences, since the statement of Leon Britten, Home Secretary, in 1983. This being so, once the tariff period expired for any life sentence be it mandatory or discretionary the prisoner was entitled to a review by an independent body of his detention under Article 5(4).

158. This Court accepts the defendants' arguments that the decision of the European Court of Human Rights in *Stafford* does little to assist the plaintiffs in their assertion that they are entitled to a review of their continued detention by an independent body. The decision in *Stafford* was entirely reflective of the fact that the applicant in that case had served the punitive aspect of his sentence and was being detained against the risk of dangerousness which is a concept specifically prohibited in Irish law.

159. For the reasons set out above the Court is also not impressed that the decision in *R (Anderson) v. Secretary of State for the Home Department* [2002] U.K.H.L. 46 gives the plaintiffs any comfort in their assertion that they are entitled to a review of their continued detention under Article 5(4) of the European Convention or that the exercise being carried out by the Parole Board and the first named defendant offends Article 5 (1).

160. The applicant in *R (Anderson) v. Home Secretary* [2002] 3 WLR 1800 instituted proceedings prior to the conclusion of the Stafford case in the European Court of Human Rights. *Anderson* was convicted of two murders and sentenced to mandatory life imprisonment. The trial judge advised the Secretary of State as to the period of time he felt was appropriate in respect of the retributive element of the applicant's sentence. The Secretary of State set a longer period than that recommended by the trial judge and the claimant challenged that decision as being in breach of his rights under the Convention. The Court of Appeal dismissed the applicants claim on the ground that the European Court of Human Rights had recognised a distinction between mandatory and discretionary life sentences and the tariff fixing procedure in both instances. The applicant subsequently appealed to the House of Lords, by which time the jurisprudence of the European Court of Human Rights had evolved. The House of Lords, made its determination against the backdrop of the finding of the European Court of Human of Rights in *Stafford.* In doing so, the House of Lords in keeping with its policy not to depart without good reason from the principles laid down by the European Court, held that the Secretary of State should play no part in fixing the tariff to be served by a mandatory life prisoner as this was properly a sentencing function which had to carried out by an independent and impartial Tribunal as guaranteed by Article 6(1) of the Convention. The Secretary of State, in the opinion of the court, could not be viewed as either impartial or independent of the Executive. Accordingly, the court held that s. 29 of the 1997 Crime (Sentences) Act, under which the Secretary of State had been entrusted with the aforementioned discretion, was declared incompatible with the European Convention. In *Stafford* the Court concluded that the position in the domestic law of the UK had changed such that there was no distinction, as set out above, in the nature of the tariff fixing exercise for either mandatory or discretionary life sentences or sentences of detention at Her Majesty's pleasure.

161. The fact that the decision in Anderson was different from that reached by the Court in *Wynne* does not, as asserted by the plaintiffs, lend authority to their submission that the European Court of Human Rights now recognises the right of all life prisoners to have their continued detention reviewed on a regular basis. Such a right only applies to those who are detained solely for reasons of dangerousness and whose retributive sentences have expired. The difference in the two aforementioned decisions is merely reflective of the fact that UK domestic law and practice in relation to the fixing of a tariff in mandatory life cases changed over the period separating the two judgments.

162. This court accepts the defendants submission that the case law which has emerged from the House of Lords and the European Court of Human Rights is case law which has evolved in response to changes in sentencing policy and legislation in the UK over the last twenty five years. As can be seen from the case law referred to above initially only discretionary life sentences could be stated to have a retributive and preventative component. The mandatory life sentence was one deemed to be entirely retributive in nature but remained subject to executive clemency. Following the statement of Mr. Leon Britten in 1983 it became the practice that a tariff period would be fixed in all life sentences be they mandatory or discretionary to represent the retributive aspect of the crime. The matter was formalised in the Criminal Justice Act of 1991 which provided for a tariff to be fixed in respect of all life sentences albeit that at that time the tariff period could be extended by the Home Secretary over and above that recommended by the trial judge in the case of the mandatory life prisoner. The role of the Home Secretary in fixing any tariff was eventually condemned as being contrary to Article 6(1) in circumstances where the fixing of the tariff by the Home Secretary in the case of a mandatory life prisoner had to be viewed as a sentencing exercise requiring judicial rather than executive intervention.

163. Having regard to the fact that the Irish courts preclude any sentence being imposed on the basis of preventative detention the mandatory life sentence for murder must be seen as entirely punitive. If this is so the plaintiffs' rights under the Convention have been satisfied by their trial in accordance with Article 5(1) and they have no rights to a review by an independent body of their detention under Article 5(4) or Article 6(1). For similar reasons once the court is satisfied, as it is, that the sentences of the plaintiffs in this case are entirely punitive in nature the intervention by the Parole Board and or the first named defendant in reviewing their continued detention cannot be viewed as a sentencing exercise.

164. This Court accordingly rejects the plaintiffs' claim that s. 2 of the Criminal Justice act, 1990 infringes any of the rights afforded

to him under the European Convention on Human Rights. The court further rejects any complaint made by the plaintiffs that the role of the Parole Board and/or the first named defendant when reviewing the continuation of a mandatory life sentence in any way contravenes the rights afforded to the plaintiffs under the European Convention.

165. For all of the aforementioned reasons this court rejects the plaintiffs contention that s. 2 of the Criminal Justice Act, 1990 is unconstitutional or that the said legislation offends the plaintiff's rights under the European Convention on Human Rights.