

THE HIGH COURT
JUDICIAL REVIEW

[2015 No. 72 JR]

BETWEEN**KEITH DOYLE****APPLICANT****AND**

THE MINISTER FOR JUSTICE AND EQUALITY, THE GOVERNOR OF THE TRAINING UNIT MOUNTJOY PRISON, THE IRISH PRISON SERVICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS**JUDGMENT of Kearns P. delivered on the 30th day of July, 2015**

This is a case about temporary release from prison pursuant to s.2 of the Criminal Justice Act 1960 as amended. On the 10th June, 2013, the applicant was sentenced to five years imprisonment in respect of an offence of possession of a controlled drug for the purpose of selling or otherwise supplying it to another at a time when the market value of the controlled drug amounted to €13,000 or more contrary to s.15A and s.27 of the Misuse of Drugs Act 1977, as amended. On the same date the Circuit Court imposed the relevant presumptive mandatory minimum sentence of five years imprisonment on the applicant in respect of a separate offence of possession of a firearm in suspicious circumstances, contrary to s.27A of the Firearms Act 1964 as amended. Having applied for temporary release in order to pursue a course of study, the applicant's request was refused on the basis that the granting of temporary release to the applicant in respect of his firearms offence is precluded by s.27C(4) of the Firearms Act 1964 (as inserted by s.61 of the Criminal Justice Act 2006) as the applicant is serving a "minimum term of imprisonment" as defined in s.27C(1) of the 1964 Act.

The applicant in these proceedings challenges the interpretation placed on the section by the respondents and contends that s.27C(4) of the Firearms Act 1964, properly and constitutionally construed, does not preclude the Minister from exercising power to grant temporary release to the applicant for the purpose of participating in an early release scheme such as the community returns scheme operated by the respondents. The respondents take the position that under the relevant section no temporary release can be granted during a minimum sentence save for grave reasons of a humanitarian nature, which do not arise in the present case.

In the alternative, if the respondents' reading of the section is correct - so as to preclude the authorities from even considering the applicant's application - the applicant contends that the said provision is unconstitutional and incompatible with the State's obligation under the European Convention on Human Rights.

By agreement between the parties, the present case and judgment is directed solely towards non-constitutional grounds of attack and is confined for present purposes to what might be described as a conventional judicial review issue arising from the respondents' interpretation of the relevant statutory provisions regarding temporary release.

In particular it is alleged on behalf of the applicant that the respondents are not precluded from granting temporary release in the applicant's case. The disqualifying provision, properly and strictly construed, prevents the Minister from exercising any power to grant temporary release under 'rules' made under s.2 of the Criminal Justice Act 1960. It is argued, however, that the Criminal Justice (Temporary Release of Prisoners) Act, 2003 places the exercise of the power to grant temporary release on a statutory footing. In those circumstances s.27C of the Firearms Act 1964 as amended does not operate to prevent the Minister exercising a power of release in the applicant's case. The applicant argues that the respondents wrongly refused to consider the application for temporary release believing that they were precluded from doing so.

It is also argued that the conviction order or warrant of imprisonment in this case makes no reference to the "minimum term of imprisonment", or that any term of imprisonment was being imposed under any section mentioned under s.27C(1) and that the respondents are therefore unable to bring themselves within the disentitling provisions contained in s.27C(4) of the Firearms Act 1964, as amended.

BACKGROUND FACTS

On the 10th June, 2013 the applicant was sentenced to five years in prison in the Dublin Circuit Court for possession of a controlled drug, at which point in time he also received a concurrent five year sentence for possession of a firearm in suspicious circumstances contrary to s.27A of the Firearms Act 1964, as substituted by s.59 of the Criminal Justice Act 2006, as amended. The firearms offence carries a presumptive minimum sentence of five years under section 27A.

The applicant was committed to Mountjoy Prison following a sentencing hearing in June 2013. During his time in prison he completed a number of courses directed at his rehabilitation and reintegration into the community. Following the completion of a number of courses, the applicant was moved to the training unit which is part of the Mountjoy campus, where he was noted to be working well. He was given a job as an industrial cleaner with responsibilities which included maintaining the cleanliness and hygiene of the landing bathroom on the landing on which he resides, the class office and the sluice room. He was registered with City & Guilds to complete a practical cleaning skills course. He also worked in the kitchen for a time. The applicant, who is a married man with four children, was granted temporary release on a number of occasions from the training unit for the purpose of pursuing these various courses in different parts of the Mountjoy Prison complex.

In addition, the applicant sought to pursue a business and finance course in Rathmines College and was scheduled to have an interview there on the 29th January, 2015, but was unable to attend as he was not deemed eligible for temporary release. The reason given in correspondence was that he was "statute barred" as appears from a letter written by Mr. Keith Lynn of the Operations

Directorate of the Irish Prison Service dated the 27th November, 2014, in which the writer, having referred to the firearms offence for which the applicant was convicted, wrote as follows:-

"Section 27C(1) specifies that this conviction refers to a minimum term of imprisonment. In addition s.27C(4) states 'Any powers conferred by rules made under s.2 of the Criminal Justice Act 1960, as applied by s.4 of the Prisons Act 1970, to release temporarily a person serving a sentence of imprisonment shall not be exercised during a minimum term of imprisonment, unless for grave reasons of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by the reason'.

The Irish Prison Service must comply with the law. As such you can't be approved for temporary release for re-socialisation, reintegration, family, education, work/training purposes. Changing the law is not a function of the Irish Prison Service, that is a matter for the Department of Justice and Equality. I understand the law won't be changed in the short to medium term. You are approved to work in the mess under the general supervision of staff. This is all you can be approved for now. You are of course entitled to make an application for enhanced remission at the appropriate stage in your sentence. Your ISM Officer will inform you of the details of how to apply and the date you can apply ... "

For the sake of completeness, it should be noted that the applicant did in fact make an application for enhanced remission by letter dated the 18th September, 2014 to which, by letter dated the 29th September, 2014 from Mr. Lynn, the applicant was informed that he should resubmit his application sometime after the 14th April, 2016. It was pointed out that an application for one third remission should not be made earlier than six months prior to the date on which the prisoner would be released if enhanced remission of one third was to be granted.

The applicant contends that the position adopted by the respondents is unfair, and indeed erroneous, because at the very stage when rehabilitation is supposed to occur, the opportunity for the applicant to be considered by the respondents for return to the community programme is being denied to him. As understood by the respondents, the relevant statutory framework precludes the applicant from even being considered for the return to the community programme. In those circumstances, he contends that his rehabilitation is significantly impeded and that he is being denied the opportunity to prepare for his reintegration into the community.

THE LEGAL FRAMEWORK

A review of the relevant statutory code may commence with a reference to the relevant provisions of the Firearms Act 1964 as amended.

Section 27A provides in relevant part as follows:-

"(1) It is an offence for a person to possess or control a firearm ... in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person possesses or controls it for such a purpose.

...

(4) Where a purpose (other than a person under the age of 18 years) is convicted of an offence under this section, the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person."

Section 27C then provides as follows:-

"(4) Any powers conferred by rules made under s.2 of the Criminal Justice Act 1960, as applied by s.4 of the Prisons Act 1970, to release temporarily a person serving a sentence of imprisonment shall not be exercised during a minimum term of imprisonment, unless for grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by that reason."

Section 2(1) of the Criminal Justice Act 1960 provided:

"2.—(1) The Minister may make rules providing for the temporary release, subject to such conditions (if any) as may be imposed in each particular case, of persons serving a sentence of penal servitude or imprisonment, or of detention in Saint Patrick's Institution."

Rules providing for the temporary release of prisoners were first introduced by the Prisoners (Temporary Release) Rules 1960 (S.I. No. 167/1960). The Rules provide as follows at rule 3:-

"(1) The Governor or other officer in charge for the time being of a prison may, subject to the directions of the Minister and subject to any exceptions which may be specified in directions of the Minister, release temporarily for a specified period a person serving a sentence of penal servitude or imprisonment in that prison."

These rules also provided that conditions could be imposed in any particular case in relation to the release, over and above those specified in the rules and that the person so released should keep the peace and be of good behaviour during the period of his release.

The Criminal Justice (Temporary Release of Prisoners) Act 2003 replaced s.2 of the Criminal Justice Act 1960 with the following section which in relevant part reads:-

"(1) The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—

(a) for the purpose of—

(i) assessing the person's ability to reintegrate into society upon such release,

...

(2) The Minister shall, before giving a direction under this section, have regard to—

- (a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.
- (b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,
- (c) the period of the sentence of imprisonment served by the person,
- (d) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison,
- (e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,
- (f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,
- (g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied,
- (h) any report of, or recommendation made by—
 - (i) the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,
 - (ii) the Garda Síochána,
 - (iii) a probation and welfare officer, or
 - (iv) any other person whom the Minister considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection (1) that relates to the person concerned.
- (i) the risk of the person committing an offence during any period of temporary release,
- (j) the risk of the person failing to comply with any conditions attaching to his temporary release, and
- (k) the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment.
- ...
- (4) A direction under this section shall be given to the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned.
- (7)(a) The Minister may make rules for the purpose of enabling this section to have full effect and such rules may contain such incidental, supplementary and consequential provisions as the Minister considers to be necessary or expedient."

In the aftermath of this legislation, the Prisoners (Temporary Release) Rules 2004 (S.I. No. 680/2004) were introduced and came into operation on the 12th November, 2004.

These rules are perhaps most notable for the emphasis given to a specific undertaking which a prisoner who is granted temporary release is obliged to sign in the following terms:-

"I hereby acknowledge that I am aware of the terms and conditions of my temporary release stated above which have been explained to me and of the time when my period of release expires. I also acknowledge that the grant of this period of temporary release shall not confer an entitlement on me to the grant of further such releases. I have been given a copy of this notice."

It may be that these rules were introduced to address considerations addressed in Supreme Court decisions in *State (Murphy) v. Kieft* [1984] 1 I.R. 458 and *Dowling v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 535 both of which considered circumstances in which issues of continuing grants of temporary release arose.

Whether that be an accurate surmise by the court or not, the rules specifically confirm the power to the Minister who, under s.2(1) of the Act of 2003 is solely invested with the power to grant the direction which, under the terms of the section, "shall be given to the governor of the prison concerned".

It is contended on behalf of the applicant that an unintended anomaly has been created by the legislation whereby the limiting provision which prevents the Minister from exercising power to grant temporary release under rules made under s.2 of the Criminal Justice Act 1960 has no application when the exercise of the power to grant temporary release is placed on a statutory footing, as was provided for by the Act of 2003. It is contended that in those circumstances s.27C(4) of the Firearms Act 1964, as amended, does not operate to prevent the Minister exercising a power of release in the applicant's case. The applicant therefore argues that the respondents wrongly refused to consider the application for temporary release, believing that they were precluded from doing so, though nothing in the Act of 2003 contained any provision to this effect.

Against that background, counsel argued that principles of strict construction must apply as this was a "criminal statute" and that in those particular circumstances the respondents' interpretation of the combined statutes to the effect that they were statutorily prevented from doing so was erroneous and should be quashed.

In response to these arguments, counsel on behalf of the respondents submitted that when s.61 of the Criminal Justice Act 2006

inserted s.27C into the 1964 Act, there were no rules that themselves created a power to grant temporary release, and that remains the case. Mr. Robert Barron, senior counsel for the respondents, argued that there were and are rules which specify conditions to which all persons released pursuant to s.2 of the 1960 Act shall be subject and these rules are the Prisoners (Temporary Release) Rules 2004. No direction can be made under s.2 of the 1960 Act without the automatic application of these rules. He submitted that s.27C(4) would be entirely "meaningless" if given the interpretation proposed by the applicant, which is that the only power restricted is a power to grant temporary release created by the rules alone. That subsection must be presumed to have some purpose and effect and, in accordance with well established rules of statutory interpretation, the court should adopt the view that s.27C(4) is clear in precluding the grant of temporary release to prisoners such as the applicant who are serving a mandatory minimum sentence, or, in the alternative, should apply a purposive approach to its interpretation of the section. In this regard reliance was placed by Mr. Barron on a decision of the High Court in *Luby v. McMahon* [2003] 4 I.R. 133, in which Finlay Geoghegan J., in relation to two possible interpretations of s.150(4b) of the Companies Act 1990, accepted submissions to the effect that the court must construe each provision of a statute "as intended to have a purpose and effect".

The interpretation of s.27C(4) proposed by the applicant would mean that the particular subsection had no effect whatsoever and failed to limit in any way the first respondent's power to grant temporary release.

Furthermore, s.5(1)(b) of the Interpretation Act 2005 provides that, when construing a statutory provision which "on a literal interpretation would be absurd or would fail to reflect the plain intention" of the Oireachtas, "the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole". The reasoning behind the mandatory minimum sentencing is clearly set out in s.27A(4A) of the 1964 Act, and it is submitted that the restriction of the first respondent's power to grant temporary release in this context is a logical extension of this reasoning. This subsection was inserted by s. 38 (b) of the Criminal Justice Act, 2007, some four years after the introduction of the Act of 2003.

It was incorrect to say that the applicant was entitled to the benefit of an anomaly based on a strict construction rule derived from the proposition that the particular legislative provision created or imposed a penalty. This was far from being the case, because the relevant section relates to the conferring of a privilege rather than a sanction.

On the other point raised, the conviction and warrant clearly specified that the term of imprisonment to be imposed in respect of the firearms offence was a mandatory minimum sentence of five years. The conviction and warrant made abundantly clear the terms of the order and warrant correctly reflected the offence for which the applicant had been convicted and sentenced.

DISCUSSION AND DECISION

Section 27A(4A) of the Firearms Act 1964, as amended, expressly refers to the harm caused to society as a justification for the imposition of minimum terms of imprisonment under section 27A. The pertinent provisions of the Criminal Justice Act 1960, as amended, specifically provide that the first respondent, before granting temporary release, shall have regard to the nature and gravity of the offence committed and the potential threat to the safety and security of members of the public. Section 2(3)(b) of the Act of 1960, as amended, clearly envisages that the first respondent's power to grant temporary release may be circumscribed by statute.

The nature of the "temporary release scheme" was considered by the Supreme Court in *Kinahan v. MJLR* [2001] 4 I.R. 454 in which Hardiman J., giving judgment for the court, commented as follows:-

"In the course of this hearing there was some debate about the nature of temporary release. It does not appear to me that temporary release is a specific exercise of the general power of commutation or remission envisaged in the Constitution. Rather, it appears to be a statutory creation administered under the Prisoners (Temporary Release) Rules, 1960 which instrument was in turn made under the powers conferred by the Criminal Justice Act, 1960.

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

The present case is not at this stage concerned with whether the applicant has a constitutional or convention right to temporary release. The kernel of the applicant's submissions at this stage are confined to the single point that as the rules introduced subsequent to the Act of 2003 do not in any way purport to preclude the Minister from exercising the power to grant temporary release, therefore strict rules of statutory interpretation apply because the relevant section of the Firearms Act only limited the power of the Minister by reference to the rules referred to in the section itself.

In support of this proposition, the applicant relied upon the decision of the Supreme Court in *DPP v. Moorehouse* [2006] 1 I.R. 421 where (at p.443) I said:-

"It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and the further requirement to interpret strictly words setting out the elements of an offence (Maxwell on The Interpretation of Statutes, (12th Ed.) at pp.239 and 240).

If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, so that it is doubtful whether the act or omission in question in the case falls within the statutory words, the ambiguity will be resolved in favour of the person charged. A desired statutory objective must be achieved clearly and unambiguously, particularly where statutes of strict liability, such as the Road Traffic Acts, are concerned. Thus, in construing a penal statute, the court should lean against the creation or extension of penal liability by implication."

Such reliance by the applicant immediately raises the question as to whether a statute providing for temporary release can properly be considered as a "penal statute". In my view it can not. No words creating an offence or penalty are under consideration in this case, and the Court accepts the argument of the respondent that the provisions in question are permissive rather than penal.

Once that point is resolved, other principles of statutory construction must lead the Court to conclude that the Act of 2003 did not intend, without express provision to that effect, to undermine and render nugatory the clear determination of the Oireachtas that, for a firearms offence, a presumptive minimum sentence must be served by a prisoner for the clearly stated public policy considerations elaborated in the statutory code.

To draw any other conclusion would result in an absurdity, in effect in this case an unintended statutory repeal of s. 27C(4),

supposedly achieved simply by reference therein to the existence of rules which were superseded and replaced by different temporary release rules in 2004.

It seems clear to the Court the principles of purposive interpretation, as applied by Finlay Geoghegan J. in *Luby v. McMahon* [2003] 4 I.R. 133 may be successfully invoked by the respondents in support of the proposition that, absent such an approach, s.27C(4) has no effect whatsoever and fails to limit in any way the first respondent's power to grant temporary release. The clear purpose of s.27C(4) is to prevent the granting of temporary release to those serving a mandatory minimum sentence. No conflict with the Act of 2003 arises from construing the Firearms Act in this way.

Similarly the principle of statutory interpretation which leans against absurdity or illogicality would point to the same conclusion. Further, as pointed out by counsel on behalf of the respondent, s.5(1)(b) of the Interpretation Act 2005 provides that, when construing a statutory provision which "*on a literal interpretation would be absurd or would fail to reflect the plain intention*" of the Oireachtas, the same shall be given a construction which does reflect the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole.

Finally, on the contention that the warrant was in some way defective, the Court is satisfied that the warrant clearly states that the applicant was convicted on Count No. 11 in respect of an offence contrary to s.27A of the 1964 Act, as amended. It clearly specifies that the term of imprisonment imposed in respect of Count No. 11 was the period of five years. Accordingly, the Court is satisfied that the applicant is serving a mandatory minimum sentence of five years under and within the terms of s.27C(1)(b) of the 1964 Act, as amended.

For these various reasons, the Court will refuse the applicant the relief sought on those two grounds.