Neutral Citation: [2015] IEHC 45

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 584JR]

BETWEEN

STEPHEN ROCK

APPLICANT

AND

THE GOVERNOR OF ARBOUR HILL PRISON, THE GOVERNOR OF THE MIDLANDS PRISON, THE IRISH PRISON SERVICE, AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 6th day of February, 2015

This is an application which commenced as an Article 40 matter but which, by court order dated the 2nd October, 2014, proceeded instead by way of a judicial review application wherein the applicant seeks an order of *certiorari* to quash the decision of the respondent to revoke temporary release granted to the applicant on the 16th July, 2014.

The applicant is a convicted prisoner serving a life sentence for murder. He was convicted and sentenced following the entry of a plea of guilty in 1988. At some point during his sentence he was transferred to Shelton Abbey prison from which he absconded in December 1999 and travelled to the United Kingdom. He was arrested and returned to Ireland in May 2005. He was subsequently brought before the Central Criminal Court and an order was made returning him to custody.

He remained in custody until he was released on temporary release in early 2012. He was granted reviewable periods of temporary release, which grants were initially one day of release per week but later increased gradually to reviewable weekly and ultimately reviewable fortnightly. He availed of grants of temporary release for the next two years during which time he resided at a required address at Priorswood House in Coolock in Dublin.

The last grant was made on the 8th July, 2014 and was of a two-week duration and was thus due to expire in the normal course on the 22nd July, 2014. The Temporary Release form of 8th July, 2014 makes clear that the applicant's release on that occasion was subject to the conditions that he be of good behaviour and keep the peace. The form specifically recited that this particular grant of temporary release did not confer an entitlement to a grant of further such releases.

On the 12th July, 2014 the applicant was arrested in relation to an incident of arson which had occurred on that date. It was alleged that he attempted to burn down a residential home with the occupants still inside and had been identified in so doing at the scene by the occupants, who knew him personally. It is further alleged that he was found outside the same house by a member of An Garda Síochána and was arrested and later charged with arson and criminal damage. He was brought before Dublin District Court where there was vigorous opposition to bail by An Garda Síochána. Notwithstanding such opposition, the District Court granted bail on terms.

Two days after being granted bail, the applicant was informed by staff at Priorswood House, where he had been required to reside, that he should attend for a meeting with the management of Priorswood and his key worker. He attended this meeting at which there were gardaí present. The gardaí informed him that he must come with them as they were bringing him back to prison. The applicant was placed in a garda vehicle and conveyed to Arbour Hill prison. In the present application, Garda Padraig O'Mara, who effected the arrest of the applicant at his home, has averred that he informed the applicant upon arresting him that the breach of temporary release related to the arson charges and that the applicant understood this to be so.

While no formal hearing was conducted prior to the revocation of temporary release, there is evidence before the Court that the applicant was aware of the reason for the revocation of his temporary release and gave an acceptance of his culpability when he was readmitted to prison, saying to Chief Officer Roche "Ah Mr. Roche, I have messed up this time". The applicant now denies making this comment, but Chief Officer Roche has averred categorically that this denial is incorrect and no application to cross-examine Chief Officer Roche on this critical conflict of fact was made during this judicial review application.

On the evening of the 16th July, 2014, the applicant was transported from Arbour Hill prison to the Midlands Prison. He is currently awaiting trial on the charges arising from the burning of the residential home.

It is suggested on behalf of the applicant that the respondents failed to answer correspondence from the applicant's solicitor or to act on telephone calls placed by the solicitor seeking an explanation for the applicant's arrest and re-committal. However, it seems clear that at the time he was readmitted into custody, the applicant made no complaint about the revocation *per se* and the query from his solicitor did not issue until the 3rd September, 2014.

It is submitted on behalf of the applicant that the decision made by the authorities to terminate his temporary release was unlawful and in breach of fair procedures and that no 'proper' hearing had been conducted into the question as to whether the applicant's release should have been terminated or into the question whether the conditions of release had been breached. The Court was informed that a claim for damages was not being pursued.

The statement of opposition filed on behalf of the respondents concedes that a 'hearing' as such did not occur in this case but it is contended that any shortcoming in this regard was not a deliberate or conscious breach of fair procedures or of any of the applicant's rights, particularly when the revocation is seen against the background that the applicant effectively acquiesced to the termination of his temporary release which, it was argued, obviated the need for a hearing on the issue. There was thus no unfairness resulting from proceeding in the manner which had occurred.

While the statement of opposition alleges that the plaintiff was further disentitled to relief by virtue of delay in challenging the revocation before September 2014, that contention was not maintained in the hearing before this Court, other than as a factor going to the credibility of the applicant's assertion that he had no idea why his release was revoked. Thus the issue for determination is essentially a simple one, namely, whether an order of *certiorari* is appropriate to quash the revocation on the facts of this case.

Counsel on behalf of the applicant in the course of submissions also argued that the applicant's further periods of detention must also be deemed invalid, arising as they do as a consequence of the initial invalidity in the revocation of the arrangements for temporary release.

The respondents for their part maintain that there is no longer any entitlement in law to have temporary release renewed and that if it is established that the initial revocation and detention of the applicant is unlawful, any such unlawfulness came to an end on the 22nd July when his period of temporary release was due to end in any event, and that he has been lawfully detained since, so that the present application is either moot or one in which any intervention by the court should be refused on a proper exercise by the court of its discretionary function.

RELEVANT STATUTORY PROVISIONS
The power to grant temporary release is addressed in s.2 of the Criminal Justice Act 1960, as substituted by s.1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003, which provides as follows:-

> *"2.—(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,*
>
> *(ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or*
>
> *(iii) assisting the Garda Síochána in the prevention, detection or investigation of offences, or the apprehension of a person guilty of an offence or suspected of having committed an offence,*
>
> *(b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—*
>
> *(i) grounds of health, or*
>
> *(ii) other humanitarian grounds,*
>
> *(c) where, in the opinion of the Minister, it is necessary or expedient in order to—*
>
> *(i) ensure the good government of the prison concerned, or*
>
> *(ii) maintain good order in, and humane and just management of, the prison concerned, or*
>
> *(d) where the Minister is of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society.*
>
> *(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.

(3) The Minister shall not give a direction under this section in respect of a person—

(a) if he is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to so do,

(b) where the release of that person from prison is prohibited by or under any enactment, whether passed before or after the passing of this Act, or

(c) where the person has been charged with, or convicted of, an offence and is in custody pursuant to an order of a court remanding him to appear at a future sitting of a court.

(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.

(5) The governor of, or person for the time being performing the functions of governor in relation to, the prison concerned to whom a direction under this section is given shall comply with that direction, and shall make and keep a record in writing of that direction.

(6) Without prejudice to subsection (1), the release of a person pursuant to a direction under this section shall not confer an entitlement on that person to further such release. (Emphasis added)

(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.

(b) Rules under this section may specify conditions to which all persons released pursuant to a direction under this section shall be subject or conditions to which all persons belonging to such classes of persons as are specified in the rules shall be subject.

(8) Every rule under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if a resolution annulling the rule is passed by either such House within the next 21 days on which that House has sat after the rule is laid before it, the rule shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

(9) This section shall not affect the operation of the Criminal Justice (Release of Prisoners) Act 1998.

(10) In this section, 'probation and welfare officer' means a person appointed by

(a) a welfare officer,

(b) a probation officer, or

(c) a probation and welfare officer.

(11) In this section—

(a) references to a person who is serving a sentence of imprisonment shall be construed as including references to—

(i) a person being detained in a place provided under section 2 of the Prisons Act 1970, and

(ii) a person serving a sentence of detention in St. Patrick's Institution, and sentence of imprisonment shall be construed accordingly,

and

(b) references to a prison shall be construed as including references to a place provided under the said section 2 and that Institution."

DISCUSSION
Any consideration of this case must commence with the decision handed down by the Supreme Court in *State (Murphy) v. Kielt* [1984] 1 I.R. 458.

In that case the prosecutor, a youthful offender, had been convicted in the District Court and sentenced to twelve months detention in St. Patrick's Institution. Having served part of the sentence he was granted a conditional release, one of the conditions being that he should keep the peace and be of good behaviour. During that period he was arrested by the police and charged in the District Court with attempted murder. He denied the charge and was remanded in custody to St. Patrick's Institution where, on his readmission, he was treated as a detainee who was serving a sentence.

The Supreme Court dismissed an appeal from a finding of the High Court (Barron J.) to the effect that the only issue to be determined was whether or not there had been a breach of one of the conditions subject to which the prosecutor's release had been granted, prior to the purported revocation of that release by the respondent. The fact that the prosecutor had been charged in the District Court with the commission of an act of attempted murder and had been remanded in custody pending his trial on that charge was not sufficient to rebut the presumption of his innocence with regard to the crime so charged or to establish that he had acted in breach of his condition of release. Accordingly, the revocation of the prosecutor's release in that case was deemed to be unlawful.

The Supreme Court addressed the issue as to whether or not some form of inquiry was required prior to the making of such an order. The Supreme Court was clearly of the view that it was. In the course of his judgment (at p. 472) Griffin J. stated:-

> *"The grant and termination of a temporary release are clearly acts which are administrative in nature. An informal procedure is all that is required, provided that such procedure is conducted fairly. As this Court has stated on many occasions, statutes which permit decisions to be taken which may affect the rights of citizens should be construed as providing for fair procedures. The rules of natural justice are essentially the rules of fair play and fair procedures as put into practice. Such an informal inquiry, which should take place within a reasonable time after arrest, will ensure that, in any individual case, no injustice is done or, at the very least, that reasonable steps are taken to ensure that no injustice may be done. Unless such an inquiry is held, an injustice may in fact be done. For example, the apparent breach of condition on the part of a person so released may be due to a mistake or such person may be able, if he is given the opportunity, to satisfy the governor that it is likely that he was not involved in an incident in which it is alleged that a breach of the peace took place; or the breach of a condition may be due to an excusable reason such as illness, accident, misadventure or the like in the case of, say, a failure to report to the welfare officer at the time and place designated by her."*

He then continued (at p. 474):-

> *"In my opinion, as the prosecutor was not afforded the kind of hearing (informal though it might be) that the circumstances of this case required, the revocation of his temporary release was not made in accordance with law, and Mr. Justice Barron was correct in declaring that the conditional order of certiorari granted by the learned President of the High Court be made absolute."*

In the course of his judgment in the same case, McCarthy J. stated:-

> *"Accordingly, if, for instance, a person on temporary release is suspected by a member of the Garda Síochána to have committed a breach of the peace, the person may be arrested without warrant and returned to the prison from which he was released. In a given case, this might occur years after the commencement of the temporary release – with the immediate statutory consequence that the period for which he was temporarily released would thereupon be deemed to have expired. It is demonstrably contrary to any concept of justice that such a sequence of events could take place without fair procedures being enforced. One must interpret the requirement of a suspicion by a member of the Garda Síochána on the basis that the suspicion is to be formed upon reasonable grounds, but the person on temporary release who is arrested must be given the opportunity of contesting those grounds."*

Similarly, in *Dowling v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 535, the Supreme Court held that the mere fact that a prisoner on temporary release was questioned in relation to the commission of another offence was an insufficient reason to revoke his temporary release. Before revoking the release, the respondent should investigate the matter to establish whether the prisoner was in breach of any of the conditions of his release and inform him of the reason for the proposed or actual termination of the release.

For their part, the respondents assert that the legal nature of a temporary release was authoritatively set out by the Supreme Court in the combined cases of *Lynch v. Minister for Justice Equality and Law Reform and Whelan v. Minister for Justice Equality and Law Reform* [2010] I.E.S.C. 34, and in particular in the judgment of Murray C.J. in which he stressed that the exercise by the Minister of the discretion to grant release is not one to which any prisoner is entitled as of right. It is a privilege which may be withdrawn at any time by the Minister for good and sufficient reason.

Counsel for the respondents conceded that no "hearing" as such had occurred in this case, but argued that the facts permit this Court to distinguish *The State (Murphy) v. Kielt* [1984] I.R. 459 from the present case. In *Kielt* it was clear on the facts that the charges were never put to the applicant and that the only basis which the governor had for believing the allegations had any substance was the fact of arrest/charge itself. It is submitted on behalf of the respondents that in the present case the applicant was informed by the arresting garda that the arson incident was the reason for the revocation, and there was in addition evidence that he accepted responsibility before Chief Officer Roche for the incident. It was further submitted, that in the absence of any cross-examination of Chief Officer Roche, there was no basis for resolving this conflict of fact in favour of the applicant or treating the admission as an uncautioned admission such as might be the case in a criminal trial context. While not specifically invoking delay as a bar to relief, it was further submitted that delay was highly significant in terms of the applicant's credibility on this issue, given that at the time the applicant was readmitted into custody he made no complaint about the revocation per se and did nothing whatsoever about it for almost two months.

Finally, it was submitted that, even if the above submissions were incorrect, the court should be slow to intervene by way of judicial review having regard to the fact that judicial review is a discretionary remedy. If there had been a procedural irregularity in this case, the effect of same had long since passed by virtue of the natural expiry of the grant of temporary release. Accordingly, no practical benefit would arise from quashing the decision or in declaring it to have been made unlawfully.

DISCUSSION

I propose to deal with the issues raised in this case in reverse order.

As a secondary point in this case, counsel on behalf of the applicant argued, by reference to the decision of the Supreme Court in *Dowling v. Minister for Justice Equality and Law Reform* [2003] 2 I.R. 535, that a finding of invalidity in respect of the revocation of the applicant's temporary release in this case would inevitably have the consequence that the non-renewal of temporary release thereafter was equally invalid.

It is not necessary to traverse the facts of the Supreme Court decision in that case in any detail, given that it was decided prior to the introduction of the Criminal Justice (Temporary Release of Prisoners) Act 2003, which specifically provided at s.2(6):-

> *"Without prejudice to subsection (1), the release of a person pursuant to a direction under this section shall not confer an entitlement on that person to further such release."*

In the *Dowling* case, decided as it was under the Criminal Justice Act 1960 and the Prisoners (Temporary Release) Rules 1960 (S.I. No. 167), the Supreme Court held that where an indefinite release subject to monthly monitoring had been granted, that release could not be brought to an end simply because the applicant had been questioned in relation to another crime.

It is clear that s. 2(6) ushered in a different statutory regime which has the effect of converting the grant of periodic temporary releases into discrete decisions in respect of each period for which it is granted.

Turning to the main issue in this case, the Court is satisfied that the instant case can be readily distinguished from the case of *State (Murphy) v. Kielt* [1984] 1 I.R. 458, which of course was one decided under the Criminal Justice Act 1960 and the Prisoners (Temporary Release) Rules 1960.

The decision in that case to revoke temporary release was made well in advance of the "hearing" to which reference was made in the judgment of Barron J. in the High Court. The prosecutor, having been returned to prison custody, spent ten days in prison garb appropriate to a convicted person (and not a person on remand) before his meeting or interview with the governor of the prison. In that case the governor apparently took the view that any form of hearing was inappropriate (see p. 474 of report).

It was therefore not so much a case about a decision to revoke temporary release, but rather one where such a decision had already been made and the applicant, in the words of Barron J., had been "pre-judged".

Furthermore, the evidence before the High Court was to the effect that the prosecutor told the governor that he had done nothing wrong and that he had been charged with offences which he had not committed during his period of release.

It is hardly surprising against that background that Barron J. took the view that "some hearing" was required and proceeded to set out a four point compass appropriate to such a hearing.

The question in cases of this sort must immediately be: what sort of hearing is required prior to the revocation of temporary release?

Counsel on behalf of the applicant readily accepts that it need only be a short informal hearing – there is certainly no requirement to prove, where an applicant has been charged with some offence, that he has in fact, and beyond reasonable doubt, been guilty of the commission of that offence. That would be an absurdity. Accordingly, it must follow that the nature of any hearing must be dictated by the facts of the particular case and by having regard to the purpose for which such a hearing is required to be held.

In this regard the answer as to what is necessary is outlined in the judgment of Griffin J. in the Supreme Court in *Murphy v. Kielt* (at p. 472). In pointing out that, absent some inquiry, an injustice may in fact be done, he proceeded to say the following:-

> *"For example, the apparent breach of condition on the part of a person so released may be due to a mistake or such person may be able, if he is given the opportunity, to satisfy the governor that it is likely that he was not involved in an incident in which it is alleged that a breach of the peace took place; or the breach of a condition may be due to an excusable reason such as illness, accident, misadventure or the like in the case of, say, a failure to report to the welfare officer at the time and place designated by her."*

In other words, the purpose and function of a hearing in these circumstances is to ensure that a mistake or mistakes of the sort cited above (which can be cured by an inquiry) have not in fact happened. It is interesting to note that this rationale for an inquiry was specifically endorsed by Murray J. in *Dowling v. Minister for Justice Equality and Law Reform* [2003] 2 I.R. 535 at 538.

Transposing those considerations to the present case, it is immediately apparent that none of the considerations alluded to by Griffin J. arise in this case. There were no mistakes, no improprieties or any other factual matters available to be called in aid by the applicant. Indeed none have been identified even at this long remove from the revocation.

The evidence before the Court is that a meeting took place between the applicant and Chief Officer Roche prior to his return into prison custody. That such a meeting took place is not contradicted by the applicant in his affidavit. At that meeting Chief Officer Roche deposes on oath that the applicant said:-

> *"Ah, Mr. Roche, I have messed up this time".*

In these circumstances, what further "hearing" was required? What purpose would it have served? While the applicant denies now having made this admission, no request to cross-examine Chief Officer Roche was made to this Court, and thus a clear conflict of fact remains unresolved in circumstances where the burden of proof falls upon the applicant. As events transpired, the applicant raised no issue of any sort until the following September, an unexplained delay to which the Court has to have regard in assessing the credibility of the assertions and bare denials offered by the applicant in these proceedings.

The Court is satisfied that, having regard to the particular facts of this case, which are entirely different from those in *State (Murphy) v. Kielt*, an inquiry sufficient in the particular factual circumstances to satisfy the requirements of fair procedures, did in fact take place and that the revocation was, in the circumstances, lawful.

DECISION

Judicial review is ultimately a discretionary remedy. This was made clear by the Supreme Court in *de Roiste v. Minister for Defence* [2001] 1 I.R. 190 at 204 where Denham J. stated:-

> *"Judicial review is an important legal remedy, developed to review decision making in the public law domain. As the arena of public law decision making has expanded, so too has the volume of judicial review. It is a great remedy modernised by the Rules of the Superior Courts, 1986, and by precedent. However, there is no absolute right to its use, there are limitations to its application. The granting of leave to apply for judicial review and the determination to grant judicial review are discretionary decisions for the court. This has been set out clearly in precedent."*

I am satisfied that, even if mistaken in the views outlined above, that the effect of any procedural irregularity, if there was one, has long since passed by virtue of the natural expiry of the grant of temporary release. In my view no practical benefit would arise from quashing the decision or declaring it to have been unlawful.

In *Re Hunter* [1989] NIJR 86, Carswell J. held that the governor lacked jurisdiction to make a disciplinary decision against the applicant due to a breach of the prison rules. The penalty imposed had been fourteen days loss of remission. Carswell J. refused to grant the applicant any remedy, as he had since been released after having served the time represented by the loss of remission. Thus to quash the adjudication would confer no benefit on the applicant. Carswell J. stated that:-

> *"There was no reason of substance why the applicant should have pursued this matter, and I consider that the bringing of such applications is to be discouraged."*

I would therefore refuse the relief sought in this case.