J220
8 JUN 1988

PA on Extradition file
copy to RP Russell's file.
132/87

Mr Gilmore

Mr Chesterton

cc Mr Innes
Mr Bell
Mr Hewitt
Mr Bentley
Mr Jackson
Mr Masefield
Mr Wood (L&B)
Mr Saunders CSO
Mr Nelson LOD
Mr Cobley HO

1) Mrs McMullan
2) Mr Johnston

This is an interesting document. It has peripheral interest in current cases regarding treatment of prisoners in N.I. + particularly is relevant in Fennane

COM 10/6

1) Miss Mawson — to see
2) Mr J Stephens

JLJ
9.6.88

EXTRADITION OF ROBERT PETER RUSSELL: SUPREME COURT JUDGMENT

On 19 January 1988 the Irish Supreme Court ordered by a 3:2 majority the return to Northern Ireland of Robert Peter Russell. This minute and annexes, largely prepared by Ms Wood, summarises the main points.

2. Russell's return was sought for offences committed during the Maze escape in September 1983. Although no section 72 warrants were served on Russell, his case was fought on the assumption that he would have to serve the remainder of his 20 year prison sentence on return to Northern Ireland.

3. Russell appealed to the Supreme Court on 4 grounds;

i) that his offences were political offences or offences connected with a political offence, being connected with the offence of the murder of Det Supt Drew;

ii) that if returned to Northern Ireland he would probably be subjected to torture, assault, battery and inhuman treatment by prison officers in the Maze;

iii) that he would be interrogated by the RUC concerning the offences with which he was charged and that he would not be brought before a Magistrates' Court as soon as practicable; and

K2056

iv) that the warrants were signed by a Justice of the Peace, who was not a judicial authority under the 1965 Act.

4. Chief Justice Finlay dismissed Russell's appeal; a summary of his main conclusions is attached at Annex A. Henchy J & Griffin J concurred with this judgment. Hederman's dissenting judgment is at Annex B and McCarthy's at Annex C. Finlay's judgment was based almost entirely on the constitutional point that as Russell's offences were committed on behalf of PIRA and that as that organization was dedicated to the overthrow of the existing Irish State, the Oireachtas could not have intended the political offence exception to apply to its members. Of Russell's claim (in a supplementary affidavit) that his own aims and objectives were limited to ending British rule in NI and that he had no intention of attempting to overthrow the Irish constitution; Finlay said that an individual was bound by the aims of the organization he belonged to and could not invoke the political offence exception by having personal aims which were less embracing.

5. The main significance of this judgment is, therefore, that it has narrowed still further the scope for the use of the political offence exception to avoid extradition. As the aims and objectives of the organization, and not those of the individual, have been decreed the deciding factor, this avenue should now be barred to all members of PIRA and INLA.

6. However, against that it must be noted that the judgment was only a 3:2 majority one and the two dissenting judges were vehement in their rejection of the arguments proposed by Finlay. They argued firstly that it was wrong for all members of PIRA and INLA automatically to be refused the political offence exception, secondly that it was the aims of the individual that were of significance and that thirdly, the courts should use as their precedent the numerous cases where the offences had been held to be political and not the cases of McGlinchey, Shannon and Quinn, all of which had special considerations.

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R.

7. Russell's other grounds of appeal were also rejected although Finlay was critical of the fact that McGlinchey and Shannon had not been brought before a court in NI as soon as had been practicable. This is something we need to watch on Russell's return. Finally, it was pleasing that Russell's spurious point about the authority of a Justice of the Peace was rejected out of hand by all the judges.

Conclusions

This is undoubted a helpful judgment. Already we have seen from the Finucane case how it will influence the way in which future cases are fought. It is to be hoped that subsequent judgments build on it and that a differently constituted court does not reverse the trend.

S A MARSH
SIL Division
6 June 1988

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ANNEX A

JUDGMENT BY FINLAY C J (HENCHY J & GRIFFIN J CONCURRED)

In rejecting Russell's appeal, the Chief Justice said;

> "the Extradition Act of 1965 having been passed since the coming into force of the Constitution, the first and fundamental rule which governs the interpretation of it must be the presumption that the Oireachtas intended by its provisions not to offend against any express or implied provision of the Constitution. The meaning of political offence within the provisions of Section 50 of the Act of 1965 cannot therefore be construed as granting immunity from extradition to a person charged with an offence the purpose of which is to subvert the Constitution or usurp the functions of the organs of State established by the Constitution."

Furthermore he added:

> "Articles 6.1 and 6.2 of the Constitution make it clear that .... decisions as to the method of which the national territory is to be reintegrated are matters for the Government .....for a person.....to seem to take over the carrying out of a policy of reintegration.....without the authority of the organs of State established by the Constitution is to

subvert the Constitution and to usurp the function of Government."

Following the Quinn judgment in February 1985 which relied almost entirely on this constitutional point, Russell filed a further affidavit in which he stated that his aims and objectives, and the aims and objectives of the IRA, were to bring an end to British rule in Northern Ireland and that it was not his desire or objective to overthrow the Constitution of Ireland. Of this affidavit, the Chief Justice said;

"Where a crime is alleged to have been committed outside the State as part of the activities of an organisation which is committed to overthrowing or undermining by force the organs of State established by the Constitution, a person whose extradition is sought because of his participation in that crime could not be entitled to escape extradition, on the ground of the political exception, by relying on personal aims or objectives which are less extensive than those of the organisation in question. If he acted under the aegis of such an organisation whose aims and objectives he must have know, he could not.....acquire the benefit of the political exception by falling back on a mental reservation which would be incompatible with the organisation in question.

This aspect of the judgment should have important implications for future cases, as the fugitive ought not to be able to hide behind an

affidavit stating that his aims were less than those of the organisation. It will be tested in the current Finucane case.

On Russell's point that he would probably be subjected to ill-treatment on return to custody, the Chief Justice said;

> "From the evidence adduced in this case....it is very improbable indeed that this Appellant will, if delivered out of the jurisdiction, to Northern Ireland, be subjected to any form of ill-treatment or degrading treatment by prison officers."

Russell's affidavit claimed he would not be brought before a magistrate as soon as practicable, citing McGlinchey and Shannon as proof of this. Whilst the LCJ was critical of the fact that McGlinchey and Shannon's treatment he went on to say;

> "If it was shown as a matter of probability that there existed a policy by the police authorities in Northern Ireland whereby persons delivered into their custody from this jurisdiction, were not brought as soon as was reasonably practicable before a magistrate, but rather were diverted so as to be interrogated either with regard to the charge in respect of which the delivery took place or with regard to other charges, different considerations would undoubtedly apply.
>
> Similarly, it would not appear that the Court in any case should order a delivery out of the jurisdiction if it was established

that the real purpose of the delivery was not to bring the person delivered before a court so as to charge him with an offence in respect of which the authorities had prima facie evidence against him, but rather to interrogate him in the hope of obtaining by way of admissions some such evidence.

I am, however, satisfied that neither of these matters has been established by the Appellant in this case as a probability, and there are no reasons why the Court should refuse to deliver him out of the jurisdiction on either of these grounds."

On Russell's point about a Justice of the Peace not being a judicial authority under the 1965 Act, the LCJ said;

"It seems to me that the words 'Justice of the Peace' has in ordinary language a meaning which would lead a layman to accept or believe that it probably indicated a person exercising judicial authority."

Furthermore,

"The standard set in Section 54(1) and Section 55(1) of the Act of 1965 is low, requiring only that the document would appear to have been issued by a judicial authority."

PW424

and,

"I reject the submission that the definition of a judicial authority contained in Section 43, Section 54 and Section 55 fails to be tested by the law of this jurisdiction when the Sections so expressly and unambiguously provide that the necessity is that the warrant has been issued by a judicial authority in a place in relation to which this part applies."

ANNEX B

DISSENTING JUDGMENT FROM HEDERMAN J

Hederman J opened his judgment with

> "One would have expected the learned trial Judge to have applied the mandatory provision of the Extradition Act, 1965, S50 and ordered the release of the applicant".

Hederman argued that the High Court Judge had sought to equate the Russell case with the Quinn one but that this was a spurious relationship as Quinn was a member of INLA "the aims and objectives of which are the establishment of a 32 county workers' Republic by force of arms" and Russell, whose personal aim was the participation in "a campaign of the ending of British rule in Northern Ireland", was a member of PIRA.

Hederman added;

> "It is well established in the decisions of this court that all cases such as this must be decided on their own particular facts and circumstances and what is in issue here is the activity and motivation of the applicant."

PW436

and

"Nowhere is there any evidence that the offences with which the applicant in the present case is charged were directed or intended to be directed against any of the institutions of this State or directed towards overthrowing the institutions of this State.....there is nothing whatever in this case to indicate that the applicant or his associates have at any time in reference to the cases under review, claimed or purported to exercise the powers of Government granted by Art 6 of the Constitution".

"It seems therefore to me that the learned High Court Judge incorrectly equated insurrectional activity outside the jurisdiction with an attack upon this State".

He added

"In effect therefore, what the Judge has decided is that because the policy of this State in the matter of national reunification, rules out violence, that anybody outside this jurisdiction, who attempts to achieve this objective by the use of violence, is guilty of an attack upon the Constitution itself and upon the organs established by the Constitution".

PW436

and that

"It appears to follow from the Judge's reasoning that if the State here took the view that the achieving of this objective by armed conflict or other means was not to be discouraged or indeed was ever to be encouraged that his decision in the present case would have been opposite to what it was."

"What is happening in Northern Ireland is that a small fraction of the population there has raised political revolt against the administration with a view to overthrowing that administration or insurrectional activity is the classic form of political offence."

and

"The defence of 'political offence' or 'offence connected with a political offence must be granted irrespective of whether the Courts or the Government or the Oireachtras or any other organ of State approves or disapproves of the activity in question once it is a political offence. To say that something is deemed not to be a political offence within the meaning of the Act simply because it is at variance or is contrary to the policy of the State in respect of an event happening outside the State is completely to alter the whole basis and intent of "political offence".

PW436

Hederman went on to argue that rather than use Quinn as the precedent the Court should have used McMahon whose case had been substantially similar to Russell's. McMahon's appeal had been successful in the Supreme Court on the grounds that some time earlier his fellow escapees had been released by the High Court on the political offence exception and that therefore his Constitutional rights would be violated if he were now to be extradited.

Hederman concluded

> "It appears to me that the reasoning of the learned High Court Judge in this case is so strained and unreal as to reduce the law regarding extradition and the 'political offence' to a state of confusion.

Hederman gave no views on the other elements of Russell's appeal.

PW436

ANNEX C

DISSENTING JUDGMENT OF McCARTHY J

In his dissenting judgment McCarthy sought to show that the extension of reasoning from the Quinn case was "strained and unwarranted". He stated;

> "The objective alleged by the plaintiff cannot, as in Quinn's case, be identified as involving the destruction and setting aside of the Constitution or any part of it, rather is it sought to deny the plaintiff the relief afforded by S 50 of the 1965 Act by seeking to have it construed ..... so as to exclude from its protection an individual citizen of this State or not, whose alleged offence is not with a stated objective expressly contrary to any Article of the Constitution".

He adds that in his view the developments in case law in the Republic have had the practical effect of depriving s. 50 of the 1965 Act of any practical effect;

> "Since the passing of the Act, the enforcement of Part III, where the issue of political offence has been raised, has been confined to cases involving the IRA or the INLA. I decline to construe a statute so as to deprive it of any practical meaning ..... the function of the Courts is to secure the enforcement of such political decisions when they become part of the law of the

State; Courts should avoid a result which would render nugatory a part of that legislation ..... I do not accept that an act committed for the purpose of pursuing a particular policy which may be opposed to that expressed by the Government of the day whether or not expressly endorsed by the legislature, can, on a construction of Art. 6 be deprived of the protection of s. 50. It is quite possible that the expressed policy of a government might change between the date of commission of the act and the application for extradition.....It may be that some Government would adopt a policy towards reintegration different from that.....at present. If an individual differs in his opinion from Government policy, and acts in furtherance of that opinion, is he at all times to be thought to be subverting the Constitution and usurping the function of Government? I think not.....I do not accept that decisions on questions of national policy are, simpliciter, matters for the Government subject to the control of Dail Eireann; I do not accept that opposition, even violent opposition, to a policy expressed by the Government at the time may lawfully deprive an individual of the protection of s. 50 of the Act of 1965."

McCarthy goes on to dispute Finlay CJ's statement that an individual cannot use the fact that his own personal aims are less than those of the umbrella organisation as a means of invoking the political offence exception;

"As I have sought to indicate in my judgment in Shannon the motive of the individual concerned is one of critical importance. By motive, I mean the personal objective of the individual".

McCarthy then cited a number of case histories where;

"There have been many claims under s. 50 of the 1965 Act in respect of members of the Provisional IRA....; these were tested on the question as to whether or not the offence charged was one that apparently was committed in pursuit of the aims of such organisation, and when found to be so the relief sought under s. 50 was granted".

He concluded;

"From this review of case law it seems clear that;

(a) until the instant case, it had been accepted in a series of cases in the High Court by express concession and in this Court, by necessary implication, that offences committed to achieve the objectives of the IRA were and were to be treated as political offences or offences connected with a political offence, unless the special circumstances of McGlinchey or Shannon applied.

(b) A significant number of persons were ordered to be released on this legal basis.

(c) Until the argument in the instant case in the High Court, no reference to Art. 6 of the Constitution is to be found in any

of the cases decided in the High Court or in this Court."

"I accept that the provisions of s. 50.....cannot properly be constructed as applying the political defence of a person charged with an offence the purpose of which is to subvert the Constitution; to purport to usurp the functions of the organs of State would be one manner of subverting the Constitution. I do not accept, however, that the objective which the plaintiff identifies as his and as those of the IRA amount to a subversion of the Constitution. I do not accept that Art. 6 is to be so construed.

To sum up, McCarthy stated;

"I conclude from McGlinchey and Shannon that the nature of the act may remove it from the category of being political, and from Quinn that the objective of the act, if it clearly contemplates the usurpation of the functions of government.....loses the protection of s. 50.

I find no such situation here. In my view, the original offence, the attempted murder of the RUC officer, was a political offence and the subsequent escape was an offence connected with a political offence, within the meaning of s. 50 of the Extradition Act, 1965".

On Russell's point that he would be subjected to ill treatment on

return to the Maze, McCarthy stated only that;

> "I incline to the view that the plaintiff had discharged the onus of proof sufficiently to impose upon the prison authority the burden of proof in respect of discipline of prison officers".

McCarthy was also critical of the fact that McGlinchey and Shannon had not been brought before a court as soon as practicable, stating in the McGlinchey case that there had been;

> "a flagrant disregard by the RUC and those others responsible for the conduct of prosecutions in Northern Ireland of the requirement that McGlinchey be brought as soon as practicable before a Magistrate.....By an standard it was a plain and deliberate breach of this requirement for the RUC to bring him from Ballymena to Castlereagh".

Of Shannon he said;

> "No explanation was given by the several RUC officers....as to why he was not brought before a Magistrate's Court earlier".

He concluded;

> "No explanation has been offered for the delay in each case in bringing the person extradited before a Magistrate, as required by the warrant, and as required by the law, without delay".

PW/437

He went on to argue that the reciprocity requirements of the legislation were;

> "not limited to the 'one offence' factor; it requires compliance with the constitutional fair procedures that apply in this jurisdiction.....But two in number they amount to 100% of the instances of which this court has knowledge .....This court cannot countenance or be seen to countenance misconduct by the RUC officers.....It is a vital ingredient of extradition arrangements that Constitutional rights will not be disregarded, that fundamental fairness of procedures will not be violated; the making of the reciprocal arrangement must presume accordingly; but, where, in the only two cases of which the Court has knowledge, these rights have been violated, that presumption is negatived."

McCarthy agreed with Finlay that there was no substance to the argument that a Justice of the Peace was not a judicial authority.