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Constitution – Fundamental rights – Liberty of the individual – Appellant detained in pursuance of extradition order – Evidence that appellant likely to be ill-treated if delivered out of the jurisdiction – Whether extradition should be refused in such circumstances – Constitution of Ireland 1937, Article 40.3, 4

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Supreme Court – Stare decisis – *Earlier decision overruled where legal principle incorrectly applied*

Facts The appellant, a member of the IRA, was detained in pursuance of an order for his extradition, in respect of offences allegedly committed during a mass escape from the Maze Prison in Northern Ireland in 1983. In the course of the escape, prison officers were attacked, and one subsequently died. The appellant was later identified as having been involved in the attack upon the said officer. During criminal proceedings in Northern Ireland, the death of the officer was found to have resulted from a heart attack. In civil proceedings for damages taken in Northern Ireland by a Maze prisoner, it was found by Hutton J that in the aftermath of the escape, prisoners had been assaulted by prison officers and attacked by dogs, and had been refused medical and legal assistance; and that prison officers had committed perjury in the course of the hearing, as part of a conspiracy to conceal the fact of the assaults. No disciplinary action had been taken against the said officers. In unsuccessful applications to the High Court for his release under Article 40.4 of the Constitution and s. 50 of the Extradition Act 1965, the appellant had submitted that, in the light of the evidence, there was a probability that he would be ill-treated if returned to the Maze to serve the remainder of his sentence, and that the court, by permitting his extradition, would fail to defend and vindicate his constitutional rights. In refusing to permit the appellant to avail of the political offence exemption of the 1965 Act, the High Court had felt itself bound by the decision of the Supreme Court in *Russell v Fanning* [1988] ILRM 333, which applied the principle in *Quinn v Wren* [1985] ILRM 410 to a situation where an appellant had committed offences pursuant to his membership of the IRA and in which it was held that the objective of the IRA of reuniting the country by force of arms, being contrary to the peaceful reunification policy of the government, infringed Article 6 of the

Constitution, and amounted to the subversion of the Constitution and the usurpation of the powers of government. On appeal to the Supreme Court, the appellant in the instant case submitted that *Russell v Fanning* had been wrongly decided, and should be overruled.

Held by the Supreme Court (Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ) in allowing the appeal on both grounds and in ordering the release of the appellant:

(1) Where the court is satisfied that there is a real danger that a person whose extradition is sought will suffer ill-treatment in breach of his constitutional rights if delivered out of the jurisdiction, the extradition of such person must be refused.

(2) In the light of the political and historical background to the extradition legislation, the court could not infer that the Oireachtas intended that the provisions of s. 50 of the Extradition Act 1965 should not apply to persons charged with politically motivated offences of violence, where the objective of such offences was to secure the unity of the country.

(3) The fact that the policy of persons acting outside the jurisdiction of the State is contrary to the policy of the government relating to the unity of the country, is not sufficient to equate it with a policy to overthrow the State or subvert the Constitution. *Russell v Fanning* [1988] ILRM 333 not followed.

Cases referred to in judgment

Attorney General for Northern Ireland's Reference (No. 1 of 1975) [1977] AC 105; [1976] NI 169
Attorney General v Ryan's Car Hire Ltd [1965] IR 642; 101 ILTR 57
Bourke v Attorney General [1972] IR 36; 107 ILTR 33
Burns v Attorney General High Court (Finlay P) 4 February 1974
Gilhooley v Attorney General High Court, 4 June 1976
Maguire v Keane [1986] ILRM 235
McCurry & Clarke v Attorney General High Court, 15 January 1976
McGlinchey v Wren [1982] IR 54; [1983] ILRM 169
McLoughlin v Attorney General High Court (Finlay P) 20 December 1974
McMahon v Leahy [1985] ILRM 422
McManus & Doherty v Attorney General High Court, 23 March 1977
Magul of Ireland v Tipperary (NR) County Council [1976] IR 260
Patrick McElhone Case High Court of Northern Ireland (McDermott J) 10 March 1975
Pettigrew v Northern Ireland Office High Court of Northern Ireland (Hutton LCJ) 17 November 1988 (1989 3 BNIL 83)
O'Hagan & Herron v Attorney General High Court, 18 July 1978
Quigley & Ors v Fanning High Court, 22 July 1980
Quinn v Wren [1985] IR 322; [1985] ILRM 410
R v Burns (1987) 9 Cr App R. 57
Russell v Fanning [1988] IR 505; [1988] ILRM 333
Shannon v Ireland [1984] IR 548; [1985] ILRM 385
State (Magee) v O'Rourke [1971] IR 205
State (Quinn) v Ryan [1965] IR 70; 100 ILTR 105
Swords v Attorney General High Court, 22 December 1977

Patrick MacEntee SC, Adrian Hardiman SC and Diarmuid McGuinness for the appellant
Hugh O'Flaherty SC, Susan Denham SC and John Hedigan for the respondent

FINLAY CJ delivered his judgment on 13 March 1990 saying: This is an appeal brought by the plaintiff/applicant against the order of the High Court dated 7 April 1989, made by a Divisional Court, dismissing both his claim for release pursuant to s. 50 of the Extradition Act 1965 and his claim for release pursuant to Article 40 of the Constitution.

The applicant was convicted at the Crown Court in Belfast of having had in his possession on 20 August 1981 two rifles and a quantity of ammunition with intent by means thereof to endanger life or cause serious injury or to enable any other person by means thereof to endanger life or cause serious injury to property, and was, on 14 June 1982 sentenced to eighteen years' imprisonment.

On 25 September 1983 the applicant escaped with others from the Maze Prison in Northern Ireland. His delivery to Northern Ireland is now sought on a number of warrants relating to offences alleged to have been committed in the course of that escape, and on a warrant requiring him to serve the unexpired balance of the sentence already imposed upon him.

I will first deal with the application pursuant to Article 40 of the Constitution.

This was submitted both in the High Court and on this appeal upon the following grounds, that is to say:

> The Court would be failing in its duty to protect his fundamental constitutional rights if it permitted his return to Northern Ireland to serve the balance of his sentence in the Maze Prison where, it is alleged, that there is a probability that he would be subjected to assaults and inhuman treatment by prison officers and would be subject to a prison regime which permits its staff, either personally or with dogs to assault prisoners, to deprive them of or delay access to doctors or solicitors, to commit perjury, to be uncooperative with enquiries or with investigations conducted by the Northern Ireland Office, the governor of the prison or the Royal Ulster Constabulary, without being disciplined.

This submission is largely based on the judgment of this Court in *Russell v Fanning* [1988] ILRM 333, where, at p. 340 in the course of my judgment I stated:

> I would accept that if a court upon the hearing of an application to set aside an order for delivery under the Extradition Act 1965 were satisfied as a matter of probability that the plaintiff would, if delivered into another jurisdiction, be subjected to assault, torture or inhuman treatment it would, in order to protect the fundamental constitutional rights of the plaintiff be obliged to release him from the detention and to refuse to deliver him out of the jurisdiction of these courts.

Counsel for the applicant in part relied upon this principle, but submitted that some less standard of proof than probability was appropriate in the application

of the principle and suggested that it would be more correctly stated as being only necessary for an applicant in order to obtain the protection of this rule to establish a 'real danger' of such events occurring. This particular submission was based upon the fundamental nature of the constitutional rights involved and upon the finality of permitting delivery out of the jurisdiction which of necessity prevented further protection of constitutional rights by the court.

The duty of the court 'as far as practicable to defend' the constitutional rights of the applicant may not necessarily be best served by any rigid formula of standard of proof.

I am satisfied that what is necessary is to balance a number of factors, including the nature of the constitutional right involved; the consequence of an invasion of it; the capacity of the court to afford further protection of the right and the extent of the risk of invasion. Upon the balancing of these and other factors in each case, the court must conclude whether its intervention to protect a constitutional right is required and, if so, in what form.

The primary facts concerning this issue were proved by affidavit and by oral evidence in the High Court. In the course of their judgments with each of which Costello J agreed, Hamilton P and Gannon J set out in convenient form the facts which they found arising from this evidence. In addition, certain other facts of somewhat less importance for the issue here arising were established in uncontested evidence. The learned trial judges then proceeded to raise inference from the facts as found by them.

I am, it seems to me, on this appeal obliged to consider and, if appropriate, to review those inferences.

The facts so found or established can thus be summarised.

1. 38 prisoners escaped from H-Block in the Maze Prison into the grounds of the prison, and most of their number escaped from the prison itself, imprisoned a number of prison officers and, in effect, fought their way out of the prison.

2. In the course of the escape Prison Officer Ferris was stabbed and died from a heart anack. Lord Chief Justice Lowry, as he then was, in the trial of a number of accused in respect of charges arising out of the escape, held that he could not be satisfied beyond a reasonable doubt, that the stabbing was the cause of the heart attack.

3. The applicant was, in an official report on the escape made in 1985, identified as one of the persons involved in the attack on Prison Officer Ferris.

4. Four other prison officers were stabbed; two prison officers were shot; 13 prison officers were kicked and beaten; and 42 were subsequently off work with nervous disorders.

5. The applicant gave evidence that before the escape he was threatened by two prison officers, whom he named, with being taken out and executed if in protests or prison disturbances any member of the prison staff was injured. Of

these two named persons evidence was given that one had been murdered by the IRA and that the other was still alive, though retired from the prison service. No evidence was tendered on behalf of the surviving prison officer denying the accusation of the making of a threat.

6. Immediately after the escape a great number of IRA prisoners remaining in H-Block were assaulted by prison officers, including assaults by dogs handled by prison officers on being moved to a different prison block.

7. Medical and legal assistance was not made available upon request to the prisoners who had been assaulted for about four days after the date of the assault, and this was due to action taken by the prison staff out of what they said was respect for the death of their colleague, Prison Officer Ferris.

8. The prison officers refused to cooperate with every form of enquiry into the allegations of assault by them in the aftermath of the escape, and clearly at an early stage entered into a widespread conspiracy to deny absolutely all accusations of assault or ill-treatment, and also to deny the refusal of requests for medical assistance.

9. These denials were maintained by the authorities who were the named defendants in claims made by the prisoners for damages for assault. This denial appears to have been made despite the existence of a number of reports of investigations by different bodies and persons, including the Board of Prison Visitors, which while incomplete due to the non-cooperation of both the prison officers and of the prisoners themselves, must be read as being strongly indicative of the existence of some major breach of discipline and some form of ill-treatment or assault.

10. The conspiracy was finally uncovered in a trial of a claim made by one of the prisoners, Pettigrew, before Hutton J (as he then was) when documents were produced which had earlier not been revealed to counsel acting on behalf of the defendants which clearly indicated the absolute falsity of the denial of unsatisfied requests for medical assistance, and which led the learned trial judge in that case to conclude, having regard to the medical evidence adduced as well, that the denials of the actual assaults were also false. What he there described as the conspiracy to cover up the assaults in defeasance of these claims, he strongly condemned.

11. Although since the time of the judgment in the case of *Pettigrew v Northern Ireland Office* in 1988, *ex gratia* payments are being offered to prisoners whose claims had previous to that time been dismissed by reason of the false evidence given against them, and although other pending claims, the evidence would indicate, are now being treated as assessments of damage, it would appear that no disciplinary action of any description has been initiated against any of the prison officers in relation either to the misconduct by way of assaulting prisoners or to their misconduct in attempting to pervert the course of justice. There does not appear to have been any criminal charge against any

of the prison officers and, on the evidence, I would be driven to the conclusion that no disciplinary or criminal charge is likely in the future.

12. Many of the prison officers who were guilty of these assaults and this perjury are still serving in the Maze Prison, and none has been discharged from the service because of any part of this conduct.

13. Hutton J in the course of his judgment expressed the opinion, with which I would agree, that one of the probable causes of these unjustified assaults was anger at the death of Prison Officer Ferris.

It was submitted by the respondents that the very fact that so many of the prisoners have now successfully brought their claims before the courts in Northern Ireland indicated that there was no ground for the applicant's fear of invasion of his constitutional rights.

I have no difficulty in accepting that if ill-treatment of any of the prisoners in the Maze Prison is brought to the notice of the courts in Northern Ireland it will be condemned and remedied. The very forthright and unequivocal language of the judgment of Hutton J in the judgment which was before this Court in *Pettigrew's* case amply supports such a belief.

This Court has, however, as its primary obligation the duty to prevent such invasions of the appellant's rights and it is not a sufficient discharge of that duty for it to rely upon the vindication of those rights by compensation after they have been invaded.

Having carefully considered the findings of fact made by the Divisional Court and the uncontested evidence before it, I have come to the conclusion that there is a probable risk, if the applicant were returned to the Maze Prison in Northern Ireland that he would be assaulted or injured by the illegal actions of the prison staff.

In reaching this conclusion I have been particularly influenced by the fact that he has been, rightly or wrongly, identified as being involved in the attack on Prison Officer Ferris, which, it is reasonable to assume, members of the prison staff may well still associate with his death, notwithstanding the ruling in the criminal case.

If they do, the total absence of any repercussions on the staff as a result of the ill-treatment of prisoners in the aftermath of the escape, and from that point of view the success of their conspiracy to cover up their conduct would appear to make the applicant, in my view, a probable target for ill-treatment.

The present detention of the applicant is in pursuance of an order of the District Court made pursuant to the Extradition Act 1965 for the delivery of the applicant into the custody of the RUC for the execution of warrants which include a warrant for the detention of the applicant in the Maze Prison to serve the unexpired balance of the sentence of 18 years imposed on him on 14 June 1982. Having regard to the findings made by me I am satisfied that this Court should prohibit such delivery in order as far as practicable to defend the

applicant's constitutional rights which are protected by Article 40.3 of the Constitution. His further detention therefore on foot of this District Court order would become unlawful.

Claim pursuant to s. 50 of the Extradition Act 1965

With regard to the plaintiff's claim for exemption in respect of a political offence pursuant to s. 50 of the Extradition Act 1965, I have read the judgment which is about to be delivered by Walsh J.

In so far as that judgment endorses the principle laid down by this Court in *Quinn v Wren* [1985] ILRM 410 I agree with it, and see no reason to alter the views expressed by me in that case.

In so far as it dissents from the application by the majority of this Court of that principle to the facts established in *Russell v Fanning* my position is as follows.

I accept that any extradition case must be decided in the light of its own facts and circumstances and that the question as to whether the principle laid down in *Quinn v Wren* is applicable to any particular case depends on whether the activity constituting the offence charged or the conviction recorded, as the case may be, can legitimately be construed as subverting the Constitution and usurping or endeavouring to usurp the function of the Government under the Constitution.

The view expressed by Walsh J in his judgment in this case, that the activity constituting the conviction of the plaintiff could not be so construed is manifestly a decision reached after the most comprehensive and detailed consideration of all the relevant factors. It is a view which I am aware is supported by the majority of my other colleagues in this Court in this case.

In these circumstances, having regard to the fundamental nature of the issues which arise in extradition cases, I am satisfied that it would be consistent with the jurisprudence of this Court that I should accept this view so that the basic principles underlying it may clearly represent the decision of this Court.

I would, therefore, allow the appeal and direct the release of the plaintiff.

WALSH J: This is an application for the extradition of the appellant to Northern Ireland on foot of a warrant charging him with escaping from prison, the object of which is to return him to serve a sentence in the prison from which he escaped.

On 14 June 1982 the applicant was convicted in Northern Ireland on the charge of having guns and ammunition with intent to endanger life contrary to Article 17 of the Firearms (Northern Ireland) Order 1981. The offence took place on 28 August 1981 and on 14 June the applicant was sentenced to 18 years' imprisonment. On 25 September 1983 he escaped from that imprisonment at the Maze Prison in Northern Ireland.

On 5 October 1987 20 separate warrants for the arrest of the appellant were

issued in Northern Ireland relating to offences alleged to have been committed by him during the course of the escape from prison. The warrants were sent to this jurisdiction for execution and were endorsed for execution by the respondent. He was arrested within this jurisdiction on foot of the said warrants and brought before the District Court which in due course made orders of extradition in respect of each of the 20 warrants and also a 21st order of extradition on foot of another warrant for the arrest of the applicant which has been issued seeking his extradition to Northern Ireland to continue to undergo the prison sentence of 18 years.

Since then it has been made clear that it is now the intention of the Director of Public Prosecutions in Northern Ireland to prosecute only in respect of seven of the original 20 warrants in addition to the 21st warrant. Each of the seven warrants refers to incidents alleged to have occurred during the prison break.

The applicant brought proceedings in the High Court pursuant to provisions of s. 50 of the Extradition Act 1965, and also proceedings for an order pursuant to Article 40.4.2° of the Constitution that his detention was not in accordance with the law. The cases were heard together in the High Court by a Divisional Court consisting of the President of the High Court and Gannon and Costello JJ.

The applicant in an affidavit sworn on 7 July 1988 claimed that the offence in respect of which he was convicted in Northern Ireland, namely, possessing arms with intent to endanger life, was committed by him as a member of and on behalf of the IRA of which he was a member of an active service unit and that the operation was directed against armed British soldiers who were on active service. In respect of the escape he claimed that as 'a republican prisoner of war' it was his duty to escape and he had been instructed by the 'republican camp staff' in the prison to escape. He also swore in the affidavit that the offence which was directed against the armed British soldiers who were on active service was confined to attempting to end British rule in Northern Ireland and that he did not have as an objective the subversion of the Constitution of Ireland or the usurpation of the organs of state established by the Constitution. He made a similar averment in respect of the purpose of the escape. He also swore that the objectives of the IRA in general was not to subvert the Constitution of Ireland or to undermine by force the organs of state established by the Constitution.

The President of the High Court in dismissing the applicant's claim drew attention to the fact that the IRA is an illegal organisation in this jurisdiction by virtue of SI No. 162 of 1939 made pursuant to the provisions of s. 18 of the Offences Against the State Act 1939. The learned President stated that he did not accept the truth of the averments made by the applicant in relation to the general objects of the IRA. The learned President took the view that the facts of the case were indistinguishable from those in *Russell v Fanning* [1988] ILRM 333 and that he was bound by the judgment of the Supreme Court in that case,

which had been delivered by the Chief Justice. In effect the learned President was saying that because the applicant was a member of the IRA, an organisation which he accepted as being one which had as its aims and objectives the overthrow of the organs of state set up under the Constitution, that an act done in the furtherance of any of the aims of the IRA could not qualify for the political exemption contained in the Extradition Act 1965. Gannon J in his judgment on this issue in the case also came to the conclusion that for the reasons stated in the majority judgment of the Supreme Court in *Russell v Fanning* that the political exemption was not available to the applicant. Costello J also agreed with the reasons stated by his two colleagues.

On the question of the political exemption counsel on behalf of the applicant has urged the court ought not to follow its own decision in *Russell v Fanning* on the grounds that the reason given by the Chief Justice for holding that the political exemption did not apply in the case of *Russell* was based on the unwarranted inference that the Oireachtas never intended the political exemption in provisions of the Extradition Act 1965, to apply in respect of acts such as those alleged against Russell because such acts amounted to a violation of Articles 6.1 and 6.2 of the Constitution and that such activities amounted to subversion of the Constitution and the usurpation of the functions of government.

For the sake of clarity it is best to quote the exact words used by the learned Chief Justice which appear at p. 338-339 of the report and which are as follows:

> The objectives for which, on the affidavit of the plaintiff, the attack was made on Detective Superintendent Drew and the objectives which were a factor in the escape by the plaintiff from the Maze Prison were to achieve the reintegration of the national territory by force of arms. The plaintiff states that he is a member of an organisation, the Provisional IRA, which intends to carry out the task.
>
> The Constitution and in particular Articles 6.1 and 6.2 make it quite clear that, subject to the provisions of the Constitution, decisions as to the method by which the national territory is to be integrated are matters for the government subject to the control of Dáil Éireann, and that the carrying out of these decisions is exercisable only by or on the authority of the organs of state established by the Constitution.
>
> Any person or group of persons is, of course, entitled to advocate a particular policy of reintegration, whether that is or is not consistent with existing government policy from time to time.
>
> For a person or a group of persons however, to take over or seek to take over the carrying out of a policy of reintegration decided upon by himself or themselves without the authority of the organs of state established by the Constitution is to subvert the Constitution and to usurp the functions of government. In my view, 'political offence' within the meaning of s. 50 of the Extradition Act 1965, cannot be construed so as to grant immunity to a person who by his own admission has, in respect of the matters with which he is charged, that objective. This ground of appeal must therefore fail.

The learned Chief Justice had earlier in the judgment agreed with O'Hanlon J's decision in the High Court in the same case that by reason of the decision of the Court in *Quinn v Wren* [1985] ILRM 410 he was bound to interpret s. 50 of the Extradition Act 1965 as excluded from the meaning of 'political offence' [illegible] for the purposes set out and, that, the aims and objectives [illegible] the second respondent's affidavit. In *Russell v Fanning* the court was asked to [illegible] decision in *Quinn v Wren* which the court declined to do. The decision in *Quinn v Wren* was based on the reasoning that as the Extradition Act 1965 was passed since the coming into force of the Constitution the first and fundamental rule which governed the interpretation of the Act must be the presumption that the Oireachtas intended by its provisions not to offend against any expressed or implied provision of the Constitution. The decision reasoned [illegible] therefore followed] that s. 50 of the Act of 1965 could not be construed as granting exemption from extradition on the ground of the political exemption to the Act to anybody charged with an offence, the purpose of which 'is to [illegible] of the Constitution or usurp the functions of the organs of state established by the Constitution.' As a statement of principle I think it cannot be questioned [illegible] immediately correct.

However it is well established that every extradition case must be decided in the light of its own particular facts and circumstances. The question must arise whether the particular activity for which the applicant was convicted in Northern Ireland and the escape subsequently made can legitimately be construed as [illegible] the Constitution and usurping or endeavouring to usurp the function of the government under the Constitution. The activities under review in *Quinn v Wren* namely, the objective of the establishment of a 'Thirty Two Counties Northern Republic by force of arms' was an objective clearly aimed at the [illegible] down of the Constitution and the organs of government set up under the Constitution and, in the appropriate case, could be reasonable and in contravention of Article 15.6 of the Constitution.

In *Russell v Fanning* the decision was to the effect that the activities complained of amounted to a violation of Article 6 of the Constitution. In the present case Mr. Woods, counsel, relied upon the decision of *Russell v Fanning* to govern the decision in this case on the point of whether or not the political exemption [illegible] of the Extradition Act 1965 was available to the present applicant.

The first thing to observe is that the decision of the High Court on this point was based essentially upon the fact that the IRA is an illegal organisation in this jurisdiction upon the grounds set out in the statutory instrument already referred to, namely, s. 18 of the Offences Against the State Act 1939. Yet the particular activity which led to the conviction of the applicant, and which is the activity that falls to be examined in the present case, was one which occurred outside the jurisdiction and was related to an episode involving the applicant and a number of members of the British army. The learned President of the High

Court declined to believe that the IRA did not have as one of its objectives the overthrow of the Constitution of Ireland. The refusal to accept the claim to the contrary concerning the objectives of the IRA cannot without more prove that the particular offence of the applicant had such an objective. In effect the case was decided upon the fact that he was a member of the IRA and linked to its general objectives rather than on the particular activity in question which led to his conviction.

Membership of the IRA obviously does not attract the political exemption simply because of such membership in respect of any offence committed by any of its members. The nature and objective of the particular activity must be the test. Being a member of the IRA does not by itself disqualify any activity of a member from the application of the political exemption. *Quinn v Wren* was decided upon the particular activities in question which were held to be aimed at the overthrow of the State. The same rule would apply to anybody or any group of persons, whether members of the IRA or not if their activities came within those the subject of consideration in *Quinn v Wren*. Members of the IRA might be prosecuted and convicted outside the jurisdiction of this State for political activities totally unconnected with the reintegration of the national territory as, for example, connected with the political situation in other countries. In such an event if the matter came before the courts here by way of an application for extradition the matter would have to be examined as to its nature and motivation before deciding whether the political exemption should apply.

Nobody may be extradited from this State in respect of any offence unless it can be done within the terms of the Extradition Act 1965 (No. 17), the Extradition Act 1987 (No. 1) and the Extradition Act 1987 (No. 25). The present case is governed only by the 1965 Act but the body of legislation dealing with extradition must be looked at as a whole and in the light of the legislative history of the subject before deciding on whether the inference upon which *Russell v Fanning* was decided can be justified.

Northern Ireland is part of the national territory as defined by Article 2 of the Constitution. Pending the reintegration of the national territory Article 3 of the Constitution provides that the laws enacted by the Oireachtas shall have the State as the area and extent of their application and may have extra-territorial effect if the Oireachtas so enacts. Since 1920 emergency powers legislation has existed in Northern Ireland with recurring bouts of civil unrest resorted to from time to time by members of the local minority community in armed pursuit of a political philosophy of reunification of Ireland. Since 1971 the IRA has embarked upon a protracted guerilla campaign in pursuit of the same philosophy in the form of rural but more often urban guerilla activity which relies heavily on the use of firearms, bombing, intimidation and significant support from sections of the local population. This has been met by highly sophisticated measures of counter insurgency especially designed to defeat political

subversion and political violence. It is unnecessary to detail the breadth and extent of such measures which include military and non-military measures including, as part of the process, the criminalisation of the political violence with important changes in the substantive and procedural law of the area. The claimed objective of the IRA is to inflict a military defeat or to demonstrate that the government of the area is unable effectively to govern the area. As in the case of the 40 or so other small wars which are going on in the world at the moment it is quite different from an open and declared inter-State war as envisaged by the Geneva Conventions and from a numerical point of view the IRA and its supporters would scarcely meet the criteria of the protocols to the Geneva Conventions relating to internal civil wars. However it would be quite unrealistic to regard the situation as other than a 'war or a quasi war' to use the words of McDermott J (as McDermott LJ then was) in what is known as the *Patrick McElhone* case on 10 March 1975 when he tried and acquitted a British soldier on a charge of murder at Belfast City Commission in a non-jury trial. When the case was referred to the House of Lords by the Court of Criminal Appeal of Northern Ireland under the name *Attorney General for Northern Ireland's Reference (No. 1 of 1975)* ([1977] AC 105 and [1976] NI 169) Lord Diplock who read the leading speech referred to the situation as 'a state of armed and clandestinely organised insurrection against the lawful government of Her Majesty by persons seeking to gain political ends by violent means. . .' (see p. 136 of AC and p. 206 of NI)

On 1 September 1976 Dail Eireann resolved pursuant to Article 28.3.3° of the Constitution that 'arising out of the armed conflict now taking place in Northern Ireland' a national emergency existed affecting the vital interest of the State. On the same day Seanad Eireann passed a resolution in identical terms. These resolutions are still in force. These resolutions, pursuant to the said provision of the Constitution referred to 'an armed conflict in which the State is not a participant' and it is unnecessary for the purpose of this judgment to consider whether that provision requires neutrality on the part of the State in respect of the conflict or whether or to what extent intervention of any sort is permitted. It is sufficient to note that the conflict affects the vital interest of this State and therefore the State must take such measures as it considers necessary to protect those interests within the State.

Three years prior to that resolution an agreement known as the Sunningdale Agreement had been reached following a conference between the government of Ireland and the government of the United Kingdom and other participants in the non-violent political life of Northern Ireland. It was agreed by the parties at that conference that persons committing crimes of violence, however motivated, in any part of Ireland should be brought to trial irrespective of the part of Ireland in which they were located. Different ways of solving the problem were discussed among them were 'the amendment of legislation operating in the two

jurisdictions on extradition, the creation of a common law enforcement area in which an all Ireland court would have jurisdiction, and the extension of the jurisdiction of domestic courts so as to enable them to try offences committed outside the jurisdiction.' It was agreed that problems of a considerable legal complexity were involved, and that the Irish and British governments would jointly set up a commission to consider all the proposals put forward at the conference and to recommend as a matter of extreme urgency the most effective means of dealing with those who commit these crimes. In due course a body known as the Law Enforcement Commission was appointed jointly by the two governments in December 1973.

The terms of reference of the commission are to be found at p. 7 of the report of the commission, made on 25 April 1974. The terms of reference expressly included a reference to the question of extradition and the subsequent report indicates that it was considered in considerable detail. In this context what the Commission was concerned with were offences which were then currently accepted as being political offences or offences connected with political offences within the meaning of the Extradition Act 1965 with the view to qualifying the political exemption in its application to a schedule of specified offences by excluding from the exemption particular politically motivated offences involving violence. The commission was informed by the Irish government that it was pointed out at the Sunningdale Conference by the representatives of the Irish government that 'it is a well recognised principle in international law that the extradition of a person accused of a political offence does not take place and that the Irish government did not feel that a departure from a principle of international law so firmly established could be justified.'

What emerged as a result of the conference was legislation enacted by the Oireachtas and, in almost identical terms, legislation enacted by the parliament of the United Kingdom providing for extra territorial jurisdiction in the domestic courts. The Irish legislation, namely, the Criminal Law (Jurisdiction) Act 1976 contained a schedule of offences for which persons could be tried here even though the offences were committed in Northern Ireland. The offences scheduled were the ones most commonly occurring for political motives although under the terms of the Act they are not confined to political motivation and are equally applicable to offences committed without any political motive. It has been pointed out by Mr Colm Campbell in his learned article entitled 'Extradition to Northern Ireland: Prospects and Problems' in the Modern Law Review, Vol. 52 (1989) p. 585, that in terms of securing convictions of fugitive offenders in respect of politically motivated crimes committed in Northern Ireland the Criminal Law (Jurisdiction) Act 1976 has been conspicuously more successful than the extradition process. He further points out that the practical difficulties of the extradition method of dealing with the problem predicted in paragraph 71 of the report of the Law Enforcement Commission has been shown

to have been correct.

It is thus clear that the Oireachtas chose not to legislate to qualify the political exemption contained in the Act of 1965 but, clearly recognising its application to politically motivated offences committed in Northern Ireland, instead chose to deal with the situation by means of the enactment of the Criminal Law (Jurisdiction) Act 1976. The political exemption provision is still the law in this State and as a principle has remained unrepealed. In fact it has been reiterated in subsequent legislation concerning extradition although abated in its application in certain cases as set out in the Extradition Act 1987 (No. 1), to give effect to the European Convention on the Suppression of Terrorism.

The effect of the European Convention on the Suppression of Terrorism as adopted by our legislation has been, to put it in very general terms, to withdraw from the political exemption offences involving the use of explosives or ammunition (weapons which by their nature tend to be indiscriminate in their effect) and any attempts at the same, and offences involving kidnapping, the taking of hostages or serious false imprisonment. It also withdraws the political exemption in respect of other matters which are not immediately relevant to the present case. S. 3 also enables a court to take into account any particular serious aspects of an offence including the collective danger to the life, physical integrity or liberty of persons or affected persons foreign to the motives behind it or that cruel or vicious means were used in the commission of the offence. The words 'collective', 'persons foreign to the motives' and 'cruel and vicious means' are recognised elements of terrorism. The court is empowered to form the opinion by reason of these elements that the offence could not properly be regarded as a political offence or an offence connected with a political offence. None of these is applicable to the present case and therefore it is unnecessary to consider them further.

The object in referring to this recent legislation is to indicate that a distinction has been drawn between what is strictly regarded as terrorism and what is regarded as politically motivated offences or offences connected with political offences. Putting it briefly political offences are defined as offences usually, though not necessarily, consisting of violent crime directed at securing a change in the political order. The effect of the adoption of the Council of Europe recommendation is to enable derogation from what the Council of Europe in the preface accompanying the convention called 'the traditional principle according to which the right to extradite is obligatory in political matters' in respect of certain violent offences. It is thus clear that the use of violence does not in itself exclude the Court of the political exemption but particular forms of violence such as those already indicated will be grounds for abating the political exemption. This is without any change in the distinction between pure political offences and political offences, as defined by O'Dálaigh CJ in *Bourke v Attorney*

The Extradition Act 1965 was modelled upon the provisions of the European Convention on Extradition and follows it closely. Article 3 of the convention prohibited extradition in respect of offences which were regarded by the requested party as political offences or offences connected with political offences. Article 26 enabled parties to make reservations in respect of Article 3 but the government of Ireland made no such reservation either in respect of events in Northern Ireland or elsewhere, and in the subsequent legislation based upon the convention, namely, the Act of 1965 no such qualification was made.

In our domestic law we do not recognise the existence of political exemption to offences committed within the State and triable within the State in respect of offences which are politically motivated. However, the legislative provisions for the political exemption apply in respect of those parts of the national territory which are not within the State, as well as to places outside of Ireland, subject to the qualifications to be found in the legislative provisions already referred to and to others not referred to and not relevant to the present case.

It is quite clear that in international law indiscriminate attacks on killing of the civilian population is contrary to the laws of war and can be classed as crimes against humanity even if they have a political objective and are also acts of terrorism whether committed by a state or by those seeking to overthrow a state. A similar outlook is at the heart of the European Convention for the Suppression of Terrorism. Needless to say terrorism can exist without any political motivation such as where a section of the population is terrorised in the course of personally motivated banditry.

The expression 'terrorism' is frequently used as a blanket term for many violent acts ranging from pure terrorism to nationalist uprisings to achieve independence. For purely propaganda purposes it is frequently used to characterise activities disapproved of by the propagandists. Only a fool (or one though can equate it with violence as opposed to peaceful persuasion) or 'Terrorism has no agreed definition and its use is often a way of conveying disapproval rather than being descriptive' – 'Suppressing Terrorism under the European Convention, a British Perspective' by D.V. Lowe and J.R. Young (Netherlands International Law Review 1978 Vol. XXV, 305). The essential ingredients are instilling terror in the public or a section of it for the purpose of intimidating such persons and the indiscriminate nature of attacks which put in jeopardy the lives or safety of civilians or other persons unconnected with the objectives of the attack.

The decision of this Court in *McGlinchey v Wren* [1983] ILRM 169 which acknowledged that the political exemption was expressly disclaimed by the appellant, touched upon the distinction between an act of terrorism and a 'political offence'. In that judgment the court did not seek to attach any particular definition to the expression 'political offence' or a particular definition of 'terrorism'. One must therefore assume that the terms were used in their ordinary

accepted meaning. It is furthermore to be noted that the case dealt solely with the particular facts of the case which disclosed a totally indiscriminate type of attack with a machine gun on a private dwelling-house when a civilian totally unconnected with any political objectives was killed. As the evidence stood this offence was correctly characterised as terrorism, with which the appellant denied any involvement and for which he was subsequently acquitted. The treatment of the matter in that case did not determine that a politically motivated offence would cease to qualify for the exemption simply because violence was used. Furthermore the decision expressly left open for future consideration the conclusion that might be reached in different circumstances. The 'reasonable man' test referred to must be a purely objective approach not to be influenced by sympathy or lack of sympathy with the aims or the means employed. The British Prevention of Terrorism Acts, the latest of which was enacted in 1989, defined terrorism as the use of violence for political ends, and includes the use of violence for the purpose of putting the public or any section of the public in fear but does not create any offence of 'terrorism'. It is a definition devoid of any legal basis in international law and is simply an *ad hoc* definition for the purpose of permitting the detention of persons who are suspected of such activity. It has restricted application in geographical terms in that it applies only to such activities which relate to Northern Ireland affairs and to countries outside Great Britain, the Isle of Man and the Channel Islands. It is not applicable to acts of political violence if perpetrated by Scottish nationalist extremists or Welsh nationalist extremists or English extremists such as the 'Angry Brigade' if the activities relate only to the affairs of those respective areas. The law in this State, whether legislative or otherwise has never accepted any such imprecise definition.

The fairly elaborate list of offences against the State which are set out in the Offences Against the State Act 1939 cover all the matters which could be in a general sense referred to as political offences within the State. It is noteworthy that the Oireachtas has not given any of these offences an extra-territorial effect. Thus the Oireachtas has, in effect, declined to make criminal under the Offences Against the State Act acts of the like nature committed outside the jurisdiction. Prior to the enactment of the Extradition Act 1965 the Oireachtas was well aware of the past history of unrest and armed conflict in Northern Ireland, yet elected to make no provision for dealing with acts done in Northern Ireland until the enactment of the Criminal Law (Jurisdiction) Act 1976.

In particular it was aware of the fact that because of the renewal in 1956 of armed conflict aimed at the ending of partition by the use of force Part II of the Offences Against the State (Amendment) Act 1940 was brought into force on 8 July 1957 and remained in force for some years. Thus the question of the legal situation of persons accused of armed political activities in Northern Ireland cannot have been absent from the minds of the members of the Oireachtas. In

subsequent extradition legislation no such provision was made and that fact coupled with the particular provisions made in the Criminal Law (Jurisdiction) Act 1976 demonstrates that the Oireachtas intentionally refrained from characterising as matters directed to the overthrow of this State or as activities designed to usurp the functions of our government, the political violence in Northern Ireland which had as its objective the re-integration of the national territory. Furthermore the Oireachtas in framing the 1965 Act did not avail of the provisions of Article 26 of the European Convention on Extradition in any way to modify the effect of Article 3 of that convention which was incorporated into the Act of 1965, namely, the exemption of political offences or offences connected with political offences. In fact the policy adopted, as is evidenced by the Act of 1976, and by the Convention of Dublin agreed on 4 December 1979 by the member states of the European Communities, appears to have been one to give effect to the maxim *aut dedere aut judicare*.

In the light of the review of the political and historical background to our extradition legislation, which I have attempted to summarise, I am of opinion that the court cannot draw the inference that it was the intention of the Oireachtas that the provisions relating to the political exemption in the Act of 1965 should not apply to persons charged with politically motivated offences of violence when the objective of such offences was to secure the ultimate unity of the country.

It is, of course, true that it always has been the policy of successive Irish governments to endeavour to ensure that reunification is brought about by peaceful means. The fact that the policy adopted by persons engaged in the armed conflict in Northern Ireland is to seek to achieve the same means by violence, deplorable and counter-productive as it is, demonstrates that such persons are pursuing a policy which is opposed to and contrary to and at variance with the policy adopted by the government of Ireland. If these activities were undertaken within this jurisdiction they would, of course, be clearly within the contemplation of the domestic law. But in so far as they occur outside the jurisdiction they do not, save to the extent that they fall within the ambit of the Criminal Law (Jurisdiction) Act 1976. The fact that the policy or activities followed by persons acting outside the jurisdiction of the State is opposed to or contrary to the policy adopted by the government of Ireland in relation to the unity of the country is not, in my view, sufficient to equate it to a policy to overthrow this State or to subvert the Constitution of this State. In one sense any offence which damages the political interest of the State is a political offence whether committed inside or outside the State. But that is a matter for which the State must expressly legislate. There may be many matters in international affairs including warlike activities in respect of which the government of this State has a particular interest or a particular policy including that under Article 29 of the Constitution, of seeking to promote the peaceful settlement of

international disputes. But that in itself would not be sufficient to enable the courts to deprive anybody who involves himself in the same dispute, in a manner opposed to the general government policy and who becomes a fugitive in this State, of the benefit of the statutory provisions dealing with the political exemption.

Under our legislation, unlike the position in many other states, the decision that a fugitive offender shall be extradited is exclusively a judicial one. The Minister for Justice can within the provisions of the Act of 1965 direct that a person shall not be extradited. His power in this regard is more restricted than that vested in the executive in other states but it is an additional safety factor in the process as he may have better access to information from his political and diplomatic sources which ordinarily would not be available to the courts and, possibly, could negotiate for better treatment for the fugitive if returned.

For the courts however, extradition cannot be treated as a question of foreign policy. They must remain completely impartial and detached and free from all political or diplomatic pressure in their objective determination of the issues involved. In addition they must safeguard the constitutional rights of the fugitive and ensure that there will be no rendition which would subject the fugitive to injustice or to any treatment or procedure which would be inconsistent with the norms of our concept of fair procedures. While foreign proceedings may be fair and humane without conforming in all respects with the particular guarantees in our Constitution, our statutory provisions do not permit the courts to ignore the motives of the requesting state or the fairness of the procedures by refusing to consider the treatment the fugitive will receive if returned. Neither should our courts ignore the answerability of the State to the organs of the European Convention of Human Rights and Fundamental Freedoms if a fugitive offender is handed over to any other State, whether a member of the Council of Europe or not, where the courts are not satisfied that his treatment there would not be in breach of the rights protected by the convention.

In my view the decision in *Russell v Fanning* on the application of the political exemption ought not to be followed. There is no valid ground to infer from the plain and unambiguous meaning of the appropriate provisions of the Act of 1965 that the Oireachtas did not intend them to be applicable to a case such as the present one. The words themselves and the legislative context and ambiance of this subject all point to the opposite conclusion.

I wish to add that I am satisfied that the analysis and the conclusions of Hederman J and McCarthy J in their respective judgments in *Russell v Fanning* are valid.

For the reasons I have given I am satisfied that the offence for which the applicant was convicted was one which would have qualified for the political exemption and that the alleged offences the subjects of the present extradition proceedings are all so closely connected with the original offence as also to

attract the political exemption — see the judgment of this Court in *Bourke v Attorney General* — and on their own would also attract the like exemption.

For these reasons I would allow the appeal on this aspect of the case.

I agree with the judgment of the Chief Justice on the Article 40 aspect of the case and I would allow the appeal on that ground also.

GRIFFIN J: Two questions arise for decision in this case:

1. Whether the offences alleged to have been committed by the appellant Dermot Finucane in the course of his escape from the Maze Prison in Northern Ireland, and the offence in respect of which he was serving a sentence of 18 years' imprisonment, and in respect of which the warrants issued in Northern Ireland, were political offences or offences connected with a political offence, which would entitle the appellant to avail of the political exemption pursuant to s. 50 of the Extradition Act 1965, and

2. Whether his release from custody should be directed by the court pursuant to Article 40 of the Constitution irrespective of whether the political exemption was available to him under s. 50.

In the course of the argument made on behalf of the appellant on the issue of the political exemption, it was submitted that the decisions of this Court in *Quinn v Wren* [1985] ILRM 410 and *Russell v Fanning* [1988] ILRM 333 were wrongly decided, or alternatively should not be followed, or in the further alternative should be distinguished. A like submission had been made, and was rejected, in *Russell v Fanning* in which the court had been invited to overrule its decision in *Quinn v Wren*. I have had the advantage of reading in advance a copy of the judgment delivered by the Chief Justice and of that delivered by Walsh J. As has been pointed out by the Chief Justice in *Quinn v Wren*, and by him and by Walsh J in the instant case, every extradition case must be decided in the light of its own facts and circumstances. Like the Chief Justice, in so far as the judgment of Walsh J upholds the principles established in *Quinn v Wren*, I entirely agree with it. In respect of the decision of this Court in *Russell v Fanning*, Walsh J has, in his judgment, expressed the view that, on the application of the political exemption, the case should not be followed. He reached this conclusion after a thorough examination and review of all the facts and circumstances existing at the time of the conviction of the appellant of the offence in respect of which he was convicted and sentenced, and at the time of his escape from the Maze Prison, and of the provisions of the Extradition Act 1965. Notwithstanding, and with due respect to his views, as expressed in his judgment, I remain of the opinion that *Russell v Fanning* was correctly decided. But as I am aware that the principles stated by and the conclusions reached by him are supported by my two colleagues who are to follow, thus forming the majority of the court, I do not propose to elaborate on my opinion. However, as this is the court of final appeal, although it may not be necessary to do so, I should like

to say that, having regard to the importance of the use of precedent in our system of jurisprudence as providing a degree of certainty upon which members of the public are entitled to rely in the conduct of their affairs, the principles established in and the conclusions reached by the majority of the court, are those which should now be applied in all cases in which the political exemption is in issue.

In respect of the application pursuant to Article 40 of the Constitution, I am satisfied that even if the political exemption was not available to the appellant, the court should refuse to deliver him out of the jurisdiction and should direct his release from custody. On this question, I am in complete agreement with the judgment of the Chief Justice, and with the reasons stated by him for the conclusions at which he arrived. I would like however to add some observations of my own.

The 38 prisoners who escaped on 25 September 1983 were housed in H Block 7, which contained over 120 prisoners in all. On the evening of the escape the prison authorities decided to transfer all the remaining prisoners in H Block 7, a total of 88, to H Block 8 which was about 60 to 70 metres away and was unoccupied, to enable a thorough search to be made for hidden weapons and to enable the police to conduct their investigation in that block. Along the route which the prisoners had to traverse there were German shepherd dogs, in the charge of prison officers who were dog handlers, on either side, four dogs being on the right and three on the left, and in addition two dogs in the yard of H Block 7. Before the transfer took place and after the dogs had first taken up positions, the governor of the prison, Mr Whittington, who was present for only a few minutes, ordered that the dogs should be moved back behind a little wall along the route. Having regard to the events that occurred subsequently, it would appear that after the departure of the governor the position of the dogs was changed to their original position notwithstanding his orders.

A large number of prisoners alleged that, in the course of their transfer, during which most of them were in their bare feet and were naked from the waist up, they were assaulted by prison staff and bitten by the dogs. They further alleged that, on 26 September, they made requests to see one of the doctors who attend the prison and that these requests were refused or ignored. They allege that further requests on 27, 28 and 29 September were also refused or ignored.

On 26 September Mr Whittington had a meeting with representatives of the Prison Officers' Association and was told that, as a mark of respect to Officer Ferris, they were imposing certain conditions from 14.00 hours on Monday until after the funeral of the officer. On the following day, 27 September, Mr Whittington learned that the prison officers were not accepting requests by prisoners to see a doctor. He was very concerned at this, and sent for the representatives of the Prison Officers' Association. He expressed his concern to them, and asked them to change their attitude, but they were not willing to do so. He then reported the matter to the Northern Ireland Office. On Friday, 30

September, being the day after the funeral of Officer Ferris, he ordered that the prison would return to normal functioning. A number of prisoners did not in fact receive visits from the doctor until nine to ten days after the escape.

Because of the allegations that prisoners had been assaulted on 25 September, and bitten by dogs, the prison department of the Northern Ireland Office requested the governor of the prison to carry out an investigation into these allegations. This investigation commenced early in October 1983 and was carried out by Mr McLaughlan, the deputy governor of the prison. His report was completed in November 1983, and in it he stated that 'I have met with what could be described as "a wall of silence" in my attempt to investigate the allegations'. This was from both prisoners and prison officers. However, a number of prison officers, including the dog handlers, who had been involved in the transfer of prisoners to H Block 8, made written statements which were furnished to Mr McLaughlan and in which they all stated that no prisoner had been assaulted and no dog had come into contact with a prisoner. All officers declined to be interviewed by Mr McLaughlan.

All the foregoing facts are to be found in the judgment of Hutton LCJ in an action taken by Brian Pettigrew against the Northern Ireland Office and the governor, hereinafter referred to.

A large number of prisoners instituted proceedings against the Northern Ireland Office and the governor of the prison in respect of the assaults, including dog bites, alleged to have been suffered by them. Three of these actions were tried in the County Court. In each of the three cases a number of prisoners and former prisoners gave evidence on behalf of the plaintiffs that they had been bitten by dogs in the course of the transfer to H Block 8, and that their requests to see a doctor had been refused or ignored. A large number of prison officers gave evidence to the effect that no one had been bitten by a dog and that no request for a doctor had been refused. All three actions were dismissed.

One of the prisoners transferred on the day of the escape was Brian Pettigrew. He commenced proceedings in the High Court of Justice in Northern Ireland, claiming damages for (*inter alia*) assaults (including dog bites) alleged to have been suffered by him in the course of his transfer, and in respect of the alleged failure or refusal of the governor to allow him to see a doctor. The action was tried by Hutton J, as he then was. It would appear that after the plaintiff had given evidence and been cross-examined, it was stated by his counsel that it was proposed to call as witnesses on his behalf persons who were prisoners in H Block 7 on the day of the escape and who were transferred to H Block 8, and who, it was alleged had been assaulted by prison officers and bitten by dogs in the course of the transfer. Counsel for the defendants objected to the admissibility of such evidence. The learned trial judge heard arguments on the admissibility of that evidence, and in due course delivered a written judgment, which I presume to have been a reserved judgment. He held that the evidence

of the other prisoners that they were bitten by dogs was admissible in evidence in that case.

The trial continued and the learned trial judge, who by that time had become Lord Chief Justice, delivered judgment in writing on 17 November 1988. In that judgment, he said at p. 6 that Mr Campbell, QC, for the defendants, in the course of his cross-examination and pursuant to his instructions, put to the plaintiff and to other former prisoners called as witnesses that if they had made a request to see a doctor on Monday 26 September and on the subsequent days, that request would have been granted. But after the trial had proceeded for two weeks, Mr Campbell informed the court that documents had just come to light which showed that his instructions were incorrect and that the true position was that if such requests had been made on any of the four days following the escape, the request would not have been granted.

It appears from the judgment that all the dog handlers and the principal officer in charge of them stated in evidence that no dog had bitten or come into contact with any prisoner. In addition, the Lord Chief Justice stated that it was suggested to the plaintiff and to the prisoners and former prisoners called by him that, if they had made a request to see a doctor on Monday 26 September, in order to obtain treatment for alleged dog bites, arrangements would have been made for them to see a doctor, the implication being that they had not done so because they had sustained no bites.

Doctors who had been called to examine the plaintiff in that case and to examine other prisoners nine or ten days after the escape, gave evidence, and the Lord Chief Justice found (*inter alia*):

1. that having regard to the doctors' evidence he did not believe the evidence of the dog handlers and the principal officer in charge of them that no prisoner was bitten by a dog;

2. that a number of prisoners, some of whom were naked from the waist up, did have injuries from dog bites when they arrived in H Block 8;

3. that a number of prison officers who gave evidence about the activities of the dogs must have lied in the witness-box.

He stated that it is deplorable that a prisoner being moved from one part of a prison to another should have been bitten by dogs in the charge of prison officers. The plaintiff in that case was awarded damages, including aggravated and exemplary damages.

It is for the purpose of putting the appellant's application under Article 40 of the Constitution into proper context that I have dealt with the aforesaid matters at some length. It is clear that a number of criminal offences were in all probability committed by some, at least, of the prison officers in the prison — these would include assault, perjury, and conspiracy. Although it is now more than six years since the escape, no prison officer has been disciplined, suspended, dismissed, or charged with any offence. During the course of the

hearing of the appeal in this Court in *Russell v Fanning*, in which judgment was delivered on 19 January 1988, a suggested explanation for such failure to discipline etc was that a large number of claims for damages had been brought by the prisoners and were then unresolved.

Whilst that explanation may have appeared plausible at the beginning of 1988, it was no longer so after Hutton LCJ delivered his judgment. It is now clear from the reports made by the governor, the deputy governor, the medical records of the prisoners, and the medical reports of the doctors who attended them, that the prison authorities were well aware of the fact that requests for medical attention were refused and that there was evidence that some prisoners had been bitten by dogs. Moreover, with this knowledge, three actions were successfully fought in the County Court by the prison authorities on the false basis that there had been no requests for medical treatment, and that no person had been bitten by a dog. Many of the prison officers who were serving at the prison in September 1983, and who gave evidence, are still serving there.

In the case of the appellant, there are further factors which are of considerable relevance on the issue arising in pursuance of Article 40. In his affidavit, he alleged that in April 1983 he was taken out of one of the workshops in the prison by two warders, whom he named, and threatened with execution by them if any warder was injured in disturbances which were then taking place in the prison. One of those named by him was murdered by the IRA on 17 February 1985. The other has since retired from the prison service, but could have been available to swear an affidavit that such allegations were untrue. No such affidavit was provided for this case.

Furthermore, as a result of the escape, an inquiry into the security arrangements at the Maze Prison was conducted by HM chief inspector of prisons, and the report of the inquiry (known as 'the Hennessy Report') was submitted to the House of Commons in January 1984. Although only very few of those who took part in the escape are identified in the report, the appellant is identified at para. 2.19 as having chased Officer Ferris who ran from the gate lodge and was shouting to the officer at the pedestrian gate to secure it and sound the alarm. That paragraph continues:

> 'He [Officer Ferris] had been stabbed three times in the chest. Before he was able to reach the gate, he collapsed and later died. Finucane continued on to the pedestrian gate where he stabbed two officers who had just entered the prison. Officer ***, the officer on gate duty, had no time to sound the alarm or secure the gate before he too was stabbed.' (The names of all officers referred to in the report were omitted from the printed report for security reasons).

It seems to me to be a fair inference from that paragraph of the report that the appellant was being identified as the person who stabbed Officer Ferris. In *R v Burns* (1987) 9 Cr App R 57, 16 prisoners in the Maze Prison (the 16 not

including the appellant) were indicted before Lord Lowry LCJ, as he then was, for the murder of Prison Officer Ferris. In his judgment acquitting all 16 of the charge of murder, Lord Lowry said that having carefully considered all the medical evidence about the heart condition of the prison officer, he could not be satisfied beyond reasonable doubt that the unlawful acts of any prisoner ('including the so far unidentified prisoner who stabbed Prison Officer Ferris') caused or helped to cause his death. Notwithstanding that finding, human nature being what it is, it appears to me to be highly likely that there are still prison officers in the Maze Prison who do not accept that the alleged activities of the appellant during the escape did not cause or contribute to the death of Prison Officer Ferris.

I agree with the Chief Justice that, if returned to the Maze Prison the appellant would, in the circumstances of this case, be a probable target for ill-treatment and I would concur in the order proposed by him pursuant to Article 40 of the Constitution. I would accordingly allow the appeal.

HEDERMAN J: With regard to the plaintiff/appellant's claim for exemption in respect of a political offence pursuant to s. 50 of the Extradition Act 1965 I agree with the judgment delivered by Walsh J.

On the applicant/appellant's claim for relief pursuant to Article 40.4.2° of the Constitution, I agree with the judgment of Finlay CJ. I would allow the appeal on both aspects of the case.

McCARTHY J: On 25 September 1983 there was a mass escape from H Block 7 of the Maze Prison in Northern Ireland. The plaintiff/applicant was one of those who escaped. His extradition to Northern Ireland has been ordered by the District Court. He sues by way of special summons for an order under s. 50 of the Extradition Act 1965 and, by way of judicial review, for an order of *certiorari* in respect of the District Court order and an order of *habeas corpus* (so called) being a complaint under Article 40.4.2°, of the Constitution that he is being unlawfully detained.

The s. 50 claim

The plaintiff says that his original offence, having guns and ammunition with intent to endanger life, was a political offence, and that the 20 other warrants issued in Northern Ireland relating to offences alleged to have been committed during the course of the escape were political offences or offences connected with political offences. To deal with that argument it may be said that all the offences have the same alleged general purpose; the original offence being committed as a member of and on behalf of the IRA, in an operation directed against armed British soldiers who were on active service; the escape offences being in carrying out his duty to escape on instructions by 'the republican camp

staff'. He abjured having any objective of subverting the Constitution or usurping the organs of state established by the Constitution (see *Quinn v Wren* [1985] ILRM 410).

The facts are not in issue; the legal inference to be drawn from the facts — whether or not the offences 'qualify' for the political exemption, is the legal issue. Therefore, no question arises as to where the onus of proving facts lies; the larger question as to where the onus lies of establishing that the offence in question is either a political offence or one connected with a political offence has not been argued in this appeal no more than it appears to have been argued in earlier cases, save in *Bourke v Attorney General* [1972] IR 36 (see *State (Magee) v O'Rourke* [1971] IR 205; *McGlinchey v Wren* [1982] IR 54; *McMahon v Leahy* [1985] ILRM 422; *Shannon v Ireland* [1984] IR 548; *Quinn v Wren (supra)*; *Maguire v Keane* [1986] ILRM 235).

The plaintiff contends that *Russell v Fanning* was wrongly decided and should not be followed, that the appropriate law is as appears from the *Bourke* and *Magee* cases. Mr MacEntee SC, referred to a number of unreported decisions of the High Court between 1974 and 1976 all of which, he says, followed the 'appropriate law' (see *Burns v Attorney General* High Court (Finlay P) 4 February 1974; *McLoughlin v Attorney General* High Court (Finlay P) 20 December 1974; *McCarry & Clarke v Attorney General* 15 January 1976; *Gilhooley v Attorney General* 4 June 1976; *McManus & Doherty v Attorney General* 23 March 1977; *Swords v Attorney General* 22 December 1977; *O'Hagan & Herron v AttorneyGeneral* 18 July 1978; *Quigley & Ors v Fanning* 22 July 1980). They are noted at p. 303 of Hogan and Walker — *Political Violence and the Law in Ireland*. It was, the argument goes, an impermissible change in *McGlinchey v Wren* to introduce a totally new concept, no argument in relation to such a radical change having been heard. The effect was to empty the section of application in a vast number of cases. The logical sequence was to effect an outlawry, speculating on what other rights might be lost.

Russell v Fanning was decided in the High Court on 18 February 1986 and by this Court on 18 January 1988. Mr O'Flaherty SC, relies upon that decision and the principle of *stare decisis* as stated, although qualified, in *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642 and *Mogul of Ireland v Tipperary (NR) County Council* [1976] IR 260. Neither case is amongst those mentioned in the report of *Russell v Fanning*, in which O'Hanlon J, in the High Court, appeared to find that the offences there in question could be regarded as political offences or offences connected with a political offence. Despite that conclusion, against which the State brought but did not pursue an appeal, he concluded that the protection of s. 50 of the 1965 Act did not extend:

> to the present case by reason of the fact that the offences alleged to have been committed by the plaintiff were committed for the purpose of promoting the

objectives of the Irish Republican Army.

The Chief Justice referred to this (at p. 338) by stating:

> On this issue O'Hanlon J. decided that having regard to the decision of this Court in *Quinn v Wren* [1985] ILRM 410 he was bound to interpret s. 50 of the Extradition Act 1965, as excluding from the meaning of 'political offence' offences committed for the purposes set out and with the aims and objectives set out in the plaintiff's affidavit.

I understand the conclusion to be that whilst the offences are, in ordinary parlance, political offences or offences connected with political offences, they are not, because they purport to usurp the functions of government, to be treated as such within the meaning of s. 50.

In *Magee's* case the plaintiff was charged before the Commissioner of Oyer and Terminer in Belfast with:

(1) Housebreaking with intent, contrary to s. 27(2) of the Larceny Act 1916;

(2) Using a motor car on the public highway without insurance contrary to s. 41 of the Road Traffic Act (Northern Ireland) 1955;

(3) Malicious damage to property contrary to s. 51 of the Malicious Damage Act 1861; and

(4) Assault on a peace officer contrary to s. 38 of the Offences Against the Person Act 1861.

FitzGerald J. (at p. 216) stated that none of these charges were political offences or connected with a political offence; Teevan J. agreed to allow the appeal, without giving any reasons therefor. Ó'Dálaigh CJ, with whose judgment Walsh J agreed stated (p. 211):

> In as clear language as perhaps one could expect in the circumstances, Magee has confessed to being concerned in the preparation of an armed IRA raid on Holywood military barracks. There can be little room for doubt that his action falls either within the category of 'political offence' or of 'offence connected with a political offence.' Counsel for the respondent has offered no argument to the contrary and, *in any event, in my judgment Magee has clearly brought himself within the terms of paragraph (b) of s. 50(2) of the Extradition Act 1965.* (emphasis added)

Budd J did not directly comment on this question but stated, having reviewed, in detail, the evidence as to the intended raid on Holywood barracks (at p. 215):

> This evidence and the inferences that, in my view, should be properly drawn from it lead me to the opinion that there are substantial grounds for believing that Magee, if removed from the State under the Act of 1965, will be prosecuted or detained for a political offence or an offence connected with a political offence.

In *State (Quinn) v Ryan* [1965] IR 70 at 120 Ó'Dálaigh CJ, stated:

> It requires to be said that a point not argued is a point not decided; and this doctrine goes for consitutional cases (other than Bills referred under Article 26 of the Constitution and then by reason only of a specific provision) as well as for non-constitutional cases.

The Article 6 argument upon which the majority decision in *Russell v Fanning* was based was not raised in *Magee* nor, presumably, in any of the many decisions of the High Court which followed on it. It might be validly argued that in making the order for extradition in *Russell*, O'Hanlon J was departing from an established legal principle and thereby infringing the rule of *stare decisis*.

The court is now asked to review the decision in *Russell v Fanning* and, if necessary, to overrule it. I have re-read the judgments in that case; because of the challenge made to it I am free to differ from its conclusion. I affirm the views I expressed, and the reasons I stated. Therefore, I agree with the conclusion expressed by Walsh J. S. 50 of the Extradition Act 1965 states a statutory imperative — that a person arrested under Part III shall be released if the High Court so directs in accordance with the section. A direction may be given by the High Court where the court is of opinion that the offence to which the warrant relates is a political offence or an offence connected with a political offence. Both these phrases must always be considered according to the circumstances existing at the time when they have to be considered. See the judgment of Ó'Dálaigh CJ, in *Bourke* at pp. 58-60. It follows that I would allow the appeal and direct the release of the plaintiff pursuant so s. 50.

I reserve for another occasion the consideration of what effect is to be given to undertakings by the prosecuting authority in another jurisdiction in respect of what may or may not be the subject of prosecution.

The Inquiry under Article 40.4.2°

I adopt the description of the relevant events as contained in the judgment of the Chief Justice. In *Russell* (at 363-364) I said:

> A breakdown in discipline may be an understandable human reaction against those believed responsible for the death of a fellow prison officer; a failure to institute and carry out disciplinary procedures at least to identify, if not to punish, those responsible for assaulting the returned prisoners is, in my view, inexcusable and points to a breakdown in the prison system. Having regard to the conclusion I have reached on the first issue, it is not necessary that I should express a view on this question; suffice it to say that I incline to the view that the plaintiff had discharged the onus of proof sufficiently to impose upon the prison authority the burden of proof in respect of discipline of prison officers.

(a) Standard of Proof

The case concerns the personal liberty and bodily integrity of a citizen. Unlike other inquiries under Article 40 the consequence of holding the detention lawful

is that the courts will have no effective role in the further protection of the constitutional rights of that citizen — he will be extradited back to the prison from which he escaped. So, the argument goes, there is a lesser standard of proof appropriate; it is not a question of probability but whether or not there is a real and substantial danger — a disproportionate risk that the applicant, if delivered into another jurisdiction, will be ill-treated. Mr MacEntee argues that it is never possible to show as a probability that people will behave outrageously. I do not accept that proposition. If in a series of instances it were shown that people in the same situation had been ill-treated over a period, then it is probable that another person put in the same situation and subject to the same control would be ill-treated. I accept, however, that in many instances, despite there being a very real danger, it is impossible to prove the probability of such ill-treatment. In my view, the courts charged with the protection of the Constitution and of the citizens whose fundamental rights are thereby guaranteed defence and vindication would fail in their duty if, being satisfied that there is a real danger that a citizen delivered out of the jurisdiction will be ill-treated, did not refuse to permit such delivery.

In the light of that, the courts must look at the circumstances of each case.

(b) The Danger

In *Russell* I inclined to the view that the plaintiff had discharged the onus of proof sufficiently to impose upon the prison authority the burden of proof in respect of discipline of prison officers. In *Pettigrew's* case, to which the Chief Justice has referred, which was tried in the courts in Northern Ireland after the decision of this Court in *Russell*, an entirely new scenario was revealed. In *Russell* [1988] IR 505, 518 O'Hanlon J, said:

> Once again, the evidence tendered on behalf of the plaintiff stops short of alleging or establishing the existence of a practice of ill-treatment or the use of unlawful violence by prison staff against prisoners in the Maze Prison. If the prisoners' rights were infringed in the manner described, immediately after their recapture in 1983, they are being given an opportunity to vindicate their rights in court in the civil proceedings which are now pending. I am of opinion that by reason of (a) the lapse of time which has occurred since the break-out took place, (b) the civil proceedings for damages which other prisoners are now prosecuting, and (c) the publicising of these allegations in the present proceedings, coupled with the response evoked from the prison authorities, it is reasonable to assume that the 'safe conduct' promised in paragraph 10 of Mr Hassan's affidavit is well-founded.

O'Hanlon J did not know that in a series of such proceedings perjured testimony would be given by prison officers as a result of which these claims would be dismissed. He did not know that a number of these prison officers would later sit in the High Court in Belfast listening to a false case being made

by their counsel because of their lies — a case that had to be retracted in the course of the trial. He did not know that despite the dismissal of the claim in the courts in Northern Ireland the Northern Ireland Office would subsequently offer to compensate those whose actions had failed. He did not know that those prison officers who had lied in court or who had allowed their legal representatives to make a false case, who had conspired to pervert the course of justice would, so far as is known, remain undisciplined and unpunished still, presumably, serving in the prison service in Northern Ireland. He did not know that the prison officers at the Maze Prison would agree together to obstruct two official inquiries into the mass break-out from the prison to such good effect that a leading member of the Prison Officers' Association expressed the hope that Deputy Governor McLaughlan 'was meeting plenty of brick walls'. He did not know what level of administration in Northern Ireland was involved in that conspiracy to pervert the course of justice; in this case Hamilton P (p. 46) accepted that the Northern Ireland Office was not a party to such conspiracy. Whatever strictures may have been expressed by Hutton LCJ, in his judgment in *Pettigrew's* case, the circumstance remains unchanged, that no disciplinary action has been taken against the prison officers. I do not overlook the fact that Russell was extradited and it may be inferred that he has not been ill-treated.

I agree that this Court should prohibit the delivery of the applicant in order as far as practicable to defend his constitutional rights which are protected by Article 40.3 of the Constitution.

Solicitors for the appellant: *Garrett Sheehan & Co.*
Solicitor for the respondent: *Chief State Solicitor*

Noreen Mackey
Barrister