THE HIGH COURT

[2023] IEHC 13

[Record No. 2016/9611 P]

BETWEEN

FINTAN PAUL O'FARRELL

PLAINTIFF

AND

THE GOVERNOR OF PORTLAOISE PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS

THE HIGH COURT

[Record No. 2016/9612 P]

BETWEEN

DECLAN JOHN RAFFERTY

PLAINTIFF

AND

THE GOVERNOR OF PORTLAOISE PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS

THE HIGH COURT

[Record No. 2016/9610 P]

BETWEEN

MICHAEL CHRISTOPHER MCDONALD

PLAINTIFF

AND

THE GOVERNOR OF PORTLAOISE PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Cian Ferriter delivered on the 12th day of January 2023

Introduction

1. In these proceedings, the plaintiffs claim "substantial" damages for false imprisonment. The false imprisonment is said to arise from their detention in Portlaoise prison between 27 September 2006 and 11 September 2014. They were detained during that period on foot of warrants issued by the High Court in July 2006 under s.7 of the Transfer of Sentenced Persons Act 1995 (as amended) ("the 1995 Act").

2. The 1995 Act provides a mechanism for the transfer back to this State of persons convicted and sentenced abroad who wish to serve out the balance of their sentences in Ireland. The plaintiffs were convicted of serious terrorist offices in England in 2002 and sentenced to 28-year prison sentences there. They successfully applied to be transferred back to the State under the 1995 Act to serve out the balance of those sentences here. Following a decision of the Supreme Court in a separate case relating to the detention of a transferred prisoner under the 1995 Act (the *Sweeney* case), the plaintiffs successfully applied to the High Court under article 40 to have their detention in Portlaoise prison declared unlawful on the basis that the warrants issued under the 1995 Act authorising their detention there were defective. They were released on 11 September 2014 having spent only some 13 years in prison when, pursuant to their English sentences, they would have been required to spend some 18 years 8 months in prison (subject to remission). The Supreme Court by a 4-3 majority decided in July 2016 to uphold the decision of the High Court.

3. As there was no legal mechanism under the 1995 Act (or otherwise) for their re-confinement in Ireland, the plaintiffs have been free since their release pursuant to article 40 in September 2014. The plaintiffs claim that it inexorably follows from their successful challenges to the lawfulness of their detention that they are now entitled to damages for false imprisonment. The defendants have mounted a vigorous defence of the claims.

4. The case raises some potentially significant questions about the scope of the tort of false imprisonment in Irish law.

Background

Arrest, Conviction, Sentence and Imprisonment

5. The background to the conviction and imprisonment of the plaintiffs is as follows. The plaintiffs were members of an illegal organisation styling itself as the Irish Republican Army and known as the Real IRA. During the course of 2001 (a relatively short period after the horrific bombing carried out by the Real IRA in Omagh which led to 29 deaths), the plaintiffs travelled to Slovakia for the purposes of seeking arms and financial support from persons they believed to be agents of the Iraqi Intelligence Service. A series of meetings with these agents were had. There was evidence given at their trial before Woolwich Crown Court in England that the plaintiffs were seeking to acquire 5,000 kilograms of plastic explosives, 2,000 detonators, 200 rocket-propelled grenades, 500 handguns and $1.5 million to be paid over six months. To put that in context, it was explained at their trial that about 1.5 kilograms of plastic explosives is used in a car bomb. In fact, the parties with whom the plaintiffs were dealing with were undercover British agents. The plaintiffs were arrested in Slovakia on 5 July 2001. They were extradited to the United Kingdom on 30 August 2001. They were tried before Woolwich Crown Court and convicted of serious terrorist offences, being the offences of conspiracy to cause explosions, inviting another to provide money or property for the purposes of terrorism and entering into an arrangement to make money and property available for terrorism.

6. On 7 May 2002, the trial judge (Astill J.) sentenced the plaintiffs to 30 years' imprisonment for the offence of conspiracy to cause explosions and concurrent sentences of 12 years for the offences of "inviting another to provide money or property for the purpose of terrorism" and "entering into an arrangement to make money and property available for terrorism". The sentences were backdated to 5 July 2001, the date on which the plaintiffs were taken into custody in Slovakia. The plaintiffs appealed the severity of the sentences to the Court of Appeal of England and Wales. On 15 July 2005, that Court set aside the original term of 30 years imprisonment and substituted a sentence of 28 years imprisonment for the conspiracy to cause explosions offences. The 12-year concurrent sentences for the other offences were left intact.

7. As the plaintiffs' convictions became final at that point, they became eligible for transfer to serve their sentences in Ireland under the provisions of the 1995 Act which implements into Irish law the provisions of the Convention on the Transfer of Sentenced Persons signed in Strasbourg in March 1983 ("the Convention").

Overview of Convention and 1995 Act

8. The scheme established by the Convention as implemented into Irish law in the 1995 Act is broadly as follows.

9. The 1995 Act applies when a person has been sentenced in another Convention State ("the sentencing state") and wishes to be transferred to a prison in this jurisdiction to serve his or her sentence. The sentenced person or the sentencing state requests the Minister for Justice ("the Minister") to consent to the transfer. If certain requirements are met (including that the order under which the sentence was imposed in the sentencing state is final and that the sentenced person consents in writing to the transfer), the Minister may consent to the request for transfer. If the Minister proposes to consent to such a transfer, the Minister must provide certain information to the sentenced person, including information as to the effect on that person of any warrant which may be issued under s.7. Following such consent, the Minister must apply to the High Court for the issue of a warrant authorising the bringing of the sentenced person into the State and the taking of the person to and his or her detention in custody. The High Court, if satisfied that the requirements of the 1995 Act are met and that the Minister consents, shall issue a warrant authorising the bringing of the requested person into the State and the taking of the person to, and his or her detention in, specified places for custody. Pursuant to s.7(4), the effect of this warrant is to authorise the continued enforcement by the State of the sentence imposed by the sentencing state in its legal nature and duration, with due regard to any remission accrued in the sentencing State, but such a warrant shall otherwise have the same force and effect as a warrant imposing a sentence following conviction by that Court.

10. Importantly, the 1995 Act (as amended in 1997) seeks to address situations where the sentence imposed by the sentencing state is "by its legal nature" incompatible with the law of the State. In such a case, the High Court may adapt the legal nature of the sentence "to that of a sentence prescribed by the law of the State for an offence similar to the offence for which the sentence was imposed" (s.7(5)(a)). There is also provision made for a situation where the duration of the sentence imposed by the sentencing state is incompatible with the law of the State. In such a case, the Minister has a discretion as to whether to apply to adapt the duration of the sentence. The provisions of the 1995 Act as amended in 1997 (in s.7(6)) make clear that where a sentence is being adapted by virtue of either its legal nature or duration being incompatible with the law of the State, the adapted sentence cannot aggravate the sentence imposed in the sentencing state or exceed the maximum penalty prescribed by the law of the State for a similar offence.

11. Other material provisions of the 1995 Act include s.7(7) which prohibits an appeal in the State against the conviction in respect of which the sentence was imposed and s.7(10) which states that a reference to the legal nature of a sentence does not include a reference to the duration of such a sentence.

Plaintiffs apply to transfer to Ireland and are transferred on foot of s.7 warrants

12. Following their sentence appeal, the plaintiffs sought their transfer to Ireland to serve out the remainder of their prison sentences here, pursuant to the terms of the 1995 Act. They had the assistance of an Irish solicitor in that regard. Correspondence was engaged in on their behalf with the English and Irish authorities. The Minister indicated agreement to the plaintiffs being transferred and set out through correspondence of a department official his understanding of the basis of the plaintiffs' transfer. The plaintiffs signed consent forms agreeing to be transferred on the basis set out in this correspondence. I will come to the terms of that correspondence and consent in more detail later in this judgment.

13. Ultimately, the Minister for Justice made an application to the High Court *ex parte* on 28 July 2006. On that date, this Court issued a warrant pursuant to s.7 of the 1995 Act providing for the transfer of the plaintiffs to the State and their detention in Portlaoise prison.

14. Given the centrality of the contents of the warrants to the arguments in the case, I set out the terms of the warrants in full below, using the warrant issued in respect of Mr. O'Farrell by way of example.

"THE HIGH COURT

Warrant pursuant to s. 7 of the Transfer of Sentenced Persons Act 1995-1997

Applicant: The Minister for Justice, Equality and Law Reform

Sentenced Person: Fintan Paul O'Farrell

Sentencing State: United Kingdom, Great Britain and Northern Ireland

Crime:

(i) Conspiracy to cause explosions

(ii) Inviting another to provide money or property for the purpose of terrorism.

(iii) Entering into an arrangement to make money and property available for terrorism.

Sentences in the Sentencing State:

(a) 28 years imprisonment for the conspiracy to cause explosions at (i) above.

(b) 12 years imprisonment concurrent to the said 28 years imprisonment, for the offences at (ii) and (iii) above.

Date of commencement of Sentences: 7th May, 2002.

WHEREAS upon the hearing of an application at the High Court held at the Four Courts, Dublin 7 on the 28th of July 2006 for the issue of a warrant authorising the bringing of the said sentenced person into the State from a place outside the State and the taking of the person in custody to and the person's detention in the State, the Court was satisfied that:-

a) the said sentenced person is regard as a national of the State within the meaning of Section 6(3)(a) of the Transfer of Sentenced Persons Act, 1995;

b) the sentence imposed on the said sentenced person by the said sentencing state is final;

c) at the time of the request for a transfer into the State, the said sentenced person had at least 6 months of the sentence imposed by the said sentencing state left to serve;

d) the said sentenced person consents in writing to a transfer into the State;

e) the acts or omissions constituting the said offences would, if done or made in, or on the territory of the State, constitute offences under the law of the State, to wit, -

i. Conspiracy to Cause Explosions contrary to Section 3 of the Explosive Substances Act, 1883 (as substituted by Section 4 of the Criminal Law (Jurisdiction) Act, 1976);
ii. Financing and/or Attempting to Finance Terrorism contrary to Section 13 of the Criminal Justice (Terrorist Offences) Act, 2005; and

f) the Minister for Justice, Equality and Law Reform consents to the transfer concerned.

An Order was made authorising the bringing of the said sentenced person into the State and the taking of the said person in custody to, and his detention in custody to Portlaoise Prison and to serve his sentence there.

THIS IS TO AUTHORISE YOU to whom this warrant is addressed to execute the said Order against the said person as follows:-

To bring the said sentenced person in custody into the State and to lodge the said person in Portlaoise Prison to serve his sentence there. And for this the present warrant shall be sufficient authority to all whom it may concern."

15. The warrants issued for each of the plaintiffs were in materially identical terms (apart from an error in the identification of the Governor of the prison, in the case of Mr. O'Farrell, which was subsequently corrected).

16. It might be noted that the warrants each contained an error in respect of the date of commencement of the English sentences (specifying that date as being 7 May 2002 when the correct date was 5 July 2001). In the article 40 proceedings brought by the plaintiffs, both the High Court and Supreme Court were satisfied that this error was not such as to vitiate the lawfulness of the warrants and that this error could lawfully be the subject of a variation order under s.9 of the 1995 Act (such a variation order being made in respect of the warrants by Hogan J. in the context of the plaintiffs' article 40 proceedings which will be discussed in more detail below).

The Sweeney case

17. As touched upon earlier, given that different Convention signatory states have different legal regimes as regards sentencing, the Convention (and the 1995 Act in implementing the Convention into Irish law) contains a series of provisions designed in broad terms to ensure that a sentence imposed by the sentencing state which is incompatible with the law of the receiving state may be adapted to ensure compatibility with the law of the receiving state.

18. One of the difficulties that emerged in the practical operation of the Convention and the 1995 Act is that the sentencing law of England and Wales provides for a form of sentence

which while described in unitary terms as a prison sentence, in fact comprises a period of confinement in prison with a subsequent (mandatory) release of the prisoner into the community under licence, with the possibility of the prisoner being recalled to prison in the event the terms of that license are breached. While, on one view, that regime has echoes of the suspended sentence facility available under Irish law, there is no equivalent to service of a period of a prison sentence in the community under licence in this jurisdiction. This led to the Supreme Court holding in *Sweeney v Governor of Loughan House Centre* [2014] 2 IR 732 ("the *Sweeney* case") that it was not permissible to issue a warrant involving imprisonment in the State for any of that period of an English sentence which comprised a licence in the community component.

19. The background to the *Sweeney* case is as follows. In March 2012, Vincent Sweeney, a separate transfer prisoner, was granted leave by the High Court to issue judicial review proceedings to challenge his detention in Loughan House Open Centre. In that case, Mr. Sweeney was convicted of an offence in England and sentenced to what was described as "*16 years imprisonment*" by a court in that jurisdiction. As a matter of English law, he had a statutory entitlement to be released from prison after serving half of that sentence (i.e. eight years) with the remaining eight years to be served on licence in the community, subject to recall. (While in Mr. Sweeney's case the period of imprisonment was one half of the sentence, in light of amendments to the relevant English legislation which applied to the plaintiffs' sentences, the relevant periods applicable to the plaintiffs were two-thirds of the sentence to be served in prison and one-third to be served on licence in the community, subject to recall).

20. The warrant issued by the High Court under s.7 of the 1995 Act for the purposes of Mr. Sweeney's transfer to the State stated that he was the subject of a sentence of imprisonment of sixteen years (no question of adaptation or conversion arose in that case). The Minister for Justice took the position that Mr. Sweeney, taking into account his entitlement to remission as a matter of Irish law (then typically 25% in accordance with the prevailing Irish prison rules) must be released after twelve years' imprisonment. The High Court (Keane J.) refused to grant the applicant a declaration that the s.7 pursuant to which he was detained was *ultra vires* the provisions of the 1995 Act and the principles contained in the Convention.

21. The Supreme Court overturned the High Court decision. The Supreme Court delivered an *ex tempore* judgment on 28 May 2014 declaring Mr. Sweeney's detention to be unlawful. It reserved its reasons to a later date and those reasons were handed down by Supreme Court in judgments dated 3 July 2014 (reported at [2014] 2 IR 732). The Supreme Court held that the term "*sentence*" as used in the 1995 Act (which was defined as "any punishment or measure involving deprivation of liberty ordered by a court…") referred to

a period of actual imprisonment and did not include any period of release on licence (see Murray J. (as he then was) at para. 44, p.747, and Clarke J. (as he then was) at paras. 79 and 82, pp.759-760). Accordingly, the s.7 warrant in that case was defective in respect of both the legal nature and duration of the sentence reflected on the face of the warrant.

The plaintiffs' article 40 proceedings

22. On becoming aware of the decision made *ex tempore* by the Supreme Court in *Sweeney* on 28 May 2014, the plaintiffs proceeded to move an *ex parte* application before the High Court (Hogan J.) for an inquiry under article 40 of the Constitution in relation to their detention. They sought to challenge the lawfulness of their detention on foot of the s.7 warrants issued in their case on the basis that the warrants sought to authorise their detention in Portlaoise prison for a period that was in excess of the actual prison time they were sentenced to serve as a matter of law in England.

23. Hogan J. delivered a judgment ("the first High Court judgment") on the article 40 applications on 26 August 2014: see [2014] IEHC 416. In that judgment, he expressed the view that the sentence imposed by the English Court (as varied by the Court of Appeal for England and Wales) would "*include a sentence of approximately eighteen years and eight months*". He expressed the view that the s.7 warrant issued by the High Court in July 2006 was defective to the extent that it recorded the sentence as one of 28 years. He then held as follows (at para. 47):-

> *"47. Given that the sentencing system in England and Wales is so appreciably different from that which obtains in Ireland, the sentence in the present case should more properly have been adapted pursuant to s. 7(5) of the 1995 Act. The British system of automatic release by way of legal entitlement after service of two-thirds (or, in the case of a conviction post-April 2005, one-half) of the sentence goes to the legal nature of the sentence imposed by the judicial branch of the sentencing state, whereas the Irish system of remission (which is normally one-quarter) is a fundamentally a matter going to the question of the administration of the sentence by the executive of the receiving state. All of this points to an incompatibility between this form of English sentence and Irish law and, consequently, the necessity for such sentences to be adapted at the time of the transfer of the prisoner to this State."*

24. Hogan J. then expressed the view that the defects in the case fell into an intermediate category, being too serious to be dismissed as harmless but not (at least at that point) "*so pervasive as to destroy the validity of the warrant*". He therefore adjourned the matter to enable the Minister, should she consider it appropriate to do so, to apply separately to the High Court pursuant to s. 9(1)(b) of the 1995 Act to vary the existing s.7 warrants so that the English sentence could be properly adapted into our law and "*especially, that the duration and the commencement of the steps be properly recorded*".

25. The Minister subsequently brought such an application to vary the warrants to seek to reflect the proper legal nature of the English sentences as involving a sentence of imprisonment of 18 years and 8 months. That application was opposed by the plaintiffs on the basis that such a step could only properly have been done by invoking the power to adapt the English sentence, pursuant to s.7, prior to the issue of the warrants and that the defects in the warrants could not be retrospectively cured by invoking the power to vary the warrants.

26. That application was the subject of a supplementary judgment given by Hogan J. on 11 September 2014: see [2014] IEHC 420 (the "second High Court judgment").

27. In the second High Court judgment, Hogan J. took the view that it was not open to the Court to vary the terms of the warrant pursuant to s.9 in circumstances where the 1995 Act distinguished between the power to adapt a sentence (provided for in s.7 as amended) and the power to vary the terms of a warrant (provided for in s.9). He took the view that, as that portion of the sentence which involves a sentence under licence in the community (open to the power of recall) was not known to Irish law, the English sentence required to be adapted by means of an order under s.7(5) of the 1995 Act. He took the view that the power to vary in s.9 could not be exercised as a substitute for the power to adapt (para. 20). He held that it was clear from the language of s.7(1) of the 1995 Act that an application for the transfer order has to be made before the prisoners are physically transferred into the State. He held that it followed, inexorably, that the power to adapt can only be exercised at that juncture, i.e. at the time of the application for the transfer order and not at any later stage (para. 26). He concluded that the High Court simply lacked any jurisdiction at this point to make an appropriate adaptation order under s.7(5) of the 1995 Act (as amended). He held (at para. 27) that:

> *"This, in turn, means that the s. 7 warrant offered by the respondent to justify the detention of the applicants transpires to be irremediably defective, and, unfortunately, lies beyond the capacity of this Court to correct or cure."*

28. In Hogan J.'s view, this had the further implication that the s.7 warrant remained manifestly defective in one highly material particular, namely, the nature and duration of the sentence imposed. He held (at paras. 28 and 29) that:

> *"28. …In the light of Sweeney, the English sentence is obviously incompatible with Irish law and requires to be adapted by this Court for that sentence to be effective in this State. All of this, in turn, leads ineluctably to the conclusion that the respondent cannot satisfactorily demonstrate that the detention of the applicant is in accordance with law, given the existence of a defective warrant which lies beyond the capacity or jurisdiction of this Court to rectify at this juncture. This jurisdiction is lacking because the power to adapt foreign sentence is a matter of substantive law requiring statutory vesture and in respect of which the Court has no inherent jurisdiction.*
>
> *29. The situation can be summed up by saying that the English sentence in question is ineffective in law unless it has been adapted by this Court under s. 7(5) of the 1995 Act. The Court has not, however, been given the statutory power to make the necessary adaptation order after the transfer of the sentenced person has taken effect. In the absence of such a statutory power to adapt post the making of a transfer order, the Court is helpless to effect the curative action which would be necessary to remedy the defective warrant in respect of which the applicant is presently held by the respondent."*

29. Hogan J., therefore, believed he was left with no alternative but to direct the release of the plaintiffs in accordance with article 40.4.2 of the Constitution on the basis that the then detention of the plaintiffs could not be shown to be lawful as a valid warrant could not be produced to justify their detention. On foot of that finding and order, the plaintiffs were released from Portlaoise prison on 11 September 2014.

Supreme Court appeal

30. The State appealed the order of Hogan J. to the Supreme Court. The Supreme Court upheld the order of Hogan J. by a four-three majority. The majority consisted of McKechnie, MacMenamin, Laffoy and O'Malley J.J. Separate judgments were delivered by McKechnie, MacMenamin and Laffoy J.J. O'Malley J. agreed with MacMenamin and Laffoy

J.J. Denham C.J., O'Donnell and Clarke J.J. dissented. Denham C.J. delivered a separate judgment and O'Donnell and Clarke J.J. delivered a joint dissenting judgment.

31. While the Supreme Court was split on the issue of whether or not the power to vary in s.9 could be applied to cure the defect on the warrant in this case, all seven Supreme Court judges were agreed that the warrants were defective. For present purposes it is sufficient to note the following findings of the majority judgments.

32. MacMenamin J. held (at para. 275, p.736) that "*the warrants contained fundamental defects in that the detention was not in accordance with law…there exist irremediable and fundamental defects as to the procedure adopted, and as to the nature, and content, of the sentence recorded* [in the warrants]". He stated (at para. 295, p.744) that "*that the process whereby the applicants were placed in detention in Ireland was fundamentally defective. The warrants were void ab initio*." He further held that the "jurisdictional deficiencies" were "fundamental in this case".

33. Laffoy J. held (para 338, p,764) that, in the absence of adaptation, the High Court had no jurisdiction to enforce the licence in the community component of the sentence; equally, the High Court had no jurisdiction to issue a warrant giving effect to the imprisonment portion of the sentence (para 339). It appears to follow from the terms of her judgment that in the absence of adaptation the Court had no power to issue the warrant at all.

34. McKechnie J. held (para 169, p.696) that the warrants were "flawed in a fundamental way" and "seriously invalid".

Course of trial of these proceedings

35. Following the opening of the case, the evidence of the plaintiffs was heard over Tuesday 21 June 2022 and Wednesday 22 June 2022. The defendants did not call any evidence.

36. The case was then adjourned to allow parties file written submissions in light of the evidence. Those written submissions were duly filed. I then heard oral closing submissions from counsel for both parties on a number of follow up dates (the last of which was on 21 November 2022) and received supplemental written submissions

(including supplemental written submissions received on 21 December 2022 following delivery of the Supreme Court decision in the *G.E.* case, discussed further below).

The Plaintiffs' evidence

37. Before addressing the legal issues arising, it is necessary to set out the evidence given by the plaintiffs in support of their claims. Each of the plaintiffs gave evidence at the hearing. I set out below a summary of the salient parts of their evidence.

Fintan O'Farrell

38. Mr. O'Farrell was born on 13 November 1963 and was 59 years of age at the date of the hearing. He was one of thirteen children. His occupation prior to his arrest and imprisonment in 2001 was that of a subcontractor plasterer. He sought to recommence that trade on his release from prison although he said he found it more difficult both physically and in terms of getting up to speed with the developments in new standards and processes during the period of his imprisonment. He has a Bachelor of Science degree.

39. Mr. O'Farrell accepted that he sought to be transferred back to prison in Ireland and consented to same. He said he was very keen to get back to prison in Ireland as this would be easier for his family and would allow him to maintain a better relationship with his wife and children. He has two daughters; the youngest was eighteen on his release in 2006 and the eldest was 22. He said that the costs of travel for family members to English prisons was very onerous. He accepts that he signed the consent on 27 June 2006 to transfer back and that he had the assistance of an Irish solicitor at the time. He accepted that he would have read and understood the contents of a letter from the Department of 24 March 2006 which contrasted the estimated release date in England of 29 April 2020 with that in Ireland of January 2022 i.e. that he accepted that he would spend longer in jail in Ireland than in England once transferred back. He said that he was not told at any stage that the projected Irish release date would exceed the maximum potential sentence for an equivalent to the conspiracy to cause explosions charge in Irish law.

40. Mr. O'Farrell gave evidence as to the impact of the period in Portlaoise prison on him. He said that it led him to becoming quieter and a little less assured of himself. He gave evidence as to the conditions in the "E wing" (or "republican prisoners' wing") in

Portlaoise Prison where he spent his eight years. He said it was an antiquated, cold, draughty building. He was confined to a cell with no in-cell sanitation and had to engage in "slopping out". He said that his relationship with his wife and children suffered. He missed the birth of two of his grandchildren. His father-in-law, with whom he was close, died in 2013 and he missed out on being able to help him out physically when he was incapacitated in his latter years.

41. He was married to his wife Patricia in 1983 and therefore was married for some 18 years at the time of his arrest. His marriage broke up while in England given the difficulties imposed by his imprisonment. They decided to part their ways in an amicable fashion. He said that they stayed in touch throughout the sentence period but not as husband and wife. On his release in 2014 he was able to return to family life living as husband and wife with his wife and having a relationship with his children and grandchildren. He said it took him a while to regain his expertise as a plasterer. His physical energies and capacities had diminished somewhat during his period of confinement.

42. Mr. O'Farrell accepted that the sentence passed by the English court reflected the magnitude of the offences committed by him. He accepted that one of the benefits of being transferred to Ireland was that it was easier on his family.

Declan Rafferty

43. Mr. Rafferty also gave evidence. He was born on 11 March 1960 and was 62 years of age at the time of the hearing. He was married on 25 November 2001 and does not have any children. He was one of sixteen children. He was born in Drogheda, County Louth and grew up in Greenore, County Louth. He was a forklift truck driver before his arrest in 2001. He also worked as a scaffolder. Since his release, he has worked as a forklift truck driver and delivery van driver.

44. Mr. Rafferty accepted that he wanted to be transferred back to Ireland, principally because his mother was over 80 and she was not fit to travel to see him in prison in the UK. The benefit of being transferred back to Ireland meant that he was closer to his siblings and his mother.

45. He said that his wife travelled to England "about half a dozen times" while he was there, being about once a year. He said that he and his wife agreed in 2007 to go their separate ways on the basis that it was too long to expect her to wait until 2020 or afterwards for him to be released from prison. He said that they got divorced but still remained friends.

46. Mr. Raftery also gave evidence of poor prison conditions in Portlaoise, including the slopping out which had been described by Mr. O'Farrell. He said that the cell conditions were very rough and it could be cold even in summertime.

Michael McDonald

47. Mr. McDonald's date of birth was 7 August 1957. He was 64 at the time of the hearing. He was born in Drogheda and grew up on the Cooley Peninsula, the eldest of a family of eight children. He left school early and did not complete formal education. He worked as a truck driver. Owing to injuries acquired over the years, at the time of the trial he was working only once or twice a week.

48. The reasons he sought a transfer back to Ireland were principally to avoid the "awful hassle" for family members involved in them seeking to travel to visit him in prison in England. He said there were a number of occasions when his mother travelled over, took the wrong train and was unable to visit him on the appointed day, at significant inconvenience.

49. Mr. McDonald understood that the estimated release date on his transfer back to Ireland, to which he consented, would be January 2022 albeit that this was not a guaranteed release date. As with the other plaintiffs, Mr. McDonald confirmed that he was not aware of any difficulties in implementing the English sentence in Ireland.

50. Mr. McDonald has three children with two of them being quite young at the time of his arrest and confinement in 2001. He said that the young ages of his children caused particular hardship in terms of them travelling over to visit him in prison in England. Once transferred back to Ireland, they were in a position to visit him on a weekly basis in Portlaoise. His mother, although not well, was also able to travel to see him in Portlaoise.

51. Mr. McDonald had a previous conviction for IRA related activities in 1983 when he was arrested, convicted and jailed in Le Havre in France when caught driving a truck containing arms destined for Ireland. He received a one-year sentence in respect of this conviction.

52. Mr. McDonald says that the experience of Portlaoise was not pleasant, but he dealt with it as best he could. He had the benefit of contact with his family every week. He agreed with the evidence given by his fellow plaintiffs as to the sanitary conditions. He said that he had been in hospital "a good few times" and the tablets he had to take required him to regularly go to the toilet and that the slopping out procedure was "not pleasant" as a result. He also gave evidence that the prison building was old and damp and "not the healthiest place to be in".

Implausible evidence

53. Each of the plaintiffs was cross examined about the events underlying their convictions in England and each of them gave implausible evidence as to a lack of knowledge as to the use which would have been made of the explosives and weapons they were seeking to source and each of them sought to downplay their role in the operation. Mr. O'Farrell sought to maintain that he was merely a "messenger boy" in the Real IRA and, implausibly, in answer to a question as to what he intended to do with the explosives being sought, suggested that they would be used "as a bargaining chip". Mr. McDonald, implausibly, could not remember any of the material detail of his various trips in connection with the meetings with the supposed Iraqi agents. He claimed to have "no clue" as to the number of bombs that could be made with the quantity of explosives they were seeking to acquire. He referred in his evidence to the Omagh bombing being a "tragedy" and despite knowing that the Real IRA of which he was a member had caused the bomb and despite his involvement in efforts subsequent to that bomb to acquire thousands of kilos of explosives said that he "didn't believe it would happen again". While Mr. Raftery accepted that the size of the Omagh bomb was in "pounds", Mr. Raftery gave implausible evidence as to having no idea as to how many bombs similar to the size of the Omagh bomb could be created or produced from the amount of explosives they were seeking in these meetings (which ran into thousands of kilograms). Mr. Raftery, as with Mr. O'Farrell, sought to portray his role as one of a mere messenger. When asked as to whether he cared as to what might become of the explosives or the use to which they were put, he answered that this was "not my department".

54. Ultimately, these implausibilities did not distract the Court from assessing the true gravity of the offences committed by the plaintiffs and the conduct underpinning same, as properly reflected in the very lengthy sentences passed on them by the English courts.

Summary of parties' positions

55. The plaintiffs claim that the law on the tort of false imprisonment makes it clear that even in the absence of special damage, once they have been unlawfully detained (as they were) they are entitled to damages, this being so - at least in part - because one of the functions of damages in false imprisonment cases is to mark the fact that the State has acted in breach of the fundamental constitutional principle that no one should be deprived of their liberty save in accordance with law. The plaintiffs maintain, in short, that the requisite ingredients of the tort of false imprisonment are made out by them, the central plank of that tort (being their detention otherwise than in accordance with law) having already been definitively established by the High Court and all seven judges of the Supreme Court who heard their appeal from the High Court article 40 decision; that the law (and, in particular, the recent judgments of Murray J. in the Court of Appeal in *G.E. v. Commissioner of An Garda Síochána & ors* [2021] 2 ILRM 441 and of Hogan J. in the Supreme Court upholding the appeal in that case [2022] IESC 51 ("*G.E.*")) make clear that they are entitled to damages as of right for the false imprisonment; that such damages should be substantial in circumstances where they were detained on foot of an unlawful warrant for almost eight years; and that the fact that they might have been lawfully detained for a longer period than the time spent in Portlaoise prison is immaterial to their claim and does not disentitle them to the substantial damages they seek.

56. The defendants advance a series of defences, including that the Governor of Portlaoise prison ("the Governor") can bear no liability where he acted in good faith on foot of warrants which on their face were issued within the general jurisdiction of the High Court; that in any event the plaintiffs cannot claim false imprisonment where they consented to or acquiesced in the transfer back to Ireland for a term in excess of the prison element of their sentences as passed in England and where, even if liability can be technically made out, they are deserving of either no damages or the lowest possible level of damages (said to be "contemptuous damages" of the "lowest coin in the realm", being 1 cent or 5 cent) in light of the egregious conduct which led to their lawful sentences of imprisonment.

57. As regards the plaintiffs' claims for damages, the defendants pleaded a Statute of Limitations defence to the effect that if the plaintiffs make out a case in false imprisonment, the period of claim is limited to the period of six years prior to the issuing

of the proceedings. As the plenary summonses issued on 27 October 2016, the State contends that any damages claim is confined to any false imprisonment in the period after 27 October 2010, i.e. the period from 27 October 2010 to 11 September 2014, a period of just under four years. The plaintiffs accept that the Statute applies as contended for and accordingly confine their claim to that four-year period.

Claims confined to False Imprisonment

58. I might note for completeness that the plaintiffs also claimed damages for breach of constitutional rights in addition to claiming for damages for false imprisonment. Murray J. in *G.E.* held (at para. 89) that "*the tort of false imprisonment is the mechanism by which the State has implemented its obligation to defend and vindicate by an award of damages the right of the citizen not to be deprived of his or her liberty save in accordance with law (W v. Ireland (No. 2) [1997] 2 IR 141 at 164-165 per Costello J.) and it follows that it is not possible to obtain damages for violation of the rights of personal liberty outside the Framework of that tort (D.F. v. Garda Commissioner [2014] IEHC 213)*". Hogan J. also references this principle in his judgment in the Supreme Court in *G.E.* I am not therefore concerned with the claim for damages for breach of constitutional rights. The plaintiffs' claim is purely a claim for damages for false imprisonment and will be evaluated on that basis.

False Imprisonment – Liability

59. The tort of false imprisonment was described in the judgment of Fawsitt J. in *Dullaghan v Hillen* [1957] Ir. Jur. Rep. 10 at 15 as follows:

> *"False imprisonment is the unlawful and total restraint of the personal liberty of another whether by constraining him or compelling him to go to a particular place or confining him in a prison or police station or private place or by detaining him against his will in a public place. The essential element of the offence is the unlawful detention of the person, or the unlawful restraint of his liberty."*

60. Hogan J. endorsed that definition of the tort in his judgment in the Supreme Court in *G.E.* (at para. 27).

61. As the essential element of the offence is the unlawful detention of the person, and both the High Court and Supreme Court held that the plaintiffs were unlawfully detained (and ordered their release on that basis), the plaintiffs say that the tort is made out by them. Their detention was not merely technically unlawful; the effect of the judgments in the Supreme Court was that the warrants were void *ab initio* and were warrants which the High Court simply had no jurisdiction to issue. The plaintiffs say that the law is clear that the onus is on the defendants to justify the lawfulness of their detention; as they could not now seek to justify the lawfulness of the detention in light of the High Court and Supreme Court decisions in the article 40 proceedings, liability for false imprisonment was made out.

62. The defendants accept that the High Court did not lawfully issue the warrants for 28 year imprisonment *in this case* as the sentence of 28 years imprisonment recorded on the face of the warrants did not represent the legal nature of the sentences passed in England (each of which was a composite one) and where a composite sentence of that legal nature was not compatible with Irish law. However, they contend that the fact that the plaintiffs had been released on foot of a successful article 40 application, and the fact that it had been found by both the High Court and Supreme Court that their detention was unlawful, was not of itself sufficient to make out the tort of false imprisonment.

63. The defendants submitted that the warrants here, in ordering the Governor to detain the plaintiffs for a prison sentence of 28 years, afforded a defence of "justification" to the Governor as a full answer to the false imprisonment claims. This was so, they argued, because the long-established test at common law, as approved by the Supreme Court in *O'Conghaile v Wallace* [1938] IR 526 ("*O'Conghaile v Wallace*"), was that a detainer had a good defence to a false imprisonment claim against him if the order issued by the Court and addressed to him was within the "general jurisdiction" of that Court and not bad on its face; they submitted that a s.7 warrant for detention based on 28 years' imprisonment was within the High Court's general jurisdiction under the 1995 Act in an appropriate case such that the Governor could not be liable in false imprisonment to the plaintiffs here. Furthermore, the defendants argued that there could be no case in false imprisonment against the Minister unless bad faith could be shown (which was not alleged) and that, in the absence of any claim for damages for breach of ECHR rights under the European Convention of Human Rights Act, 2003 as amended (article 5(5) ECHR providing for a right to compensation in the event of breach of the article 5 right to be detained only in accordance with law), the State could have no liability for an unlawful detention resulting from a defective warrant issued by the High Court.

Is the "general jurisdiction" defence available to defeat a false imprisonment claim where detention has been found to be unlawful under article 40?

64. The lynchpin of the defendants' case on this issue was the Supreme Court decision in *O'Conghaile v Wallace* which was said to be authority for the proposition that the fact that a person has been released on an application for *habeas corpus* (now an application under article 40 of the Constitution) did not *per se* entitle that person to damages for false imprisonment where the detainer was acting on foot of a Court-issued warrant which was on its face issued within jurisdiction.

65. In that case (the underlying facts of which concerned a failure by the plaintiff to comply with a Circuit Court injunction prohibiting him from interfering with fishing rights), the Circuit Court made an order for attachment to commit the plaintiff to prison for contempt. The plaintiff was held in custody for a number of months until an order for *habeas corpus* was made by the High Court ordering his release. He was also subsequently granted an order of *certiorari* quashing the attachment Order. In the proceedings that came on appeal before the Supreme Court, the plaintiff claimed damages for wrongful arrest, conspiracy and false imprisonment against, *inter alia*, the governor of the prison in which he had been detained (Limerick prison) and the party who had secured the attachment order (being the plaintiff in the original Circuit Court proceedings). The prison governor pleaded in his defence that he acted under the authority of a judicial act of the Circuit Court and that the plaintiff was imprisoned under the authority of orders of that Court. The reply pleaded by the plaintiff was a general traverse and he neither pleaded the order of *certiorari*, nor did he plead the particular grounds upon which the Circuit Court order had been quashed.

66. While the case was ultimately decided on a pleading point (namely, that the plaintiff had not sought to sought to plead that the order of attachment was bad in such a way as to prevent the governor or parties acting on foot of it), the judgments of the Supreme Court address in some detail the circumstances in which at common law a party (such as a detainer) acting in good faith on an order for detention apparently issued within jurisdiction would have a defence to an action for false imprisonment in the event the detention order was subsequently held to have been issued in error. Thus, Fitzgibbon J. held (at pp. 547-548) that

> *"In my opinion where a Court of inferior jurisdiction makes an order upon a matter within that jurisdiction, but erroneous in fact or form, so that it may be set aside, an officer acting in good faith upon that order is protected against an action for trespass or damages in respect of anything done by him before the order was set beside".*

67. Fitzgibbon J. in *O'Conghaile v Wallace* concluded (at p. 548) that the prison governor was not liable as:-

> *"In my opinion the order upon which the Gardaí and the Governor of Limerick Prison acted in the present case afforded ample justification for their action, and did not disclose upon its face any want or excess of jurisdiction which would have entitled them to refuse to execute it."*

68. He based that view on a survey of authorities, including *Andrews v Marris & Witham* 1 QB 3 and *Carrat v Morley* 1 QB 13. Later in his judgment (at page 555), when addressing the question of liability of the party who applied for the defective order, Fitzgibbon J. cites *Demer v Cook* 20 Cox C. C. where he references Lord Alverstone as saying:

> *"the authorities cited by the Attorney-General—Olliet v Bessey, Butt v Newman, Countess of Rutland's Case , Henderson v Preston and Greaves v Keene (some of which were cited to us [i.e. the Supreme Court in O'Conghaile v Wallace]) are, in my opinion, conclusive to show that where a gaoler receives a prisoner under a warrant which is correct in form, no action will lie against him if it should turn out that the warrant was improperly issued or that the Court had no jurisdiction to issue it."*

69. Fitzgibbon J. goes on to state:

> *"There is, however, authority for the proposition that officers are supposed, or presumed, to know the limits of the general jurisdiction of the tribunals whose orders they are bound to prepare or to execute, and that they may be liable in trespass if they prepare or execute an order which shows upon its face that it is outside the general jurisdiction of the tribunal which professed to make it."*

70. Fitzgibbon J. (at p.558), then concludes his analysis of the position of an officer, including a prison governor, acting on foot of a warrant as being that:-

"Provided the order showed upon its face that it was within the general jurisdiction of the tribunal by which it had been issued, it was a protection to the officer who executed it….. The officer who was directed to execute the order is not required to know more than that, he is not presumed or required to know, nor is he authorised to inquire into, the nature and propriety of all the proceedings in the cause. If the writ do not indicate its invalidity upon its face, the officer is protected though the writ ought never to have been issued."

71. Murnaghan J. agreed with Fitzgibbon J. In rejecting the plaintiff's argument that he was entitled to damages for trespass merely because the warrant was subsequently quashed, Murnaghan J. stated as follows (at p.567):

"This contention, indeed, ignores the distinction, old even in the days of Coke, who says in his report of The Case of the Marshalsea *10 R. 68b (at 76a): And a difference was taken when a Court has jurisdiction of the cause, and proceeds* inverso ordine *or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is coram non judice and actions will lie against them without any regard of the precept or process."*

72. Meredith J. (at p.579) concurred with both Fitzgibbon J. and Murnaghan J. on the false imprisonment analysis.

73. The defendants submitted that the fact that the s.7 warrants here were held to be void *ab initio* did not mean that they were not warrants which were otherwise within the Court's "general jurisdiction". It was pointed out by counsel for the defendants that *Andrew v Marris* which was relied upon in *O'Conghaile v Wallace* in fact involved a warrant which was held to be a nullity but nonetheless the sergeant who executed the warrant was held not to be liable.

74. The defendants submitted that this principle set out in *O'Conghaile v Wallace* continues to apply at common law and represented good law in Ireland still.

75. The defendants relied on an extract from the fifth edition of *Halsbury* (2021) which stated, under the heading "justification as defence to false imprisonment" that "*a defendant acting with lawful authority may still plead justification even if the warrant or provision under which he acts is subsequently found liable to be set aside*." A series of English authorities from 1997 to 2003 are cited by Halsbury in support of that proposition, including *R v Governor of Brockhill prison ex p Evans (No. 2)* [2001] 2 AC 19 ("*Evans (No. 2*)").

76. Before looking at *Evans (No. 2)*, it is worth noting that the relevant English line of authority starts with *Olliet v Bessey* (1682) T Jones' Rep 214 ("*Olliet v Bessey*") which was relied upon in *O'Conghaile v Wallace* (see para. 68, above). In *Henderson v Preston* (1888) 21 QBD 362 ("*Henderson v Preston*"), at p.366, Lord Esher MR said:

> *"That being the warrant, I adopt the judgment of Stephen J when he said that the warrant protects the governor, and that no more need be said. In the case of* Olliet v Bessey *(1682) T Jones' Rep 214 decided about 200 hundred years ago, it was so held, and from that day to this no action can be found in the books to have been maintained against a gaoler where he acted within the terms of the warrant."*

77. In the same case Lindley L.J. said, at p.366:

> *"What is a governor of a gaol who receives such a warrant to do except to obey it? ... It appears to me that the governor by obeying that warrant has simply done his duty, and the warrant protects him and is an answer to the action."*

78. These *dicta* were cited with approval by Lord Woolf MR in *Evans's case* [1999] QB 1043 (at 1056). Lord Woolf's endorsement of these dicta was in turn cited by Kennedy L.J. in *Swinland v Governor of Swalesdale Prison* [2003] QB 306 (at 313).

79. The principle in *Olliet v Bessey/Henderson v Preston* line of authority - namely that an order of court within jurisdiction directing a governor to detain a person provides the governor with a defence of justification to the tort of false imprisonment notwithstanding that the detention may subsequently found to be unlawful - was also endorsed by the House of Lords in relatively recent times (2001) in *Evans No. 2*. In that case the plaintiff (who had been serving concurrent sentences) sought damages for false imprisonment

when he was detained for a period longer than he should have been. His claim was made following a court decision in another case as to the correct method of calculating release dates for prisoners serving concurrent sentences, which decision over-ruled earlier authority.

80. The note of argument in the Appeal Cases report of *Evans (No. 2)* (found at [2011] 2 AC 19) records counsel for the governor of the prisoner in which the applicant was detained as submitting as follows:

> *"Justification for an imprisonment for the purposes of the law of tort exists where a court has ordered that imprisonment. The order of the court should be treated as authoritative because the court is the body with the expertise to decide what may be lawfully ordered and the authority (subject to appeal to a superior court) to determine the legality of what is ordered. Since a person ordered by the court to do an act does not have any responsibility for determining whether the order is lawful, he should not have liability in damages imposed upon him if the act proves to be unlawful. In such a case the nexus between responsibility for the act and legal liability which underlies the law of tort is broken: see* Henderson v Preston *(1888) 21 QBD 362 ;* Greaves v Keene *(1879) 4 Ex D 73 ;* Percy v Hall *[1997] QB 924 and* Olliet v Bessey *(1682) T Jones' Rep 214 . The person to whom the court order is directed cannot be taken to have assumed the risk that the order might prove to be wrongful. That is a matter entirely for the court. Since as a matter of law and common sense no such risk has been assumed by the person it is inappropriate to impose liability in damages on him should the court prove to be wrong."*

81. While holding that these authorities did not apply on the facts (as the governor had a duty himself to work out the appropriate release date and had got that wrong), a number of the Law Lords who gave judgment in that case endorsed the continued applicability of the *Olliet v Bessey* principle.

82. Lord Hope's speech contains perhaps the most involved engagement with the issue. Under the heading "*Justification for the false imprisonment*", he states as follows:

> *"The tort of false imprisonment is a tort of strict liability. But the strict theory of civil liability is not inconsistent with the fact that in certain circumstances the harm complained of may have been inflicted justifiably. This is because it is of the essence of the tort of false imprisonment that the imprisonment is without lawful*

justification. As Sir William Holdsworth, A History of English Law, 2nd ed (1937), vol VIII, p 446, puts it:

> *"A defendant could escape from liability if he could prove that his act was, in the circumstances, permitted by the law, either in the public interest, or in the necessary defence of his person or rights of property ..."*

Various phrases are used in the textbooks to describe this qualification. Clerk & Lindsell on Torts, 17th ed (1995), para 12-17 refer to "complete deprivation of liberty ... without lawful cause". Winfield & Jolowicz on Tort, 15th ed (1998) refer to "bodily restraint which is not expressly or impliedly authorised by the law". Fleming, The Law of Torts, 9th ed (1998), p 33 defines the tort as "intentionally and without lawful justification subjecting another to a total restraint of movement".

83. Lord Hope went on to note that the Solicitor General (for the respondents) relied *inter alia* on *Olliet v Bessey, Greaves v Keene* (1879) 4 Ex D 73, *Henderson v Preston* and *Olutu v Home Office* [1997] 1 WLR 328 in support of his basic proposition that the governor was complying with an order made by the Court at all times during the period of the applicant's detention in custody. He held that these cases did not avail the governor on the facts but did state (at p.35) that "*His* [the governor's] *position would have been different if he had been able to show that he was acting throughout within the four corners of an order which had been made by the court for the applicant's detention. The justification for the continued detention would then have been that he was doing what the court had ordered him to do*", making clear that he was endorsing the continued vitality in that jurisdiction of the "justification" defence based on compliance with a seemingly good court order.

84. In his speech in *Evans (No. 2)*, Lord Hobhouse noted (at p.42) that

> *"Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say that he believed that he could justify it. In contrast with the tort of misfeasance in public office, bad faith is not an ingredient of the tort; it is not a defence for the defendant to say that he acted in good faith: e g, per Taylor LJ in R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58, 123."*

85. Lord Hobhouse recognised the principle of lawful justification as a defence in tort to a false imprisonment claim as reflected in *Henderson v Preston* and *Greaves v Keene* but, as with Lord Hope, held that they did not avail the governor on the facts. He further stated (at p.45/p.46) that:

> *"The argument of the Solicitor General persistently confused a valid order for detention which is subsequently set aside with a valid order which is misinterpreted; it also confused a valid order which has not yet been set aside with an order which was never valid. These distinctions are basic to any legal system. An appeal against a conviction or sentence may lead to the conviction being quashed or the sentence being set aside or varied. But up to that time there were lawful orders of the sentencing court which were orders which had to be obeyed…. The critical importance of the warrant and what detention it actually commands and authorises applies both ways as illustrated by the judgment in Demer v Cook [1903] 88 LT 629 . Lord Alverstone CJ contrasted two situations. One was where the gaoler receives a prisoner under a warrant which is correct in form in which case no action will lie against him if it should turn out that the warrant was improperly issued or the court had no jurisdiction to issue it. The other was where the warrant had on its face expired or the gaoler has received the prisoner without any warrant, in which case the action will lie: "the warrant and nothing else is the protection to the gaoler, and he is not entitled to question it or go behind it": p 631."*

86. As we have seen (at para. 68 above), *Demer v Cook* was considered with approval by Fitzgibbon J. in *O'Conghaile v Wallace*.

87. Accordingly, the common law position as reflected in *O'Conghaile v Wallace* and in the English case law before and since *O'Conghaile v Wallace* appears to be as follows: that, while the tort of false imprisonment is a tort of strict liability, a detainer may escape liability for the tort by pointing as a justification in law for what transpires to be an unlawful detention to the fact that he acted on foot of a warrant for detention issued by a Court within its general jurisdiction and where the warrant in form was not bad on its face.

88. On the basis that *O'Conghaile v Wallace* was still good law (it not having being the subject of any reconsideration or qualification by the Supreme Court since 1938), the defendants argued that it was within the "general jurisdiction" of the High Court to issue a warrant under s.7 authorising detention in Ireland based on an English prison sentence of 28 years for the offence under English law of conspiracy to cause explosions; that it followed

that there was no error on the face of the warrants here and that the Governor accordingly had a defence of justification to the claims against him for false imprisonment. They argued that this was so on the basis that a 28 year prison sentence for the conspiracy to cause explosions offence was within the jurisdiction of the English courts and therefore in an appropriate case the High Court would have the jurisdiction to issue a s.7 warrant for such a prison term (a jurisdiction permitted by the terms of s.7(6) as amended notwithstanding that such sentence might exceed the maximum which could be imposed in Ireland for such an offence). They argued that the warrants accordingly did not disclose any error on their face or want of general jurisdiction such as to disentitle the Governor to act on them or to give him permission to refuse to execute them.

89. The defendants also relied on *O'Conghaile v Wallace*, and long-established authority set out therein, for the proposition that in addition to the Governor not being liable, the Minister as the party who applied for the warrant could not, absent bad faith, be held liable in false imprisonment. They submitted that paragraph 142 of the fifth edition of *Halsbury* (2021) correctly summarises the common law position as being "*no claim for false imprisonment otherwise lies against a person who takes proceedings before a magistrate or judge in respect of an imprisonment which is caused by the orders of the magistrate judge; the remedy, if any, of the person imprisoned in such a case, is a claim for malicious prosecution against the person who instituted the proceedings*".

90. The defendants emphasised that this did not mean that a person who had been the subject of unlawful detention as a result of a defective court order purporting to authorise that detention was left without a remedy. Counsel for the defendants drew the Court's attention to the provisions of s.3A European Convention of Human Rights Act 2003 as inserted by s.54 Irish Human Rights and Equality Commission Act 2014 which provides for a cause of action in damages for breach of article 5 ECHR rights to liberty in Irish law where a person "*has been unlawfully deprived of his or her liberty as a result of a judicial act*" without apparent circumscription as to the precise nature of the error which led to the unlawful deprivation of liberty (albeit confined to "actual injury, loss or damage": s.3A(3)(a)). The defendants stated that the plaintiffs had not pursued this remedy and were now out of time to do so.

91. Counsel for the plaintiffs submitted that the defendants' case simply overlooked the findings of both the High Court and Supreme Court as regards the fundamental defects in the warrants which were said to be wholly devoid of jurisdiction and legal effect. He submitted that *O'Conghaile v Wallace* was readily distinguishable as that addressed a situation where the detainer had acted on a warrant issued within jurisdiction albeit on a legally defective basis. Counsel for the plaintiffs submitted that the essence of the High Court and majority Supreme Court decisions on the plaintiffs' article 40 applications was

that the High Court did not have jurisdiction to issue the warrants in this case. The sentences passed by the English Court were simply not capable of enforcement in this jurisdiction without adaptation and there was no successful adaptation application made here prior to the issue of the warrants.

92. As a fall back, counsel for the plaintiffs submitted that the old authorities relied upon in *O'Conghaile v Wallace*, and *O'Conghaile v Wallace* itself, could no longer be taken to represent good law in this jurisdiction in light of more modern dicta in the Irish jurisprudence (such as in the judgment of Murray J. in *G.E.*) which emphasise the strict liability nature of the tort of false imprisonment; a defence essentially premised on the principle that the Governor could not be faulted for obeying orders seemingly valid on their face was said to be inconsistent with those strict liability principles. Similarly, it was contended that *O'Conghaile v Wallace* was objectionable in principle as, if continued to be applied, it would amount to a hollowing out of the fundamental constitutional right not to be detained otherwise than in accordance with law and the tort of false imprisonment which gave effect to that right. If the State was right in its submissions, *O'Conghaile v Wallace*, if it continues to represent good law, would result in the anomalous situation where a detention held to be unlawful under article 40 as a result of a substantial error would not be actionable in damages if that error was not apparent on the face of the detaining instrument but where a less substantial error but one apparent on its face would entitle an affected party to damages.

93. The example was given of a District Judge sentencing an accused to 3 months but the registrar incorrectly recording the sentence in the Court's order as one of 4 months and a governor then detaining the accused in accordance with the Court order for 4 months i.e. for one month in excess of the sentence passed. It was said that this would be a case where there was no error on the face of the record on the State's conception of such errors (because it was within the general jurisdiction of the District Court to pass a four-month sentence) and therefore the party held for one month in prison without lawful authority would not be entitled to any compensation for the tort of false imprisonment. It was submitted that such an approach, if accepted, would improperly fail to vindicate the prisoner's constitutional right to liberty.

94. The plaintiffs further submitted that even if the Governor had a defence of justification on the basis of *O'Conghaile v Wallace* (and it was submitted that there was no evidence before the Court that the Governor was unaware of the legal infirmities in the sentence as reflected on the warrant), primary liability lay with the State defendants more generally in any event. It was the Minister's decision not to apply for an adaptation order under the 1995 Act but rather to seek the form of warrant which the High Court issued. The Minister

has overall charge of the transfer process and could not escape liability if his or her errors have resulted in unlawful detention.

95. I will firstly consider whether the defendants are correct in their submissions as to the application of the principles in *O'Conghaile v Wallace* to the facts of this case before turning, if necessary, to the question whether, if so, I am bound to apply the case notwithstanding its asserted incompatibility with more modern authority.

96. On the basis of *O'Conghaile v Wallace*, in order for the defendants to succeed in their defence of justification to the false imprisonment claims, they must establish that a warrant authorising the detention of the plaintiffs for 28 years imprisonment on the basis of an English sentence for the offence of conspiracy to cause explosions was within the general jurisdiction of the High Court under the 1995 Act.

97. I have to say that it was not established by any evidence before the Court that the prison component of a unitary sentence for the offence of conspiracy to cause explosions passed by an English court could extend to 28 years; while reference was made to a sentence of life imprisonment for this offence in English law (see paragraph 21 of second High Court judgment of Hogan J. in the article 40 proceedings), it was not explained how a life sentence could translate by its legal nature into a 28 year period of imprisonment for the purposes of s.7 of the 1995 Act or what sentence could be passed in English law which, in light of the statutory provisions in that jurisdiction for mandatory release into the community under licence after a period of service of the sentence in prison, would result in a sentence, in its legal nature, of 28 years imprisonment for the purposes of (a presumably adapted) transfer and detention order under s.7.

98. However, whatever about the evidential limitations in establishing the foundational proposition of the argument, even accepting for argument's sake that the defendants were right in this contention, it seems to me that such an approach posits the wrong question. The High Court here had no jurisdiction, generally or on the facts of these cases, to issue a warrant under s.7 purporting to authorise the detention in prison in Ireland of these plaintiffs for the entire of a composite English sentence which had a licence in the community component. Such a sentence is incompatible with Irish law. It cannot be the subject of a s.7 warrant without an order for adaptation.

99. The parameters of the High Court's jurisdiction under s.7 are dictated *inter alia* by the legal nature of the sentence passed in the sentencing state and whether such sentence is

compatible with Irish law. As a sentence incorporating a licence in the community element is not compatible with Irish law, the High Court would never have jurisdiction to issue a s.7 warrant for such a sentence absent adaptation. Adaptation would be a jurisdictional pre-requisite of any valid s.7 warrant in such circumstances. Any valid warrant in the circumstances would have to record an appropriate adaptation order on its face. The warrants on their face record no adaptation. In the absence of any appropriate adaptation, they were issued wholly outside the jurisdiction of the Court.

100. It seems to me to be important to bear in mind at all times that a warrant issued under s.7 is not in itself a warrant giving effect to a sentence of imprisonment passed by an Irish court such that a governor executing the warrant in Ireland need simply have regard to the period of imprisonment specified on the face of the warrant which he or she is obliged to give effect to. As s.7(4) makes clear the effect of a warrant under the section is to authorise the continued enforcement by the State of the sentence concerned imposed by a court of a foreign state in its legal nature and duration. Setting aside any question of the duration of the sentence for the moment, in the event that the legal nature of the sentence passed in the sentencing state is incompatible with the law of this State, the sentence will require an order of the Court adapting the legal nature of the sentence to that of a sentence prescribed by the law of the State for a similar offence if it is to be the subject of a valid s.7 warrant. This is an intrinsic part of the statutory scheme going to the Court's general jurisdiction under s.7 which a governor must be taken to be aware of (see passage from *O'Conghaile v Wallace* cited at para. 69 above) and the application of which will need to be clear from the face of a s.7 warrant.

101. No particular form of order is specified under the 1995 Act. However, in light of the terms of s.7, one would expect to find on the face of a warrant issued under the section a specification of the legal nature of the sentence passed in the sentencing state; and, where that legal nature is not compatible with the laws of this State, a specification of any necessary adaptation to a sentence prescribed by the law of the State for a similar offence. In this way, any disparity between the terms of the original sentence and the period of that sentence, appropriately adapted, to be spent in custody in Ireland pursuant to the warrant would be made clear. As we know, this was not done in this case. The warrants fundamentally misstated the sentences in the sentencing state as being for "28 years imprisonment" for the conspiracy offence. That did not at all reflect the legal nature of the sentence passed in England. There was no adaptation order applied for or made; accordingly, the necessary process of seeking to render compatible with Irish law a sentence which was otherwise incompatible in its legal nature with Irish law was not carried out and the absence of those necessary steps is evident from the face of the warrants.

102. Accordingly, in my view these warrants were not within the general jurisdiction of the High Court by reference to the discrete statutory procedure set out in the 1995 Act as amended. It follows that it is not open to the Governor to plead justification in the face of these claims for false imprisonment; the warrants were wholly bad in jurisdictional form and substance and not ones within the general jurisdiction of the Court to issue under the 1995 Act.

103. It follows that, in my view, on the assumption that the *Olliet v Bessey* line of authority endorsed in *O'Conghaile v Wallace* and the decision in *O'Conghaile v Wallace* itself still represents good law in this jurisdiction, it does not avail the defendants: the plaintiffs were detained pursuant to warrants issued wholly without jurisdiction, which were bad on their face and (subject to the defences of consent, waiver and acquiescence next considered) the Governor is therefore liable in false imprisonment.

104. In light of the conclusions I have reached above, it is not necessary for me to determine the contention that the *Olliet v Bessey* line of authority approved in *O'Conghaile v Wallace* no longer represents good law in light of more modern authorities addressing the scope of the tort of false imprisonment and the role of that tort in vindicating a person's constitutional right not to be the subject of unlawful detention. That contention will have to await resolution in an appropriate case.

Consent/waiver/acquiescence?

105. I turn now to a series of defences (variously described as consent, waiver, acquiescence and estoppel) mounted by the defendants which stem principally from the fact that the plaintiffs consented in writing to their transfer to, and detention in, the State for a period in fact specified to be longer than the period they would have spent in confinement in prison in England if they had remained there to serve their sentences. In order to put these defences in their appropriate context, it is necessary to set out the facts relevant to this aspect of the case.

106. As part of the correspondence between the plaintiffs and the Minister's department on foot of their applications to transfer to Ireland pursuant to the 1995 Act, an official in the Department wrote to each of the plaintiffs informing them that the Minister had consented to the transfer application. A letter (in materially identical terms) was sent to each of the plaintiffs, on 24 March 2006 which enclosed a copy of the legislation and an explanatory leaflet on its operation. This letter involved the Minister discharging the obligations on him pursuant to s.6(5) of the 1995 Act as to the information which needed to be given to the

plaintiffs to include inter alia information as to the effect on them of any warrant issued under s.7.

107. The letters highlighted, in particular, that "*if you consent to a transfer to Ireland, it is likely, given that you will be eligible to earn remission of up to a quarter of the balance of sentence (as opposed to a rate of one third in the UK) that your final release date will extend beyond 29 April 2020.*" A detailed estimate of each plaintiff's likely sentence in Ireland was enclosed with the letter. Based on a hypothetical transfer date of 1 July 2006, the estimates calculated each plaintiff's estimated release date as 20 January 2022.

108. It is clear that these calculations were done on the basis of an assumption that, while the plaintiffs would have been released from prison after 18 years and 8 months if they remained in the UK, upon transfer to Ireland the appropriate approach was to apply an assumed remission of 25% of the remaining period of the original 28 year sentence as if that 28 year sentence was entirely concerned with a sentence of imprisonment. We now know that this was a legally incorrect approach to the matter in light of both the *Sweeney* case and the judgments of the High Court and Supreme Court on foot of the plaintiffs' article 40 applications.

109. The letters also stated that "*you will be expected to serve the balance of your sentence in accordance with the "continued enforcement" procedure under the Convention on the transfer of sentenced persons"*. Information in respect of remission/temporary release, under Irish rules, was enclosed with the letters.

110. The letters sought the plaintiffs' consent and enclosed a consent form headed "Transfer of Sentenced Persons Acts, 1995 and 1997 Consent of Prisoner to Transfer to Ireland". As noted earlier in this judgment, the consent of the prisoners to their transfer is a necessary requirement before the Minister can apply to the High Court for the issue of warrants under s.7.

111. Taking Mr. Rafferty's case as an example, the text of these consent forms was as follows:

> *"I, Declan John Rafferty, hereby confirm that I have read [the Minister's official's] correspondence dated 24th March, 2006 advising me as to the administration of my sentence on transfer to Ireland. I also confirm that I have been informed in writing in my own language:*

a) *of the substance, so far as is relevant to my case, of the international arrangements between Ireland and the United Kingdom for the repatriation of sentenced persons:*

b) *of the effect in relation to me of a warrant authorising my transfer from the United Kingdom to Ireland:*

c) *of the effect in relation to me of so much of the law in Ireland as has effect with respect to repatriation under these arrangements:*

d) *of the arrangements governing the continued enforcement of my sentence in Ireland:*

e) *of the powers of the Minister for Justice, Equality and Law Reform under Section 9 of the Transfer of Sentenced Person Act, 1995; and:*

f) *that I will continue to serve my sentence of 28 years imprisonment, as reduced from 30 years imprisonment on appeal in the Court of Appeal Criminal Division on 15 July, 2005, and other concurrent sentences, as advised in [the official's] letter of 24th March, 2006.*

and I hereby give my consent to my transfer from the United Kingdom to Ireland."

112. The terms of (a) to (f) above largely replicate the terms of s.6(5) of the 1995 Act which impose an obligation on the Minister to inform the sentenced person of the matters addressed by those sub-paragraphs. Each of the plaintiffs then signed and returned the consent forms in the terms outlined above.

113. We now know that the summary contained in the letters of 24 March 2006 as to the application of the provisions of the Convention and the 1995 Act to the continued enforcement of the plaintiffs' English sentences was fundamentally wrong. Each of the plaintiffs gave evidence at the hearing of this action that they were not informed by the Minister that there was any issue in relation to the lawfulness of the proposed terms of

transfer they consented to. It was not suggested to the plaintiffs in cross-examination that they were aware, for example, through their own legal advice that there was a fundamental problem with the proposition that service of the balance of their sentences in Ireland should be approached on the basis that the 28 year English (composite) sentence was to be treated as a sentence of 28 years imprisonment, with Irish remission rules to apply to the remaining unserved balance of that 28 year imprisonment but that the plaintiffs were content to proceed notwithstanding the non-conformity of those propositions with the correct legal position under the 1995 Act.

114. The parties are agreed that concepts of consent, waiver or acquiescence cannot be invoked in the context of an article 40 inquiry so as to render an unlawful detention a lawful one. MacMenamin J. addressed this issue in his judgment in the Supreme Court appeal in the article 40 proceedings, at para. 276, under the heading "*Conduct or waiver?*" as follows:

"In Caffrey v Governor of Portlaoise Prison [2012] IESC 4, [2012] 1 IR 637, at para 33, pp 652 and 653, Denham CJ approved the following statement of the law by Charleton J, then in the High Court:-

> "9. What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the Court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in *habeas corpus* proceedings. There is only one issue in this kind of inquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment."

On this, Denham CJ observed at p 653:-"[33] … I would affirm this approach by the High Court Judge. The issue for the court was whether the applicant was lawfully detained or not. The applicant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law."

115. MacMenamin J. went on to state:

> *"[277] The consequence of the application of this principle, as the law stands, is that a plea of waiver, consent or estoppel cannot assist the respondent. It has not been suggested that* Caffrey v Governor of Portlaoise Prison *[2012] IESC 4, [2012] 1 IR 637 was incorrectly decided. The observation appears directly on point. While the following observation is obiter, the circumstances of this Article 40 inquiry are distinct from those which may arise regarding waiver in the law of tort. Section 34(1)(b) of the Civil Liability Act 1961 provides that the subsection of the provision dealing with contributory negligence "shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection shall apply notwithstanding that the defendant might, apart from this subsection, have the defence of voluntary assumption of risk". Thus, a defendant in civil proceedings, brought under the law of tort, may escape liability (a) where he or she shows that by contract he is not liable, or (b) where he or she can show the plaintiff, before the act agreed to, waived his legal rights in respect of it. In either case, the burden of establishing the defence falls on the defendant (*O'Hanlon v Electricity Supply Board *[1969] IR 75, at p 90, per Walsh J)."*

116. The defendants submitted that it followed that question of whether the plaintiffs' claims in tort for false imprisonment may be successfully maintained in circumstances where they consented to their transfer to serve their sentences in Ireland, in the knowledge that they would remain in prison until January 2022, is very much in issue in this case. They submitted that the plaintiffs could not action their false imprisonment claims where they consented to imprisonment in Ireland for longer than their likely periods of imprisonment in England if their full sentences were served there; alternatively the terms of their written consent were such that they could be taken to have waived any entitlement to maintain any claim in false imprisonment or alternatively to have acquiesced in their unlawful detention in such a manner as to disentitle them to maintain these claims.

117. I will address the consent argument before addressing the questions of waiver and acquiescence/estoppel.

Consent

118. The defendants, citing *McMahon and Binchy Law of Torts* (4th edn. para 20.268), submitted that consent to harm directly inflicted on a person defeats a cause of action in trespass to the person and that, as false imprisonment involves a trespass to the person, consent can also operate as a defence to false imprisonment. Here, it was submitted that there was express consent by the plaintiffs to their transfer on terms subsequently impugned by them such as to disentitle them from seeking to maintain this action.

119. In my view this contention is not well founded. As can be seen from the definition of the tort set out earlier in this judgment (at para. 59), the essential element of the tort of false imprisonment is the unlawful deprivation of liberty. If consent is to provide a defence, it would follow that consent would have to be to a deprivation of liberty that is otherwise unlawful. This is not akin to a situation where e.g. a party consents to being physically struck and where the essence of the tort of assault (being an unwanted attack on the person) is thereby negated by consent. The plaintiffs did not consent to being unlawfully detained. Their consent to being transferred back to Ireland to serve out their sentences here was a consent within the terms of the statutory scheme. As seen earlier, their consent to their transfer back to the State is recorded on the face of the warrants issued under s.7. It follows that the consent must be taken to be a consent to a transfer back to the State and detention here in accordance with the requirements of the 1995 Act. The plaintiffs each gave evidence at the hearing that they were not aware of any issue of incompatibility of their English sentences with Irish law. There is no evidence that they consented to an unlawful detention in Ireland. They did not partake in the hearings which led to the issue of the s.7 warrants. In the circumstances, I do not believe that a defence of consent is available to the defendants in respect of the tort of false imprisonment on the facts of this case.

Waiver/Acquiescence/Estoppel

120. The defendants also raised acquiescence, as their written submissions put it, "*as a form of estoppel, where the person stands by and thereby induces the other to commit the act complained of. Thus, acquiescence in this sense involves an implied assent but one which having been relied upon by the party committing the alleged wrong, provides that other party with a defence in law and equity.*"

121. They submitted that the practical application of this doctrine may be seen in caselaw concerning convicted persons who have not asserted their rights at the proper time, citing in that regard authorities such as *State (Byrne v Frawley)* [1978] IR 326, *Brennan v Governor of Portlaoise Prison* [2008] 3 IR 364, *Gorman v Martin* [2005] IESC 56 and *A v Governor of Arbour Hill Prison* [2006] 4 IR 88.

122. As regards the question of waiver or acquiescence the plaintiffs submitted that they never consented to, or acquiesced in, being detained unlawfully nor did they waive any entitlement to take action in the event their detention proved unlawful. Each of the plaintiffs gave unchallenged evidence at the hearing of the action that they were unaware of the incompatibility of the English sentence with Irish law. In short, it was submitted that uninformed consent or acquiescence is no consent or acquiescence.

123. The Minister never told the plaintiffs that their English sentence was not capable of being implemented in this State, at least without appropriate adaptation. They were not told that there was any issue with lawfully carrying into effect the transfer mechanism for this type of sentence. The plaintiffs were not party to the applications for the s.7 warrants; indeed, they sought through their solicitors to participate in the warrant application process but were (correctly) told that they had no entitlement to be involved in those applications. In those circumstances, the position is different to that obtaining in the authorities relied upon by the defendants: this was not a situation where a party to a criminal proceeding elected not to take a point or sought to raise a point too late in the proceedings. They were never party to a court process during which they could have raised objection to the form of the warrant but did not do so.

124. On becoming aware of the Supreme Court's decision in the *Sweeney* case, the plaintiffs moved promptly in bringing their article 40 applications. On succeeding in the Supreme Court, following the State's appeal against the High Court decision on their article 40 applications, they instituted these proceedings promptly thereafter.

125. In the circumstances, in my view, the plaintiffs are not prevented by the doctrines of consent, waiver or acquiescence from seeking to now claim relief for false imprisonment.

Approach to Damages

126. Having held that the Governor is liable for false imprisonment, and the plaintiffs are not disentitled to pursue their claims, it is necessary to turn to the question of damages. The

question of the proper approach to assessment of damages in respect of the Irish tort of false imprisonment has recently been comprehensively addressed by the Court of Appeal and Supreme Court in *G.E.* Given the centrality of the issues discussed in the judgments of the Court of Appeal and Supreme Court in that case to the damages question in this case, it is useful to examine closely what was held in *G.E*.

The GE case and High Court decision

127. The plaintiff in *G.E.* was a non-national who arrived in Ireland in 2008 and sought asylum in the State. He originally claimed to be from Sierra Leone, although there was evidence to suggest that he was in fact Nigerian. His application for asylum was refused and he subsequently applied for subsidiary protection. During the period in which this application was still pending, GE was arrested. He had left the State and then re-entered by bus from Northern Ireland. He was refused permission to land in the State pursuant to ss. 4(3)(e), (g) and (h) of the Immigration Act 2004 and arrested pursuant to s. 5(2) of the Immigration Act 2003 ("the 2003 Act"). He was then detained overnight in Dundalk Garda Station on foot of a detention order directed to the Member in Charge of the station. This order was stated to be made in exercise of the powers conferred on the Minister for Justice and Equality by s. 5(2) of the 2003 Act. On the following day, he was released and then immediately re-arrested and detained on foot of a fresh detention order made out to the Governor of Cloverhill Prison, which was made out on the same basis and by the same officer as the first.

128. GE took article 40 proceedings and was released on foot of a finding by the Supreme Court that the detention order was defective as it should have recorded the fact that GE had been refused permission to land and that it should also have recorded that the reason for GE's arrest and detention was that the immigration officer in question had reasonable cause to suspect that he was a non-national who had been unlawfully in the State for a continuous period of less than three months. Because the warrant recorded neither of these requirements, the detention was held to be unlawful. GE had been detained on foot of the unlawful warrant for 26 days. He subsequently brought proceedings claiming damages for false imprisonment. Liability in respect of false imprisonment was not in dispute and the issues in the case focused on the question of the appropriate approach to damages.

129. The High Court awarded GE €7,500 damages for the 26 day period of his false imprisonment. This sum represented a reduced sum in circumstances where GE was held to have lied in his evidence to the Court. In arriving at the award, the High Court rejected

an argument on the part of the State defendants (based on the decision of the United Kingdom Supreme Court in *R. (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 A.C. 245 ("*Lumba*")) that GE should only be awarded nominal damages in circumstances where, but for the errors in the relevant detention order, GE would have been lawfully detained and was therefore not entitled to any material compensatory damages. The defendants appealed the High Court's decision to the Court of Appeal (having been denied a "leapfrog" appeal to the Supreme Court).

The Court of Appeal decision in G.E.

130. In *G.E.*, the Court of Appeal (in a judgment of Murray J., concurred in by Whelan and Power JJ.) addressed what it described as "a novel and important issue" regarding the award of general damages for false imprisonment namely the contention that where the plaintiff establishes that he or she has been unlawfully detained, the defendant can defeat any consequent claim for compensatory damages "if it can be shown that had the plaintiff not been unlawfully detained he or she could and would have been lawfully detained." As Murray J. noted, it was the defendants' case that in *Lumba* a majority of the UK Supreme Court had decided that where a person had been unlawfully detained but could (and would on following the correct procedure for the detention) have been lawfully detained, an entitlement to only nominal damages arises – unless the circumstances were such as to give rise to a claim for exemplary or punitive damages (para. 13).

131. In a masterful analysis, Murray J. rejected the contention that Irish law recognised a "but for" test of causation in calculating damages and actions for false imprisonment. He held as follows (at para. 147):

> *"The tort of false imprisonment as part of the common law of the State at the time of the adoption of the Constitution was a cause of action in which compensatory damages were awarded for an unlawful deprivation of liberty. The law in this jurisdiction does not contemplate a bright line rule precluding a person who could have been detained lawfully when they were not, from obtaining by reason of that fact alone any award of general damages. It is wrong to view compensatory damages for false imprisonment as being merely for loss of liberty and associated injury, without acknowledging the consequence of the fact that they are triggered where the containment is unlawful. The tort is the response of private law to the insult caused by that illegality. The award of damages reflected that. It is not open to the courts to now retheorise that cause of action."*

132. Importantly for present purposes, he held (at para. 150) that:

> *"where a person has been unlawfully detained and that detention is more than merely fleeting, the starting point in the determination of damages is that having been unlawfully detained the plaintiff is entitled to an award of compensatory damages. These are calculated to take account of the fact of the plaintiff's loss of liberty and the impact upon him or her of the detention including the attendant mental suffering, disgrace, injury to reputation and social standing."*

133. He further held:

> *"151…a court is entitled to reduce the award it would otherwise make for this composite injury to reflect the fact the plaintiff was a person who had through his conduct rendered himself liable to lawful detention in the first place and in the consequence that the event rendering the detention unlawful was purely procedural or technical in nature. The nature and extent of that reduction is a matter for the trier of fact having regard to all the circumstances. There will be cases in which the plaintiff's conduct is such that in awarding damages on that basis the court properly finds the interest of the plaintiff in his liberty to be so attenuated that the reduction is a substantial one resulting in very low compensatory damages."*

134. Murray J. went on to note (at para. 152) that once a plaintiff has established the basis for an award of compensatory damages he or she has triggered an entitlement at common law to an award which contains within it the objective of vindication. He noted that a person who has their liberty unlawfully constrained will usually have established that the actions of the defendant had an effect over and beyond that of those constitutional infringements in respect of which a declaration or nominal damages would be adequate. He noted that "*This element of the award does not have to be a substantial sum, but it must reflect the fact that for a period of time the plaintiff was deprived of his or her liberty other than in accordance with law*."

135. In the course of his analysis, Murray J. noted (at para. 120) that "*the fact that a constitutional right has been violated in such a way as to give rise to a cause of action in damages does not automatically and without more give rise to an obligation to award substantial damages in order to reflect the inherent value of the right that has been breached*" and referenced a number of decisions in which nominal damages alone have been awarded for such breaches.

136. Murray J. referred to the Supreme Court decision in *Simpson v Governor of Mountjoy Prison* [2020] 1 ILRM 81 ("*Simpson*"). As summarised by Murray J. (at para. 125), in *Simpson* the plaintiff endured seven and a half months of imprisonment in joint occupancy cells which lacked in-cell sanitation. He was in a "lock up" regime which meant that he was frequently in his cell for 23 hours per day. The absence of in-cell sanitation in circumstances where the plaintiff both shared a cell and was for substantial periods of time unable to leave it, was held to represent a breach of rights to privacy and the person as guaranteed by Art.40.3.2° of the Constitution. The Court determined that he was entitled to damages for that infringement and that the common law did not provide him with a remedy.

137. Murray J. noted that the Supreme Court there declined to embark upon an award of "vindicatory" damages. He then (at para.125) cited five relevant principles identified by MacMenamin J. in *Simpson*. There, MacMenamin J. stated:

> *"In considering the question of damages, it seems to me that a court may apply the following basic principles. First, there must be a restitutionary element, seeking to put a claimant in the same position as if his or her constitutional rights had not been infringed. Second, it is necessary to ask whether what arose in a particular case was not simply some procedural error. Third, a court's approach should be an equitable one, having regard to the particular facts of an individual case and the seriousness of the violation. Fourth, if and where necessary, a court awards damages under the various headings of common law, such as non-pecuniary loss including pain, suffering, psychological harm, distress, frustration, inconvenience, humiliation, anxiety, and loss of reputation. Fifth, punitive damages will not generally be awarded save in very grave cases, such as where there was a direct intent or purpose in bringing about a significant consequence or detriment."*

138. Murray J. went on to state:

> *"128. Importantly for present purposes, when MacMenamin J. referred to the award being "equitable" he made it clear that this included a consideration of the gravity of the breach: it was intended to reflect "that the seriousness of the violation requires more than a mere declaration" (at para.126). He explained (at para.127): "Ultimately, all these considerations place the question of remedy within the category of compensatory damages. An award of compensatory damages can serve a vindicatory purpose. It will recognise that what happened was wrong and did*

have an effect upon the appellant over and beyond other constitutional infringements where a declaration would be adequate. To mark the wrong in this case, therefore, the vindication must go further than a mere declaration and contain a just financial redress."

139. Murray J. then noted (at para. 152) that "*The need to obtain "vindication" of the right through an award of damages is thus related to the gravity of the breach, and its impact on the plaintiff. Where the breach has "an effect" on the plaintiff, "vindication" may require financial redress….A "procedural error" may result in no damages being awarded, while such damages are more likely to be awarded where the breach is "serious". While damages will be awarded under common law headings, the guiding principle is directed by the first point – placing the plaintiff in the position they would have been in had their constitutional rights not been violated*."

140. The important touchstone of an "equitable" approach to the process of assessing damages is further addressed by Murray J., at paras. 137 and 138 of his judgment, as follows:

"….the correct analysis has as its starting point that in all cases of unlawful detention the plaintiff is entitled to an award of compensatory damages. That may be reduced, depending on the facts, to take account of the plaintiff's conduct and, therefore, of the reasons the detention is unlawful. In some cases in seeking to obtain the "equitable" outcome urged in Simpson, this may result in a plaintiff obtaining very low damages. However, one would expect that in most cases even where the plaintiff's own conduct has rendered him liable to lawful detention, the plaintiff will retain an element of the compensatory award to which he or she would otherwise be entitled so as to reflect the fact that his detention was not effected lawfully (a matter for which he can rarely, if ever, be responsible).

138. In thus positing an element of vindication through an award of compensatory damages the approach I suggest undoubtedly comes dose to envisaging an award under a distinct heading of "vindicatory" damages. However, in limiting any such entitlement to cases in which a plaintiff establishes a basis for compensatory damages in the first place, I believe it is more correctly viewed as an irreducible element of the compensatory award to which a plaintiff will by reason of the illegality usually be entitled irrespective of how that illegality arose. Critically, it allows the court in fixing damages to both acknowledge the illegality and to tailor any reduction to reflect the particular facts and circumstances of the case."

The Supreme Court decision in G.E.

141. The Supreme Court granted leave to appeal against the decision of the Court of Appeal. Judgment on the Supreme Court appeal was given by Hogan J. with the other members of the court (O'Donnell C.J., Dunne J., O'Malley J. and Baker J.) concurring.

142. Hogan J. stated (at para. 1) that the appeal raised "*a novel and important issue in respect of the award of general damages for the tort of false imprisonment. This Court has been asked to determine the following question: in circumstances where a plaintiff can establish that he or she has been unlawfully detained, can a defendant defeat any consequential claim for compensatory damages if it can be shown that had the plaintiff not been unlawfully detained, he or she could and would have been lawfully detained? If that question can be answered in the affirmative, then it is suggested that the plaintiff in those circumstances is confined to an award of nominal damages only*."

143. Hogan J. agreed with Murray J.'s "powerful, comprehensive and scholarly analysis" of *Lumba* and the other authorities addressing the "but for" argument which prevailed before the UK Supreme Court in *Lumba* (para. 30). Hogan J. saw the issue presented by the appeal as reducing itself to the question of "whether it could ever be appropriate to award purely nominal damages to someone who has genuinely and actually been deprived of their liberty by reason of the illegal actions of the State or its agents" (para. 31).

144. Hogan J. noted that the scope of the remedies provided in respect of the tort of false imprisonment must be construed in light of the constitutional guarantee in article 40.3.2 which requires the State in the case of injustice done to, *inter alia*, vindicate "the person", which includes vindication for unlawful deprivation of liberty (para. 39).

145. Hogan J. took the view, on a proper analysis of the authorities, that the award of damages for false imprisonment has a vindicatory element given the importance of the right which has been infringed (paras. 48 and 53). Hogan J. viewed the analysis of MacMenamin J. in *Simpson*, with its reference to an "equitable" approach to damages, as being consistent with the fact that compensatory damages awards may have a vindicatory element of to them (para. 56).

146. Relevantly for present purposes, Hogan J. devotes a section of his judgment to the question of "the personal conduct of the plaintiff and the award of damages". Hogan J. pointed to the provisions of s.34 Civil Liability Act 1961 ("s.34") relating to contributory negligence in holding that the personal conduct of a plaintiff can be relevant when it comes to assessing damages, even in respect of the tort of false imprisonment (para. 62). He held that "*Contributory negligence in the sense understood by s. 34 of the 1961 Act may apply even though, for example, there could be no sense in which the plaintiff's conduct would amount to a separate cause of action in negligence. Rather, contributory negligence in this extended sense is designed to reflect a state of affairs where the plaintiff's own carelessness or inattentiveness or, indeed, unreasonable behaviour has helped to bring about the loss which he or she has suffered. The award of damages in respect of a civil wrong may accordingly be reduced in accordance with s. 34 of the 1961 Act in order to take account of the personal conduct of a plaintiff where this is material to the circumstances of the commission of the tort in question*" (paras. 65 and 66).

147. On the facts of *G.E.*, Hogan J. held that the plaintiff there had conducted himself (by unilaterally leaving the State without the Minister's permission and then seeking to re-enter the State in circumstances where he had no obvious legal entitlement to do so) in a way that amounted to "*a want of care or a failure to exercise reasonable care for his own protection within the meaning of s.34 of the 1961 Act. His irregular conduct rendered him liable to be arrested under the immigration acts. This, of course, did not entitle the gardai to behave illegally or to detain him pursuant to a defective warrant but neither can it be said that GE is in the position of, e.g., the plaintiff in Walsh v Ireland, who was the victim of mistaken identity*". (para. 60).

148. Hogan J. then discussed a number of examples consistent with this principle found in cases involving wrongful dismissal. He concluded (at para. 75) as follows:

> *"At all events, what these cases show is that the general conduct of the plaintiff is relevant in the assessment of damages in respect of the wrongful conduct of a defendant, even in the case of the tort of false imprisonment. It does not, for example, follow that a plaintiff whose detention is rendered unlawful by reason of legal error should necessarily obtain the same amount in damages as the entirely innocent plaintiff who has been wrongfully detained as a result of some fundamental misunderstanding. General principles of law such as contributory negligence and the duty to mitigate one's loss may have a relevance – depending on the circumstances of each case – to the final damages award."*

149. Hogan J. then stated (at paras. 76 and 77):

> *"Yet what cannot happen is that the illegality of the detention is simply marked by the award of nominal damages. Article 40.3.1° and Article 40.3.2° of the Constitution oblige the courts as the judicial arm of the State to vindicate the right to liberty in an appropriate fashion. The award of nominal damages in respect of anything but the most technical or fleeting instances of false imprisonment would seriously devalue the tort of false imprisonment and would be inconsistent with the rule of law based democratic State envisaged by Article 5 of the Constitution and the vindicatory obligations found in Article 40.3.1° and Article 40.3.2°.*
>
> *As Faherty J. put it in her judgment in the High Court (at paragraph 67):* "…the fact of the matter is that the plaintiff was wrongfully deprived of his liberty for some twenty six days, a deprivation which was not in due course of law, as required by the Constitution, and which, to my mind, cannot be remedied by an award of €1.00 as urged by counsel for the defendants.*"*

150. Before considering the application of the *G.E./Simpson* principles to the facts of the cases before me, I would like to address two other arguments relevant to the damages question which arose during the hearing.

Contemptuous Damages?

151. The defendants submitted that one issue that did not arise in *G.E.*, because it was not argued, was whether it would be open to the Court to award the minimum sum possible (otherwise known as "contemptuous damages") having regard to the conduct of the plaintiffs. They relied in this regard on the following summary of the principle of contemptuous damages in McMahon and Binchy *The Law of Torts*, 4th edition at 44.04, "*Contemptuous damages are awarded where the court is of the view that the plaintiff, although technically entitled to a verdict, has no moral claim to damages*."

152. Two of the three cases cited by McMahon and Binchy in support of this proposition are libel cases. The other was a case of battery. The defendants submitted that the principle was not confined to libel or defamation cases (where in effect a jury awarding contemptuous damages determines that the plaintiff does not have a reputation worth

compensating) and cited in this regard *Chinn v Morris* [1826] 2 C&P 361. In that case, the jury awarded the plaintiff "the smallest coin in the realm". Having considered the very short report of that case (which is almost 200 years old), I do not see it as being authority for the far-reaching proposition advanced by the defendants. The case concerned the defendant butcher who appears to have taken the plaintiff to a constable alleging that the plaintiff had stolen some of the defendant butcher's fat. The report records that a charge of felony was preferred before the magistrate and dismissed by him because the defendant could not identify the fat as his property. It appears the plaintiff sued the defendant for damages for false imprisonment and a trial of the action proceeded before a jury. Best C.J. is recorded as having directed the jury that "*if the defendant intended to injure the plaintiff, and to prevent his being a rival in trade, then the plaintiff would be entitled to large damages; but if he honestly took him before a magistrate, believing that a felony had been committed, and that he was doing his duty to the public, then small damages would be sufficient. The defendant, as a plain unlettered man, might imagine that there was sufficient evidence, when a magistrate, knowing the law, might be of a different opinion*." Best C.J. then left it to the jury "to say under what motives the defendant had acted" and they returned a verdict for the plaintiff of damages of 1 farthing.

153. Counsel for the plaintiffs argued that the defendants were trying to reintroduce nominal damages through the back door of contemptuous damages which was fundamentally at odds with *G.E*.

154. In my view, the principles outlined by Murray J. and Hogan J. in *G.E*. sufficiently encompass the question of the conduct of the plaintiffs being weighed appropriately in any assessment of an equitable level of compensatory damages and I do not believe there is a self-standing basis upon which, notwithstanding the principles outlined by Murray J. and Hogan J., the plaintiffs could be separately held to be entitled only to contemptuous damages (which would amount to the smallest legal tender being 1 cent or 5 cent, on the defendants' submission). In my view, such an approach would run counter to the principles set out in *G.E.*, which require a structured approach to the question of assessment of damages for false imprisonment, commencing from the starting point that a plaintiff who has been the subject of false imprisonment is entitled to some compensatory damages given the importance of the right protected by the tort.

Guidance from other awards?

155. Murray J. suggested in *G.E.* that the threshold of the irreducible element of the compensatory award that a plaintiff would usually be entitled to might be "*usefully conducted having regard to international norms for the assessment of compensation for unlawful detention as formulated by the appropriate human rights bodies*" (at para. 138, citing in that regard the ECtHR decision in *Vasilecskiy & Bogdanov v Russia* [2018] ECHR 591). Hogan J. did not address this issue in his judgement in G.E. While both sides addressed me on the *Vasilecskiy & Bogdanov* case. I was not provided with any comprehensive analysis of awards of compensation by the ECtHR for unlawful detention, let alone any case in which the ECtHR had addressed a false imprisonment claim in a transfer of prisoners context.

156. Counsel for the plaintiffs also made reference to the level of awards made in certain Irish cases including *Raducan v the Minister for Justice* [2012] 1 IR 49 and the *G.E.* case itself. In *Raducan*, the plaintiff received €7,500 damages for three days unlawful detention. In *G.E.*, the plaintiff received €7,500 damages for 26 days of unlawful detention. That figure in fact represented a reduced figure as the plaintiff was held to have told lies in his evidence to the Court, thereby contributing by his conduct to a lower level of damages that he otherwise would have received. Counsel for the plaintiffs accepted that there was no "daily tariff" for such damages and that the level of damages (at least when viewed on a daily basis) would have to taper the longer the period of unlawful detention involved. However, it was submitted that a significant factor here was a strikingly unusual length of the period of detention being a period of some 8 years from September 2006 to September 2014, some four years of which is actionable in light of the Statute.

157. Hogan J. in his judgment in *G.E.* also referenced awards for false imprisonment in other Irish cases in the context of pointing out that compensation for false imprisonment invariably contains a vindicatory element.

158. It seems clear that there is no readily available or reliable scale of appropriate level of compensation for false imprisonment arising on the authorities. In my view, given the inherently fact sensitive nature of the exercise of assessing appropriate compensatory damages for the tort of false imprisonment, this is unsurprising and I do not see that the level of awards made by either the Irish courts or the ECtHR in other cases (none of which involved transfer of sentenced persons scenarios) is of any meaningful assistance to me in arriving at an equitable level of damages in the cases before me.

The parties' principal submissions as to damages

159. The plaintiffs submitted that the judgment of Hogan J. in *G.E*. made it clear that they were entitled to substantial damages in order to mark the serious and prolonged nature of their unlawful detention in Portlaoise prison.

160. On the application of the principles set out in *G.E.*, the plaintiffs sought to lay emphasis on the fact that the errors in the warrants here were fundamental and were not merely procedural or technical. They also point to the fact that they had been shut out from the process of the Minister applying to the High Court for the s.7 warrants. They submitted that the issue of contributory negligence did not arise since the defendants had not pleaded that defence in their defence. Without prejudice to that submission, they submit that contributory negligence does not arise on the facts here as the plaintiffs had no role in the application for the defective warrants, nor in the decision not to seek adaptation of the English sentences, nor in the preparation of the warrants.

161. The plaintiffs relied on the lengthy period of unlawful detention of some 8 years albeit accepting that the claim was confined to some 4 years of that for Statute of Limitations reasons. It was said that the State could have chosen to release the plaintiffs following the Supreme Court decision in *Sweeney* but chose not to do so and continued their detention beyond when it became indefensible to do so.

162. The plaintiffs relied on the evidence which they gave as to the conditions of their detention in Portlaoise prison, including the fact that there was no in-cell sanitation, the fact they were required to engage in slopping out and that the building was an old and cold one. They also sought to rely on the adverse impact which their detention had on their personal and family relationships and the life events missed out on while in unlawful detention in Portlaoise.

163. It was properly accepted by counsel for the plaintiffs that the Court was entitled to reduce the award of damages to reflect the plaintiffs' conduct in rendering themselves liable for detention in the first place but it was submitted that such discount should be proportionate and not be of such a level as to hollow out the constitutional rights breached.

164. On the basis of the judgment of Hogan J. in *G.E.*, the defendants submit that the plaintiffs here should not be awarded any damages given the egregious conduct which led to them being sentenced to very lengthy sentences under English law and also "*the fact that, to their knowledge, the explosives they were seeking to acquire were for the use of the*

same criminal organisation as had recently committed the Omagh atrocity." They submitted that, to quote from their supplemental written submissions, if the tort of false imprisonment is found to have been committed in this case, "*the plaintiffs by their conduct have been contributorily negligent (within the extended meaning of that phrase contained in Section 34(1) of the Civil Liability Act, 1961) to such a degree (in terms of moral blameworthiness) that they ought to be awarded no damages*."

165. The defendants also submitted that the Court should take into account the plaintiffs' conduct in agreeing to be transferred to Ireland on their understanding they were going to be in jail for a longer period of time than if they had stayed in England and that their transfer to Ireland was likely to have a positive impact on relationships with their families. The defendants also emphasised that there was no basis in the evidence to suggest that the errors in the warrants here were anything than *bona fide* legal errors.

166. The defendants laid particular emphasis on the fact that the plaintiffs in fact spent substantially less time in prison than they were lawfully sentenced to and substantially less again than they agreed to spend in prison in Ireland on foot of the terms of their consents to transfer.

Discussion and decision on damages

167. In my view, the judgment of Hogan J. in *G.E.* is, at least in broad terms, consistent with that of Murray J. in the Court of Appeal in *G.E.*, insofar as both judgments make clear that while the award of damages for the tort of false imprisonment has a vindicatory element given the importance of the right which the tort protects, the plaintiff's conduct may be relevant to the assessment of the appropriate level of damages in any given case and may require a reduction in the level of damages which might otherwise be awarded. Hogan J.'s reliance on the concept of contributory negligence, in the sense used in s.34 of the 1961 Act, as assisting in arriving at what might be an appropriate level of compensatory damages does not seem to me to be a question of pleading; rather it highlights the necessity to take into account relevant aspects of the plaintiff's conduct in arriving at what MacMenamin J. in *Simpson* termed an equitable level of damages. It seems clear that Hogan J. was not confining relevant plaintiff conduct to the circumstances in which the State authorities made the error leading to the defective detention warrant but rather that he took a broader view of relevant plaintiff conduct to include conduct which might have put the plaintiff in a position where the authorities were legitimately seeking to detain him or her.

168. As regards the nature of the illegalities tainting the warrants, while it can properly be said that the errors in the warrants and the process leading to those warrants went beyond the purely procedural or technical, it does not follow in my view that the plaintiffs are thereby entitled to substantial damages for false imprisonment. As Murray J. repeatedly emphasises in *G.E.*, and as is clear from the principles outlined by MacMenamin J. in *Simpson*, it is necessary to conduct a fact sensitive analysis which produces an equitable outcome. This approach is also fully consistent with the analysis of Hogan J. in *G.E*. A relevant consideration in that regard is that it had only become clear through the Supreme Court decision in *Sweeney*, which was issued a short time before the plaintiffs brought their article 40 applications, and indeed which prompted those applications, that the plaintiffs' s.7 warrants appeared to be defective. I find no evidence of the defendants having been party to a knowing breach of the plaintiffs' rights. Nonetheless, I take into account that the errors in process leading to the defective warrants were not merely trivial.

169. On a related argument, I do not see that the fact that the plaintiffs were not permitted by the Minister to participate in the s.7 warrant application process is relevant to the question of assessment of damages. The plaintiffs had no right under the 1995 Act to participate in that application process and there was therefore nothing improper in not acceding to their request to so participate.

170. I do not accept as well-founded the defendants' submission that the moral blameworthiness of the conduct of the plaintiffs in this case (in the events which were the subject of their conviction) was such as to trump any wrongdoing by the defendants, thereby justifying no award of damages to the plaintiffs. Such an approach if accepted could lead to the complete negation of the important role of vindication of the constitutional right to liberty which is fulfilled by an award of damages in a false imprisonment case. That said, as I shall come to discuss, it seems to me that there are very particular factors in the cases before me which lead me to the conclusion that a low award of damages is appropriate for the plaintiffs.

171. The unusual and, in terms of the Irish case law on false imprisonment, perhaps unique feature of the cases before me is that the transfer to Ireland occurred to facilitate the plaintiffs' desire to serve out in Ireland the balance of sentences which had been lawfully passed on them by the English courts and which sentences remained lawful notwithstanding the article 40 decisions of the High Court and Supreme Court as to the unlawfulness of their detention in Portlaoise prison on foot of the defective s.7 warrants. When one applies to the facts of the plaintiffs' cases the first principle of the assessment of damages set out by MacMenamin J. in *Simpson* (and endorsed by Murray J. in *G.E.*), that "*there must be a restitutionary element, seeking to put a claimant in the same*

position as if his or her constitutional rights had not been infringed", one is inexorably led to the conclusion that if the invalid transfers and detention had not occurred at all, the plaintiffs would have lawfully remained in English prisons serving their lawfully passed English sentences and would have been in prison there for the entire of the period in respect of which they now seek to claim damages in this jurisdiction.

172. It is important to note that the s.7 warrants are not a form of primary sentence following conviction. This is not a situation where the plaintiffs were the subject of unlawful sentences following conviction. Rather, they were subject to perfectly lawful (and lengthy) prison sentences under English law. The effect of the finding that the s.7 warrants were unlawfully issued was not to invalidate the underlying English sentences. It seems to me that this is a singularly important factor in applying the principles set out by in *G.E*. and in *Simpson* to the facts before me.

173. As a result of their (ultimately admitted) conduct in committing serious terrorist offences, the plaintiffs had no lawful entitlement to serve *less* than 18 years 8 months in prison (setting aside any question of remission on that period of imprisonment, which would not materially change the analysis in any event). This context must also inform the application to the facts here of the other principles set out by MacMenamin J. in *Simpson*. Any equitable approach to damages cannot ignore the fact that the plaintiffs through their conduct and through the passing of English sentences which have never been impugned stood to serve over 18 years in prison subject to remission. As matters transpired they spent only just over 13 years in prison. In my view, any equitable approach to the assessment of damages for their false imprisonment has to reflect that reality.

174. It seems to me that this context is also relevant to the contention that the plaintiffs missed out on significant life events and experienced stresses during the period of unlawful detention in Portlaoise prison such as to sound in significant damages. The plaintiffs sought to be transferred to Ireland to serve out the balance of their sentences here. If they had not been transferred to Ireland, they would have lawfully served out their sentences in England. Each of the plaintiffs gave evidence that their primary reason for seeking to be transferred back to Ireland was that such a transfer would make it easier for themselves and their families in terms of visits and access to family members, given that their closest family members (including parents, wives and children as described earlier) were living in Ireland. If they had not been transferred here, they would have served their prison time lawfully in England with increased difficulties and stresses for themselves and their families. While it might be said that the physical and sanitation conditions in Portlaoise prison were worse than those which would have been experienced by the plaintiffs had they remained in prison in England, that needs to be weighed against the fact that the plaintiffs were unanimous as to the benefits to their relationships and

their families which accrued from them serving their prison time in Ireland as opposed to England. I do not see how damages for distress, inconvenience, loss of reputation or anything of the like can be said to meaningfully arise in the circumstances.

175. One could envisage a situation where, in respect of English sentences equivalent to the sentences passed here, a prisoner was transferred from England, and was detained in Ireland for a period which brought his total time in prison to, say, 20 years i.e. one year and 4 months beyond the maximum time which he could have served in prison if he had remained in England. In those circumstances, on the face of it, there would be a much more compelling case for significant compensation for deprivation of liberty in respect of the one year four-month period of the overall detention as, on any view, that prisoner was never legally required to spend that time in prison. However, we are faced with a very different position here. The plaintiffs (aside from any question of remission under English law), were the subject of lawful sentences which required them to spend 18 years and 8 months in prison. They had no legal entitlement to spend less than that time in prison whether as a matter of English law or as a matter of principle under the Convention as implemented in the 1995 Act. Owing to the application of a defective procedure under the 1995 Act, the plaintiffs were transferred back to the State and released by order of the High Court well before the expiry of 18 years and 8 months. In my view, it can fairly be said in the circumstances that their interest in their liberty was so attenuated in the period of claim that their entitlement to compensatory damages in that period is correspondingly attenuated.

176. In making this point, I wish to make clear that I am not applying a "but for" analysis as to what period of imprisonment may have been served by the plaintiffs in Ireland if the appropriate and lawful orders had been applied for under the 1995 Act; rather I am having regard in weighing the question of an equitable level of compensatory damages to the indisputable fact that the plaintiffs, if restored to their pre-defective s.7 warrant position, would have been required to serve out entirely lawful sentences in England for a period well beyond the period in fact spent in prison in Ireland on foot of the defective s.7 warrants. In my view, this *sui generis* feature of the facts of the plaintiffs' cases weighs heavily against the award of any significant level of compensatory damages.

177. The question that next arises is whether there should be an irreducible element to any award of damages to the plaintiffs to reflect the fact that the State breached a fundamental right of the plaintiffs, being their right not to be subject to unlawful detention. It will be noted that Murray J. in *G.E.* was careful to frame his view on an irreducible element of damages as being what might "usually" be appropriate (see para. 138) and Hogan J. in his judgment in *G.E*. made clear that the conduct of a plaintiff might result in damages being very significantly reduced citing (at paras. 59 to 62) as a relevant

example the breach of contract case of *McCord v ESB* [1980] ILRM 153 where the plaintiff's conduct in the context of a breach of contract by the defendant contained such an element of contributory negligence within the meaning of s.34 of the 1961 Act that the plaintiff there was not awarded any damages.

178. If there had not been the backdrop of the entirely lawful and unchallenged English sentences that required a minimum of 18 years and 8 months to be served (subject to remission), a period of just under four years false imprisonment (being the reduced period of claim in light of the application of the Statute) on foot of a serious and substantive legal infirmity in their detention may have warranted a significant award of damages. However, it seems to be that what might otherwise have been a significant award in the "usual" course of events must be necessarily very significantly reduced given the facts here as identified above. Nonetheless, in light of the analysis of Murray J. and Hogan J. in *G.E.*, it is in my view necessary to award some level of non-nominal compensatory damages to reflect the fact that the plaintiffs' constitutionally-protected rights to personal liberty were breached by virtue of the defects in the s.7 warrants (albeit not in a manner which in reality caused them any material loss or harm).

179. In the circumstances, accepting that the plaintiffs are entitled to some level of compensatory damages, in my view an equitable level of damages on the facts of these case is a sum of €2,500 to each plaintiff by way of damages for false imprisonment.

180. I have arrived at that figure having regard to the principles set out in *G.E.* and *Simpson* and by taking into account the following factors:

(i) The fact that the plaintiffs were the subject of detention in Portlaoise prison on foot of an invalid Irish detention order for an 8 year period of which just under 4 years is actionable.

(ii) The fact that the errors in process infecting the detention warrants were material ones albeit ones which had only become clear following the Supreme Court decision in the *Sweeney* case which was issued a short time before the plaintiffs brought the article 40 applications which led to their release.

(iii) The fact that by their conduct for extremely serious terrorist offences the plaintiffs had been lawfully sentenced by the English courts by virtue of which they stood to spend some 18 years 8 months in prison (subject to any remission in that jurisdiction had they remained there) which meant that their interest in liberty before the expiry of that sentence period was attenuated to negligible levels.

(iv) The fact that the period of their unlawful detention in Ireland (including that part of their unlawful detention which is not statute barred for the purposes of these false imprisonment claims) completely overlapped with (and was less than) the period of time in prison which remained to be served on their lawfully-passed English sentences at the time of their transfer such that if the *status quo ante* before the making of the invalid s.7 warrants had prevailed, the plaintiffs would have been in custody for the entire of the period in claim albeit in an English prison and not an Irish one.

(v) The fact that as a result of their release pursuant to article 40 the plaintiffs spent less time in prison as a whole than they were lawfully sentenced to serve by the English courts notwithstanding those English sentences were never struck down as being invalid in whole or in part.

(vi) In light of points (iii), (iv) and (v) above, issues of personal inconvenience, stress, and frustration (such as missing out while in Portlaoise prison on key life events related to their families) count for little or nothing in the scales of what an equitable award would require in the circumstances.

(vii) In light of points (iii), (iv), (v) and (vi) above, a very significant reduction in what otherwise would have been an appropriate award of damages is justified.

(viii) The fact that it is nonetheless important to mark with some compensation the interference which occurred with the plaintiffs' constitutional rights.

Conclusion and Award

181. In conclusion, I hold that each of the plaintiffs is entitled to succeed in his claim for damages for false imprisonment. I award each of the plaintiffs €2,500 by way of damages for false imprisonment.