

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2015 No. 537 JR]**

**BETWEEN**

**PAUL O'SHEA**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY AND THE GOVERNOR OF SHELTON ABBEY AND THE ATTORNEY GENERAL AND  
IRELAND**

**RESPONDENTS**

**JUDGMENT of Mr. Justice McDermott delivered on 19th day of October, 2015.**

1. On the 8th July, 2015 counsel on behalf of the plaintiff in High Court proceedings entitled " George Maloney, Plaintiff and Paul O'Shea and Cannon Agri Limited, Defendants (Record No: 2014 No. 10696P)" sought an order Under Order 44 of the Rules of the Superior Courts, for the attachment and committal of the first named defendant Paul O'Shea, the applicant in these proceedings, by reason of his failure to abide by an order of the High Court (Noonan J.) made on the 22nd December, 2014 and to abide by undertakings given to the Court on the 19th May, 2015. The order of the 22nd December, 2014 required the applicant to surrender vacant possession of certain property and prohibited him from impeding or obstructing the plaintiff in his efforts to take possession of the property or securing it. The Court also made an order restraining the applicant from harassing, intimidating, threatening or interfering with named persons and businesses or attending at their private or business premises. The applicant undertook to the Court on the 19th May to surrender vacant possession to the plaintiff and not to impede him in doing so. On the 9th July 2015, the Court (Gilligan J.) found the applicant guilty of contempt and made an order that he be committed to prison for a period of 100 days. The body of the order contains the following recital:-

"And the Court being satisfied that the first named defendant has been guilty of contempt of this Court by disobeying the said Order dated 22nd December, 2014 and by not abiding the undertakings given by him the first named Defendant on the 19th May, 2015 to abide the said Order in that the said first named Defendant has not surrendered vacant possession to the Plaintiff, his servants and/or agents of the property described in the Schedule to the Plenary Summons herein ("the Property") and that said contempt is continuing to this day.

And the Court doth find that such contempt be found to be a serious and flagrant continued contempt and IT IS ORDERED THAT THE SAID finding of contempt be punitive in nature and that the said first named Defendant is not to be afforded an application to purge his contempt

And the Court doth Adjudge that the First Named Defendant Paul O'Shea is guilty of contempt of this Court by reason of such default and that he be committed for such contempt to Mountjoy Prison to be detained therein for 100 days for such contempt.

And Accordingly IT IS ORDERED that the Plaintiff be at liberty to issue an Order of Committal directed to the Commissioner and Members of the Garda Síochána against the first named Defendant to arrest him and thereupon to lodge him in Mountjoy Prison there to be detained for 100 days ..."

An application to stay the order for committal was refused.

2. The order was perfected on the 15th July and an "Order of Committal" issued directed to the Commissioner and members of An Garda Síochána dated 17th July. It recited the findings set out in the Order of the 9th July that he was guilty of contempt of the High Court for which he had been committed to prison. The Order directed that the applicant be arrested and lodged in Mountjoy Prison "there to be detained for a period of 100 days' duration from the date of such lodgement without the opportunity to purge his contempt".

3. The applicant was arrested and imprisoned on the 22nd July, 2015. The prison authorities intend to release him from custody when he has served the full 100 days detention on 29th October, 2015. The applicant claims that as a prisoner serving a term of imprisonment, he is entitled to be treated in the same way as any other prisoner serving a sentence of imprisonment and, in particular, to be granted remission of sentence in like manner. It is accepted by the Prison Service that if he were within a category of prisoners to whom the ordinary remission rules applied he would be entitled to 25% remission of his sentence. However, the respondents submit that because he is serving a sentence for contempt of court he falls into a different category and is not entitled to earn remission.

4. The Prison Rules 2007 (S.I. 252 of 2007) provide for the government of prisons and were made under section 35 of the Prisons Act 2007. Section 35(2) provides, *inter alia* that such rules may provide for the classification of prisoners and the remission of portion of a prisoner's sentence. Section 2 provides that a "prisoner" is "a person who is ordered by a court to be detained in a prison ..."

5. The applicant was received into the prison under Rule 3(1) as a person in respect of whom a valid committal order existed authorising his detention. Under Rule 15(1) a person who has been sentenced to a term of imprisonment or detention (other than for life) must be informed of the due date of his release which is calculated on the basis of:

"(a) the service of the sentence without remission and,

(b) if applicable, the service of the sentence where normal remission, is provided for in accordance with paragraph (1) of Rule 59 (Remission), has been earned.”

The applicant was furnished with a release date without remission.

6. Different prison rules apply to convicted and unconvicted prisoners in respect of such matters as visits and correspondence. Rule 2(2) provides that a “convicted prisoner” means “a prisoner who is being detained in prison by virtue of having been convicted of an offence, whether or not a sentence of imprisonment or detention has yet been imposed in relation to the conviction”. An “unconvicted prisoner” is “a prisoner other than a convicted prisoner”.

7. Rule 59 of the Rules as substituted by Rule 3 of the Prison (Amendment) Rules 2014 (S.I. 227 of 2014) provides:

“(1) A prisoner who has been sentenced to –

(a) a term of imprisonment, or

(b) terms of imprisonment to be served consecutively shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or terms as the case may be....

(3) This Rule shall not apply to a prisoner who is serving a term of imprisonment ordered under section 18 of the Enforcement of Court Orders Act 1926 (S.I. No. 18 of 1926), a prisoner sentenced to life imprisonment or to a prisoner committed to prison for contempt of court. ...”

8. Part 6 of the Rules which contains Rules 71 to 74 (inclusive) makes special provision in respect of “unconvicted prisoners”. They should be accommodated in areas that are separate from convicted prisoners and subject to a less strict regime in respect of such matters as activities within the prison, engaging in their normal trade, or employment and health care.

9. If a prisoner is found guilty of a breach of prison discipline as set out in Schedule 1 to the Rules, he may suffer a penalty following a determination made pursuant to Rules 66, 67 and 68, and Part 3 of the Prisons Act 2007. Section 13(f) provides that a prisoner may be subjected to a forfeiture of not more than 14 days remission of portion of his sentence for a breach of discipline. The remission provisions and the sanction of forfeiture are an important tool in the maintenance of good order and discipline in a prison and in the encouragement of rehabilitation.

10. The applicant seeks an Order of Mandamus directing the Governor of Shelton Abbey to grant him remission on the same terms as those applicable to other prisoners under Rule 59(1), or in the alternative, a declaration that as a prisoner serving a fixed duration punitive sanction for contempt of court, the applicant is entitled to remission. Alternative declarations are sought that Rule 59 of the Prison Rules 2007 is incompatible with Article 40.1 of the Constitution and the provisions of the European Convention of Human Rights.

11. The applicant claims that as a person serving a sentence of imprisonment he is entitled to remission under Rule 59 on the same basis as other prisoners serving a term of imprisonment. The correspondence between the applicant’s solicitors and the respondents establishes that he has been refused remission because he is subject to the provisions of Rule 59(3) which provides that Rule 59 shall not apply “to a prisoner committed to prison for contempt of court”. The applicant claims that this distinction between prisoners serving sentences for breaches of the criminal law and prisoners upon whom a term of imprisonment has been imposed as a punitive sanction for contempt of court constitutes a breach of the guarantee of equality before the law under Article 40.1 and is unfair, discriminatory, unlawful, unreasonable and irrational. It is submitted that his exclusion from the remission regime is neither proportionate nor rational and is therefore unlawful.

12. The respondent submits that the distinction is lawfully drawn and that Rule 59(3) properly excludes the applicant from the remission regime because of the special nature of the contempt jurisdiction. It is submitted that the courts have an inherent and constitutionally based jurisdiction to protect their process, and to ensure that orders are respected and obeyed. The contempt jurisdiction of the High Court, whether dealing with matters as civil, or criminal, contempt of court is an essential part of the courts’ power and jurisdiction to secure compliance and protect the proper and effective administration of justice. It is submitted that the exercise by the executive of a power to remit a punishment imposed for a contempt of court would be an unwarranted interference with that jurisdiction. It would amount to an unconstitutional interference with the power of the judiciary and undermine the separation of powers and the due respect which the executive must show to the judicial organ of government. It is submitted that the Minister is entitled and/or duty bound not to confer the privilege of remission on persons who have been committed for contempt and are guilty of acting contrary to the fair administration of justice and in a manner calculated to undermine the authority of the courts. Since the purpose of contempt orders is directed to achieve the proper and effective administration of justice, the release by the Minister, or the Governor, of a contemnor prior to his/her purging the contempt, or completing the specific term of imprisonment imposed, would amount to a serious interference with a core tool in the effective maintenance of judicial authority. Rule 59(3) is framed to ensure that the Executive does not interfere with or otherwise undermine the steps which the Court has deemed necessary to protect the administration of justice and the effective operation of the judicial arm of government. I am satisfied that this is so.

13. Both sides agree that the power to remit sentences under Rule 59 conferred on the Governor is an executive power which derives from Article 13.6 of the Constitution which provides that:-

“The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities”.

The power to remit punishments imposed by “any court exercising criminal jurisdiction” was devolved to the Government and the Minister under sections 23 and 23A of the Criminal Justice Act 1951 and ultimately conferred on the governors of prisons as appropriate authorities. The respondents accept that the sentence imposed by the High Court in this case was imposed by a court “exercising criminal jurisdiction”.

14. Rule 59(3) provides that Rule 59 shall not apply to three categories of prisoners including “a prisoner committed to prison for contempt of court”. The applicant in this case was committed to prison for contempt of court for a period of 100 days, without the option to return to court to purge his contempt. Therefore, it is claimed that the Governor has no authority to apply Rule 59(1) to the applicant

15. The question arises whether on a proper interpretation of Rule 59(1) the fact that the applicant is committed for a specific term

of imprisonment requires that he be treated as a prisoner subject to a finite period of detention unlike a person who is committed for an indefinite period until he/she purges their contempt.

16. A prisoner entitled to the benefit of Rule 59(1) has been sentenced to a term of imprisonment. Rule 59(3) excludes a person serving a term of imprisonment under s.18 of the Enforcement of Court Orders Act 1926. It does not specifically exclude a person serving "a term of imprisonment" for contempt though it does exclude "a prisoner committed to prison for contempt." The latter reference clearly includes persons who are committed to prison for contempt for an indefinite period. This is entirely in accordance with the separation of powers because the court that ordered the committal still retains control of the contemnor's case and the terms upon which he/she may be released should they return to court to purge their contempt. Walsh J in *The State(O) -v- O'Brien* [1973] I.R. 50 (at p.73) in determining that a sentence imposed upon a child for murder and expressed to run "during His Majesty's pleasure" was inconsistent with the provisions of the Constitution because it conferred a sentencing function upon the Executive and commented upon the power to commit for civil contempt:-

"The powers already enjoyed by the Courts in respect of the committal of persons for civil contempt of court where a court may order the detention or imprisonment of a person until the court is satisfied that he has purged his contempt, or where for any other good reason the court may think fit to release him, are quite analogous to this power and authorise a period of imprisonment or detention at the will of the court to compel obedience to the order of the court, which imprisonment cannot be remitted or commuted by virtue of the powers granted by Article 13.6 of the Constitution. It is a matter completely within the sphere of the judicial power."

Undoubtedly, Rule 59(3) insofar as it relates to coercive detention of an indefinite period recognises and complies with this constitutional imperative. Of course, it is also impossible to remit an order of committal which is indeterminate in length and may only be discharged by court order.

17. The contempt at the centre of this case arose in civil proceedings. The application for attachment and committal was moved on behalf of the plaintiff and the purpose of the application was to secure compliance with the High Court's order and the subsequent undertakings given but dishonoured by the applicant. This was a case of civil as opposed to criminal contempt and invoked originally the coercive jurisdiction of the court to commit the applicant to prison until he complied with the order and undertakings. He refused to do so and persisted in his contempt of court. Thus far the jurisdiction invoked related to the private interest at issue between the parties. However, if there is continuing default, the second element of a civil contempt arises "as between the party in default and the State, a penal or disciplinary jurisdiction to be exercised by the court in the public interest" (per Finnegan P. in *Shell E&P -v- McGrath* [2007] I.R.684). It is this punitive or disciplinary jurisdictional element that was invoked by Gilligan J. in the face of flagrant and continuing contempt of court by the applicant.

18. In *Laois Co.Council -v- Hanrahan* [2014] IESC 34 the contemnor was sentenced to a period of six months imprisonment unless he completed certain works within a defined period. Fennelly J. outlined the principles to be followed when exercising the jurisdiction to punish in cases of civil contempt:-

"59...i) It will normally be a matter for the court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a term of imprisonment, although there may be cases involving matters of purely private interest where the court may be invited to exercise the jurisdiction.

ii) The circumstances justifying the imposition of punishment will almost always include an element relating to public interest, including the vindication of the authority of the court. The object is punishment, not coercion.

iii) A court should impose committal by way of punishment as a last resort. The contempt must amount to serious misconduct involving flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct.

iv) Committal by way of punishment inherently relates to conduct which has already taken place, not to future conduct. A person cannot be punished for his future conduct: that would involve preventive detention.

v) Any imprisonment must be for a fixed term."

These are the principles which were applied in this case. In the *Laois Co. Council -v- Hanrahan* case the Supreme Court held that the period of imprisonment should not have included a contingency that the term would only take effect if there were a failure to complete the works. That was said to blur the line between civil and criminal contempt. The applicant in this case has been sentenced, as a punitive measure, to a fixed term of imprisonment in the course of proceedings relating to a civil contempt which went beyond the private interests of the parties and gave rise to a public interest concerning the vindication and protection of the authority of the court. The punitive element does not, in my view, deprive the proceedings and the term of imprisonment of their essential nature. They are contempt proceedings and the applicant is a prisoner who has been committed to prison for contempt of court: his sentence is covered by the exclusion under Rule 59(3). Consequently, the applicant's sentence may not be shortened by remission under Rule 59(1).

19. It is accepted by the parties that the imposition of the 100 day term of imprisonment in this case involved the exercise of criminal jurisdiction by the High Court within the meaning of Article 13.6 of the constitution. The Applicant submits that since the purpose of the sentence is punitive only and the learned judge who imposed it is now *functus officio*, the nature of the order is entirely distinguishable from the usual coercive order. Furthermore, the coercive order does not attract the public policy considerations underlying the punitive order. Since the court does not retain seisin of the case following the imposition of the fixed term sentence, the granting of remission does not interfere with the exercise by the court of its contempt jurisdiction in any respect. The court retains no capacity to revisit the matter. There is no possibility of re-entering the case to purge the contempt. It is submitted that Rule 59(3) properly interpreted differentiates between those imprisoned for a coercive purpose and those subject to a fixed punitive sentence.

20. It is clear that the coercive and punitive purpose of orders made in civil contempt cases are linked to the centrality of the role of the judiciary in securing compliance with court orders and ensuring that the effective administration of justice is not thwarted. The differences relied upon by the applicant between coercive and punitive orders do not adequately take account of the fundamental and complementary importance of each type of order in ensuring respect for, and compliance with, orders of the courts established by the People under the Constitution. The identification by the court of a serious challenge to its authority on the part of a contemnor resulting in a punitive sentence marks a serious escalation of an *inter partes* private dispute to a level where the court feels obliged to mark its disapproval of conduct, on grounds of public policy, which involves a threat or challenge to the administration of justice. If

it is accepted that a fixed sentence imposed against that background may be the subject of executive clemency or remission, it is equally open to the Minister to determine that a contemnor should not benefit from remission because of the fundamental importance to the State of the effective administration of justice, the special contempt jurisdiction of the courts to enforce orders and the respect which the executive organ of government owes to the judicial arm in supporting it in that process based on the separation of powers. When one considers that contemnors have acted contrary to the administration of justice and in open defiance of the court, it is not unreasonable for the executive to determine that to grant remission to contemnors would or might tend to undermine the judicial process.

21. The applicant has not established that as a prisoner serving a term of imprisonment he has a substantive right to remission of his sentence. The granting of remission, like the power of pardon and commutation is subject to a very wide executive discretion. This is especially so when applied to individual cases. There may be many reasons why the wider powers of pardon and commutation are not exercised or even considered in respect of individual prisoners. I am not satisfied that there is a duty on the Minister to provide a remission regime that applies to all prisoners. The Minister is entitled on reasonable policy grounds, such as those set out above, to exclude certain offenders from the regime, as has been done in respect of three categories. Though the result is that contemnors sentenced to a term of imprisonment are excluded from the remission but other prisoners are not, I am satisfied that the exclusion is reasonable and rational and not based on any unlawful discrimination. As Henchy J., stated in *Dillane -v- Ireland* [1980] ILRM 167 in a different context, it is irrelevant whether the court approves of the distinction, what matters is whether it could reasonably be arrived at as a matter of policy by those to whom the relevant power has been constitutionally delegated.

22. The impugned Rule is entitled to a presumption of constitutionality and I am not satisfied that this has been rebutted on the basis of the materials presented to the court. I do not consider that Article 14 of the European Convention on Human Rights is engaged in this case.

23. Accordingly, the application is refused.