THE HIGH COURT

RECORD NO: 2017/938 JR

BETWEEN

JONATHAN HEAPHY

APPLICANT

AND

IRISH PRISON SERVICE, GOVERNOR OF CORK PRISON, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 12th day of April, 2019

1. The applicant is currently serving a sentence in Cork Prison in connection with offences of which he was convicted of 9th May, 2016, pursuant to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010. He is shortly due for release. The applicant is suffering from an incurable brain cancer in respect of which he has been receiving treatment while in prison. His treatment required surgery, and follow-up treatment in the form of radiation and chemotherapy. The surgical treatment was carried out in Cork University Hospital. Needless to say, the applicant required temporary release from prison to facilitate that treatment.

2. With that phase of his treatment over, the applicant was due to return to prison (and did, in fact, return to prison) and was scheduled to commence radiation and chemotherapy soon afterwards. An application was then made on behalf of the applicant for his further release from prison, for a temporary but indefinite period, for the duration of his chemotherapy. This application was considered by the third named respondent ("the Minister") and refused on 3rd October, 2017. Following upon that refusal, solicitors acting on behalf of the applicant sent a letter to the first named respondent ("the IPS") in Longford whereby they, in effect, asked the IPS and/or the Minister to review the decision of 3rd October, 2017. This correspondence must have been referred to the second named respondent ("the Governor") because he responded to this letter by letter of 17th October, 2017, to the solicitors for the applicant. This letter states that the application for temporary release was considered under the terms of the policy on "compassionate temporary release on grounds of health or health related humanitarian grounds" (the "Policy"). This is a policy document that was issued by the IPS in March 2017. I will return later to the procedures set out in that policy.

3. In this same letter, in response to a point made by the applicant's solicitors, the Governor stated that:-

> "The reason given for refusing the application was that there was no evidence to support the position that Mr. Heaphy required a level of care that was not available in the prison setting. This information was provided by me to both Mr. Heaphy and his mother."

4. The Governor concludes the letter by saying that if further developments in the medical condition of the applicant required, he would make further applications to the IPS in support of medical advice, by which I infer it to mean that he would make such further applications as might be necessary to implement any medical advice as regards the applicant.

5. Correspondence continued between the solicitors acting on behalf of the applicant and the Governor. In a letter of 14th November 2017, the applicant's solicitors submitted that medical opinions (which became available after the decision of Mr. Smyth of 3rd October, 2017) indicated that it would be imperative for the applicant, following chemotherapy, to avoid contact with third parties in order to reduce the risk of infection, in particular to reduce the risk that the applicant would contract tuberculosis or hepatitis. It was submitted that the applicant would be at a greater risk of such infection while in prison, than if he were permitted to go home during the course of such treatment. The solicitors again asked the Governor to review the decision to refuse temporary release and argued that such refusal was unreasonable and/or irrational, in breach of s. 2(2) of the Criminal Justice Act 1960 (as amended) (the "Act of 1960") and also in breach of Article 8 of the European Convention on Human Rights.

6. This further request was again refused by the Governor, by return of post on 15th November, 2017. The Governor stated in this letter that he met with the prison medical team that very day, who confirmed that the applicant's medical needs continue to be met in the prison setting. He also referred to a letter from a Prof. O'Reilly who had advised that the main risk of infection to the applicant or to patients in these circumstances, came from the patients themselves from organisms within them due to neutropenia rather than infection from the community. He then referred to rule 105 of the Prison Rules 2007, which refers to information that may be provided by the prison doctor regarding the health of a prisoner. He said that none of the information that he had been provided with met the requirements of that rule.

7. Further correspondence was exchanged but agreement was not reached and ultimately, the applicant caused the issue of a motion seeking various orders, including an order for leave to apply for judicial review of the decision of the respondents to refuse to grant the applicant temporary release from Cork Prison for the duration of his chemotherapy and/or radiation treatment. Other reliefs are also sought, and I will return to these presently. However, on the return date of the motion, no decision was made on the leave application, and instead this matter was sent forward for determination by way of "telescoped" hearing. At this juncture it is appropriate to confirm now that leave to bring the application is hereby granted.

8. While it is not expressly referred to in the proceedings as originally issued, the impugned decision is the decision originally taken to refuse an application made on behalf of the applicant by a Mr. Peter O'Brien, Assistant Governor of Cork Prison. This application was emailed to Mr. Martin Smyth, Director of Operations of the IPS. No form is completed for the purpose of the application and so it was made by means of a letter sent by email from Mr. O'Brien to Mr. Smyth, and also to the Governor, and it was also copied to a number of other named individuals, including a Mr. Enda Kelly, National Operations Nurse Manager at the IPS. The application was supported through the attachment of a letter from a registrar writing on behalf of the neurosurgeon attending the applicant in the context of his postoperative recovery period. The letter stated that the return to prison of the applicant at that point in time posed "an unacceptable infection risk" so soon after his surgery. Mr. Kelly endorsed that recommendation later that day, and it was also supported by the Governor, although in an email the following day to Mr. Smyth, the Governor stated that "the only difference between the care offered at home and what could be offered here is that he would not be in prison". All of this was prior to chemotherapy, which also posed risks as regards infection.

9. Mr. Smyth, however, raised a number of queries and ultimately he was not satisfied that the applicant would be at any less risk of

infection at home than he would be in prison. In an internal email that he sent to the Governor on 3rd October, 2017, he stated:-

> "I have considered the attached application and other information provided by the HSE, and am of the view that the prisoner's medical condition is not such as to qualify for compassionate T.R. under the terms of the policy bearing that name.
>
> The information, to the effect, that if returned to prison he is exposed to a HIGHER (my emphasis) risk of infection, is insufficient for the Minister to, in effect, set aside a sentence imposed by the courts.
>
> I am advised, in effect, that the prisoner would be better off at home, as he faces a higher risk of suffering some unknown, unnamed infection at Cork Prison – which again is insufficient reason to bring him within the definition/criteria of the Policy.
>
> Of course, the situation can be revisited in the event of a serious deterioration in condition and/or further rehospitalisation."

10. It appears that this decision was then communicated verbally by the Governor to the applicant. In any case, this is the decision that is impugned by these proceedings.

11. The applicant applied for leave to apply for judicial review on 4th December, 2017. On 18th December, 2017, the respondents agreed to a "telescoped" hearing date being fixed and the matter was listed for hearing on 9th February, 2018. However, by letter dated 7th February, 2018, the applicant was informed that his application for temporary release would be considered *de novo* by the Minister and he was invited to submit a fresh application for temporary release, supported by such material as he wished to have considered with the application. When the matter came on for hearing before me on 9th February, 2018, it was submitted to me on behalf of the respondents that the Minister had offered to reconsider the application of the applicant *de novo*, the proceedings were now moot. The applicant did not accept that this was so and sought leave to submit an amended statement of ground in the light of these developments. I granted leave to the applicant to do so and the matter was adjourned for hearing to 24th April, 2018.

12. In the meantime, without prejudice to these proceedings, the applicant submitted a further application for temporary release, together with supporting documentation. On receipt of this application, the Minister sought clarification of a number of issues from the prison general practitioner, a Dr. Flynn, who expressed the view that the applicant remained fit for continued imprisonment and that his life was not in any imminent danger. The application was then refused by way of a further decision of the Minister dated 13th March, 2018.

13. It is useful to observe at this point that when I say the application was refused by the Minister, it was, in fact, refused by a Mr. Martin Smyth, Director of Operations of the IPS. Notwithstanding that he was employed by the IPS, it appears to be accepted both by the applicant and all respondents that, in giving the decisions that he did, Mr. Smyth was acting under the lawful authority of the Minister. The Governor is also an employee of the first named respondent but it is the applicant's contention that he does not have the authority of the Minister to determine or to screen applications for temporary release from prison, and that this amounts to an unlawful delegation of functions on the part of the person (Mr. Smyth) who is himself acting on behalf of the Minister pursuant to lawfully delegated functions.

14. In refusing the renewed application of the applicant, Mr. Smyth relied upon the opinion of the prison doctor, Dr. Flynn, who expressed a clear opinion that the applicant remained fit for continued imprisonment. Dr. Flynn, in giving his opinion, summarised his own experience of fifteen years post qualification experienced as a general practitioner, five years of which he practiced specifically in the prison setting in Cork Prison. He noted that it was unclear from the opinions furnished on behalf of the applicant whether the practitioners concerned had any experience at all of providing medical care in the prison setting, or if they had ever even had visited Cork Prison in order to inform their opinions.

15. Apart from the opinion of Dr. Flynn, Mr. Smyth also referred in his decision to s. 1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003. This section amends s. 2(1) of the Act of 1960. The latter (as amended) provides that the Minister may direct that a prisoner be released from prison for a temporary period where there exist circumstances which, in the opinion of the Minister, justify his temporary release on the grounds of health or other humanitarian grounds. Section 2(2) of the Act of 1960, provides that before giving a direction under s. 2, the Minister shall 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 the 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."

16. Having considered this section, Mr. Smyth in his decision proceeds to refer to the fact that, since the original decision on 3rd October, 2017, the applicant had been caught in possession of a mobile phone on two separate occasions, and on both occasions, he faced disciplinary charges within the prison on those two offences against prison rules. He went on to note that these matters were also referred to An Garda Síochána, in view of the fact that possession of a mobile phone in prison without the consent of the Governor is an offence. Accordingly, Mr. Smyth concluded that if the applicant breaks the law while detained in prison, it is difficult to see how the Minister could be satisfied that he will respect the law if released on temporary release. Mr. Smyth also referred in his decision to the criminal record of the applicant and noted that the applicant had a series of previous terms of imprisonment in respect of drugs related offences.

17. An amended statement of grounds was delivered on behalf of the applicant on 21st February, 2018. It hardly needs to be said, therefore, that the most recent decision of Mr. Smyth is not the subject of these proceedings. An amended statement of opposition was delivered on 20th March, 2018. It quickly becomes apparent therefore that the decision which originally gave rise to these proceedings has been overtaken by events, leading to the argument on the part of the respondents that the decision of Mr. Smyth of 13th March, 2018, rendered these proceedings entirely moot. More than that, in so as far as the applicant argues that he engaged with the offer of the Minister of 7th February, 2018, on a without prejudice basis (and, therefore, that the impugned decision cannot be regarded as moot), the respondent argues that the mere offer on the part of the Minister to reconsider the application of the applicant *de novo*, itself renders the proceedings moot.

18. In order to consider whether or not the proceedings are indeed moot, it is necessary to consider the reliefs sought. In this regard, it is clear that any reliefs sought whether by way of orders for *certiorari* or declaratory relief that relate to a decision of 3rd October, 2017, are no longer of relevance. This means that reliefs 2, 4, 5, 6, 7 and 8 of the statement of grounds do not require consideration. Relief 1 is the application for leave to apply for judicial review itself. Relief 3 is a request for an order of *mandamus* compelling the respondents, their servants or agents to grant the applicant temporary release for the remainder of his illness.

19. At the resumption of these proceedings, counsel for the applicant informed the court that the most relevant reliefs now sought on behalf of the applicant are reliefs 9, 10 and 11 of the amended statement of grounds. These are:-

"9. A declaration that by failing to refer the applicant's requests for compassionate temporary release dated 12th October, 2017, 14th November, 2017 and 27th November, 2017, to the third named respondent to decide, and by instead deciding himself not to reconsider the applicant's application for compassionate temporary release, the second named respondent usurped the statutory decision making power of the third named respondent, acted in excess of his own powers and acted in breach of the principles of natural and constitutional justice.

10. A declaration that in deciding not to refer the applicant's requests for compassionate temporary release dated 12th October, 2017, 14th November, 2017 and 27th November, 2017, to the third named respondent to decide and instead in deciding himself not to reconsider the applicant's application for compassionate temporary release, the second named respondent acted on the basis of a flawed interpretation of the criteria to make such a decision and thus, usurped the statutory decision making power of the third named respondent, acted in excess of his own powers and acted in breach of the principles of natural and constitutional justice.

11. A declaration that by operating a system in relation to applications for temporary release on the grounds of health and health related humanitarian grounds whereby prison governors had been given the power to decide whether or not to pass on information received from an applicant in relation to an application for temporary release to the first and third named respondents, the respondents, their servants or agents, are acting in breach of s. 2 of the Criminal Justice Act 1960, as amended, and are acting in breach of the principles of natural and constitutional justice."

20. Simply put, the argument is that when the solicitors for the applicant wrote to the Governor on 12th October, 2017, 14th November, 2017 and 27th November, 2017, the Governor should have passed that correspondence on to the Minister for his consideration (and in this regard it appears to be accepted that Mr. Smyth was lawfully acting on behalf of the Minister and so the correspondence should have been sent to Mr. Smyth, if not the Minister directly) and should not have determined the issue himself. While it is lawful for the Minister to delegate his functions to Mr. Smyth, it is not lawful for Mr. Smyth to further delegate any of those functions or for the Governor to assume any of those functions and make decisions on any of those matters, the authority for which has been delegated to Mr. Smyth. It is submitted that in acting as he did, the Governor is, in effect, acting as a "gatekeeper" and the effect of which in this case meant that the Governor made a decision on the further submissions of the applicant, rather than Mr. Smyth.

21. One practical consequence of this in this case, is that Mr. Smyth did not receive additional relevant information upon which he based his original decision. In that decision, he stated:-

"I am advised, in effect, that the prisoner would be better off at home, as he faces a higher risk of suffering some unknown, unnamed infection at Cork Prison – which again is insufficient reason to bring him within the definition/criteria of the Policy."

22. The letter of the applicant's solicitors of 14th November, 2017, specifically mentioned that the applicant's doctor was concerned about the possible exposure of the applicant, while in prison, to infectious diseases such as tuberculosis or hepatitis, whilst the applicant undergoes chemotherapy. It is clear that the Governor considered this and replied, by return, on 15th November, 2017, referring to a different medical report from a Prof. O'Reilly which identified the main risk of infection as being from the patient himself,

due to neutropenia. In their further letter of 27th November, 2017, the solicitors for the applicant asserted that there is a high incidence of tuberculosis and hepatitis in prisons and that prisoners have an increased risk of being exposed to tuberculosis. It is submitted on behalf of the applicant that all of this correspondence, and supporting documentation, should have been submitted to the Minister (acting through Mr. Smyth) and that the Governor acted unlawfully in failing to refer this material to the Minister for his consideration and determination. Moreover, it is submitted that it is clear from the terms of s. 2 of the Act of 1960 that the Governor should not be involved in this process by reason of the fact that one of the matters to be taken into account in considering an application for temporary release is any report of the Governor of the prison concerned.

23. Before considering the submissions of the parties, it is necessary to set out the relevant provisions from the Policy and also from the Prison Rules 2007. Dealing with the latter first, rule 105 deals with information to be given to a prison governor on the state of health of a prisoner and provides as follows:-

> "A prison doctor shall, after consulting with such other healthcare professionals as he or she considers appropriate, inform the Governor in writing if he or she is of the opinion that –
>
> (a) the life of a prisoner will be endangered by continued imprisonment,
>
> (b) a prisoner is unlikely to live until the expiration of the period of his or her sentence,
>
> (c) a prisoner is unfit for continued imprisonment or for that particular prison's regime,
>
> (d) the mental or physical state of any prisoner is being significantly impaired by his or her continued imprisonment, or
>
> (e) a prisoner is unfit to travel outside the prison, including attendance at any court,
>
> and shall make a record in writing of the prisoner's name, the information given to the Governor under this Rule and the time on which he or she so informed the Governor."

24. According to Mr. Smyth, the Policy was created to ensure a consistent approach where a prison governor receives information from a medical practitioner on the state of health of a prisoner to ensure that standardised procedures are in place for all releases from prison and to provide guidance as to the circumstances under which a prisoner may be considered for release on grounds of health or other health related humanitarian grounds. Under the heading of "procedures for implementation", s. 4.1 of the Policy sets out in full, rule 105 of the Prison Rules. Section 4.2 of the Policy provides:-

> "4.2 Where the prison doctor advises the Governor of the prisoner's health condition which accords with the criteria set out in 3.2 (above), the Governor will submit an application to the Director of Operations for consideration in compliance with statutory measures contained within relevant legislation dealing with temporary release decisions.
>
> 4.3 Where the Director of Operations endorses the application from the Governor, a submission will be transmitted to the Director General and/or the Minister for Justice, depending on the sentence type for a decision regarding the granting of possible compassionate temporary reliefs."

25. Section 3.2 of the Policy refers to:-

> • Prisoners with a terminal illness where death is anticipated within a short timescale.
>
> • The health of a prisoner will be significantly adversely effected by continued imprisonment.
>
> • Prisoners with advanced Alzheimer's disease and related dementia.
>
> • Prisoners with serious, progressive, non-reversible illness which have profound functional and/or cognitive impairments.

26. Section 3.3 then goes on to state that consideration of release of a prisoner will be subject to the provisions of s. 2 of the Act of 1960.

27. So, therefore, it can be seen that a statutory power relating to the temporary release of prisoners on health or compassionate grounds is contained in s. 2 of the Act of 1960 and the procedures in relation to such applications and the matters to be taken into account in such applications, are set out in rule 105 of the Prison Rules 2007 and in the Policy. While the ultimate decision as to whether or not to grant such reliefs is a matter for the Minister, the procedures leading up to the point where the Minister makes that decision are undertaken by different individuals operating within the Prison Service *i.e.* the relevant prison doctor, the relevant prison governor and the Director of Operations of the IPS. The procedure starts with the prison doctor informing the Governor of a prison that the health of a particular prisoner meets one of the criteria set out in s. 3.2 of the Policy and it is then a matter for the Governor of that prison to submit an application to the Director of Operations. The Director of Operations then makes a decision, not to grant or refuse the application, but whether or not to endorse the application for onward transmission to the Director General and/or the Minister for Justice, for a decision.

28. It is an interesting feature to the process that it is not initiated by the prisoner, but by the prison doctor. There does not appear to be any prescribed form of application. In this case, the process was not initiated by the prison doctor, but by Assistant Prison Governor, Mr. Peter O'Brien who, on 1st October, 2017, emailed Mr. Smyth and requested compassionate temporary release for the applicant based on the report, not of the prison doctor, but of the registrar to Prof. O'Sullivan, the neurosurgeon who operated on the applicant. Mr. Smyth then replied the following day by email to the Governor and Mr. O'Brien, as well as others to whom the email was copied. He raised certain queries, and later the same day, Mr. O'Brien replied, having obtained other medical reports including a letter from the prison doctor. Although not entirely clear, it appears the latter came from a Dr. Mahony who stated that in his opinion, the applicant would be at increased risk of infection if he remained in prison during treatment. Other reports furnished at the same time also supported the applicant's temporary release. On the morning of 3rd October, 2017, at 9:14 a.m., the Governor wrote to Mr. Smyth also supporting the application. However, later the same day, Mr. Smyth declined to endorse the application for the reasons already set out above.

29. It is apparent from this summary of events that the procedures followed were slightly at variance with the steps prescribed by the Policy or the Prison Rules, insofar as the procedure was not initiated by the prison doctor. It started with a letter from an external doctor, the registrar to the neurosurgeon responsible for operation on the applicant, and it was only when Mr. Smyth asked for more information that the opinion of the prison doctor was obtained. What followed the decision of Mr. Smyth of 3rd October 2017 was not provided for in either the Prison Rules or the Policy. It could be described either as an appeal from Mr. Smyth's decision or alternatively, a new application for the temporary release of the applicant, but in either case it was not initiated by the prison doctor, but by the solicitors acting on behalf of the applicant, who wrote on 12th October, 2017, to the IPS, the Department of Justice and Equality and the Governor. They did not enclose any new materials with this letter but asserted that the refusal to afford the applicant temporary release was contrary to s. 2(2) of the Act of 1960, as well as Article 8 of the European Convention on Human Rights, and they requested that the issues referred to in their letter be addressed as a matter of urgency.

30. This letter was replied to by the Governor who referred to the earlier refusal of the application by Mr. Smyth and stated that it was refused because there was no evidence to support the position that the applicant required a level of care that was not available in the prison setting. (I should mention at this point that it was a feature to these proceedings as originally issued that the applicant was given different reasons at different points in time for the refusal of the application, but that is no longer relevant because of the offer on the part of the respondents to reconsider the application, *de novo*, and its subsequent reconsideration). In this letter, the Governor indicated that the applicant's medical condition would remain under review and further applications would be made for the temporary release of the applicant, if appropriate.

31. On 14th November, 2017, the solicitors for the applicant again wrote to the Governor and referred to further medical reports concerning the applicant received in the intervening period from Prof. O'Sullivan, Consultant Neurosurgeon, Prof. Seamus O'Reilly, Consultant Oncologist and the plaintiff's general practitioner, Dr. Ciaran Donovan. This letter referred to the fact that the applicant was shortly due to commence chemotherapy and that it was imperative that he should avoid contact with anybody who might have infectious diseases such as tuberculosis or viral hepatitis. He requested the Governor to review the decision to decline temporary release. This letter, and the reports to which it referred, undoubtedly contained information additional to that available to Mr. Smyth at the time that he made his decision on 3rd October, 2017.

32. In replying to this letter on 15th November, 2017, the Governor stated that he met with the prison medical team that day to discuss the applicant's care needs. He said that the nursing team (in the prison) had been advised regarding the applicant's ongoing care by the Oncology Clinic, and that the applicant had met the nursing team and that the process of medication had been explained to him. He referred to the letter from Prof. O'Reilly and he stated that it could be argued that the access to around the clock nursing care in the prison could be regarded as a positive from the point of view of the applicant, and the management of his condition.

33. He stated that rule 105 of the Prison Rules refers to information that may be provided by the prison doctor regarding the health of a prisoner, and stated that none of the information to hand met the conditions of the rule. He concluded by saying that he would support the medical advice and that he might make further applications (for temporary release of the applicant) in the future, if appropriate.

34. It seems to me that at least part of the difficulty that has arisen is that a procedure has been followed that is not in accordance with the Policy. Nowhere in the Policy is it envisaged that the Governor will receive submissions from persons acting on behalf of a prisoner. The Policy envisages that the prison doctor will advise the Governor as to the occurrence of certain events in the health of a prisoner, but in such cases, the Governor will then submit an application to the Director of Operations. While the Policy may not deal with situations where the Governor receives requests or submissions either from a prisoner directly or from others on his behalf, such as in this case, it seems to me that in such cases, the appropriate course for the Governor to follow is to refer those communications to the prison doctor and invite his/her views on the issue for the purposes of rule 105 of the Prison Rules. Upon receipt of the doctor's opinion, the Governor can then act as appropriate *i.e.* either by submitting an application to the Director of Operations where the prison doctor advises that circumstances of the kind prescribed by rule 105 of the Prison Rules obtain, or by not submitting an application where the prison doctor advises that those circumstances do not arise. While it has been argued on behalf of the respondents that it is legitimate for the Governor not to send on an application to the Director of Operations where the circumstances have not changed, I do not consider that this is his decision to make. However, any difficulty in this regard as regards the specific application under consideration was obviously disposed of (and is accepted to have been disposed of) by the subsequent offer of the Minister to consider – reconsider the application *de novo*.

35. Although not referred to in either the Policy, or the Prison Rules, s. 2(2)(h) of the Act of 1960, refers to a report or recommendation of the governor of a prison as regards prisoners to which that section refers. The Minister is obliged to have regard to any such report arriving at his decision on the temporary release of a prisoner. It is obviously, therefore, open to the Governor to submit such a report when forwarding an application for the temporary release of a prisoner to the Director of Operations. That, however, is the extent of his involvement. He does not have any decision-making powers.

Are the proceedings moot?

36. There is no significant dispute between the parties as to the law in relation to the determination of disputes that have become moot. The courts lean heavily against determining such disputes. Both parties referred to the decision of O'Malley J. in this Court in the case of *Dundon v. Governor of Cloverhill Prison & ors* [2013] IEHC 608. In the course of that decision, she stated at para. 61:-

> "It is clear that the policy of the courts is to decline to hear cases which are purely hypothetical or academic. It is, however, equally clear that a case is not moot if the controversy still affects or potentially affects the rights of the parties."

37. The applicant accepts that his complaint regarding the original decision of Mr. Smyth of 3rd October, 2017, with which these proceedings are concerned, is now moot. However, he argues that the issue that gave rise to the dispute in the first place *i.e.* the exercise by the Governor of a decision-making power which he does not have could still potentially affect his rights under the Policy and the Prison Rules.

38. One of the well-established exceptions to the law of mootness is that an issue that is capable of repetition or is likely to arise either between the parties in the case at hand or, in the case of one of the parties only, in very many cases in the future. In *Dundon*, O'Malley J. quoted the following passages from the decision of Clarke J. (as he then was) from the case of *P. V. (A Minor) v Courts Service* [2009] 4 I.R. 264 at para. 57:-

> ""In the United States, an issue is not deemed moot if it is capable of repetition, yet evading review. This will be the case where there is a reasonable expectation that the same complaining party would be subjected to the same action again. Likewise Irish Courts have held that proceedings may not be considered moot where the matters raised concern issues

which have future ramifications for the parties involved …

In *O'Brien v. Personal Injuries Assessment Board* [2007] 1 I.R. 328, this Court granted declaratory relief, having determined that the respondent concerned had acted unlawfully in the exercise of its statutory powers by refusing to deal with the applicant's duly appointed solicitor in connection with his claim for damages for personal injuries. The respondent appealed, but during the appeal the applicant received an authorisation from the respondent to institute proceedings in respect of his claim for personal injuries. Such proceedings were then commenced. As a consequence of such authorisation and the initiation of the relevant proceedings, the applicant was no longer obliged to deal with the respondent. The Supreme Court rejected the argument that the appeal was moot as the respondent Board had a real and current interest in the issues pending appeal before the court regarding the exercise of its statutory powers. Murray C.J. framed the question as whether the case was moot in the sense of being 'purely hypothetical or academic' and noted that this was a case in which the respondent had a wider interest than the applicant insofar as the conclusion and declaration of the High Court affected the manner in which the respondent exercised its statutory functions not only vis-a-vis the applicant but with regard to many other applications made to it. Murray C.J. found that it was obvious that respondent Board had a real, current interest in the issues pending on appeal before the court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers.

It is clear from the above authorities that the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it can not, in the words of Murray C.J. in O'Brien, be 'purely hypothetical or academic'. In addition there may be circumstances where it may be appropriate to nonetheless determine issues even though such issues may, strictly speaking, be moot. For example, the types of issues with which the Supreme Court was concerned in O'Brien stemmed from a situation where the same issue was likely to arise for the respondent in very many cases, and where the respondent was faced with an adverse judgment of this court from which it sought to appeal. While the issue might have become irrelevant to the applicant in that case (given that his personal injury litigation had gone beyond the stage of the Personal Injuries Assessment Board), it was still very much alive from the perspective of the respondent. Likewise there may be cases, such as those identified in the American jurisprudence, where, in practical terms, it may be impossible to have a final determination on important legal issues unless the courts (and in particular Appellate Courts) are prepared to relax a strict application of a mootness rule."

39. The letter of 7th February, 2018, whereby the applicant was informed that his application for temporary release would be considered *de novo* by the Minister was not exhibited or otherwise produced in evidence to the court. However, it was not suggested that this proposal was made without prejudice on behalf of the Minister, although the applicant engaged with that invitation on a without prejudice basis. Without sight of the letter, however, the Court simply cannot know whether or not the Minister was openly accepting that an error had been made or that the procedure that was being followed was otherwise than in accordance with the Policy. It was certainly not accepted at the hearing of these proceedings, there was any error on the part of any of the respondents. It cannot, therefore, be presumed that the Governor will not fall into the same error that gave rise to these proceedings at some point in time in the future.

40. Even though the applicant may not have not very much longer of his sentence to serve, it cannot be ruled out that he may again find himself in the same situation at some point in time in the future. This was expressly accepted in the written submissions of the respondent. Moreover, it is very clear that this is an issue which may affect not just the respondent in the future, but prisoners generally who may apply for temporary release on grounds of ill health. The issue is far from being purely hypothetical or academic and having regard to the possibility, if not indeed the probability (in the absence of any admission on the part of the respondents that there was any error in the handling of this applicant's application) that the very same issue will arise again in the future, I do not consider that these proceedings can be regarded as moot.

41. Accordingly, I propose to make a declaration in substantially the terms of para. 9 of the amended statement of grounds, but amended to reflect more precisely the findings in relation to the procedure that should have been followed by the Governor in order to accord, as closely as possible with the procedures set out in the Policy.