

**THE HIGH COURT
JUDICIAL REVIEW**

[2017 No. 303 J.R.]

BETWEEN**JOHN JOE O'NEILL****APPLICANT****AND****THE MINISTER FOR JUSTICE AND EQUALITY AND THE GOVERNOR OF CASTLEREA PRISON****RESPONDENTS****JUDGMENT of Ms. Justice Faherty delivered on the 3rd day of July, 2018****Background**

1. On 12th May, 1998, in the London Central Criminal Court, the applicant was convicted of the offence of the murder of his girlfriend, Geraldine Bindon. He was sentenced to life imprisonment with effect from 11th October, 1997. In 2000, he was repatriated to Ireland and transferred to Castlerea Prison where he has remained for the majority of his imprisonment.

2. The applicant's case was considered by the Parole Board ("the Board") in January 2015 which noted several positive aspects of his behaviour. The Board recommended that the applicant remain in Castlerea prison while a programme of escalating temporary release was implemented. The first named respondent agreed with this recommendation. The applicant was then granted increasing periods of temporary release from time to time. In December 2015, the first named respondent directed that the applicant be given temporary weekly release from 2nd December, 2015 to 9th December, 2015 for the purpose of pre-release/resocialisation and that this grant of weekly temporary release was to be reviewed on an ongoing basis.

Thereafter, the applicant was granted successive temporary release periods.

3. The applicant's last temporary release was from 4th May, 2016 to 11.00a.m. on 11th May, 2016 on the following conditions, namely that he:

- "1. Shall not enter a pub, club or other licensed premises or off-license premises.
2. Shall reside at [a named address] in Ballaghaderreen, Roscommon, Ireland.
3. Agree not to change address... without a new TR [temporary release] form.
4. Be under the supervision of the Probation Service, including attending all appointments directed by [the] supervising officer & cooperating with all lawful directions of the supervising officer.
5. Shall attend the Stepping Out program in Athlone as directed. Shall continue to engage with psychologists services available to him. Report to Castlerea Garda Station. Attend a minimum of two days work made available to him [by] AA sponsor.
6. Be of Good Behaviour.
7. Do not convey messages in/out of Prison.
8. Keep the Peace.
9. Report to Castlerea (24h) Garda Station within 24 hours of release & daily thereafter in order to get [his] TR form stamped.
10. Return to Castlerea prison on the date and time [listed on his TR form].
11. Shall be of sober habits."

4. On the expiration of the one week temporary release of 4th May, 2016, the applicant presented himself to Castlerea prison on 11th May, 2016, as required. It is common case that on his return to Castlerea, the applicant was returned to prison rather than being granted a further period of weekly temporary release. The circumstances of how this came about is a matter of dispute between the parties in the within proceedings. The respondent's position is that the applicant returned to Castlerea prison on the said date because his period of temporary release had expired and he was required as a matter of law to return to prison. It is also the respondent's position that on 11th May, 2016, a decision was taken not to grant the applicant a further period of temporary release. The applicant's position is that his temporary release was unfairly revoked on 11th May, 2016.

5. By order of the High Court (Ní Raifeartaigh J.) on 25th April, 2017, the applicant was granted leave to challenge the decision made on 11th May, 2016.

6. In the within proceedings, the applicant seeks a number of reliefs, namely, an order of *certiorari*, by way of application for judicial review, quashing the decision of the respondents of 11th May, 2016, whereby his temporary release was revoked, together with a number of declaratory orders, including that the said decision was in breach of the applicant's constitutional rights and was unreasonable, irrational and *ultra vires*. He also seeks declaratory orders to the effect that he was entitled to a renewal of his temporary release in circumstances where he had abided by previous conditions and that the respondents were not entitled to refuse to grant him further temporary release without affording him fair procedures, natural justice and/or constitutional justice.

7. The grounds upon which the relief are sought are as follows:

1. The respondents revoked the applicant's temporary release for being in a relationship with a woman [R. McD]. There was no condition of the applicant's temporary release prohibiting him from being in a relationship with another person. The revocation took place in the absence of a hearing on the issue. The applicant was not afforded any opportunity to contest the revocation. The decision by the respondents to revoke the applicant's temporary release was unreasonable,

irrational and *ultra vires* in the absence of any information, input or observations from the applicant. In circumstances where the applicant was not in breach of any conditions of his temporary release, it is irrational that the respondents did not give him reasons for their decision to revoke his temporary release.

2. The decision to revoke the applicant's temporary release was irrational, unreasonable and *ultra vires* in circumstances where the applicant had complied with all conditions of his temporary release and the reason for revoking the temporary release was as a result of the applicant being in a relationship.

3. The decision to revoke the applicant's temporary release was made in breach of the rules of natural and constitutional justice (in particular, the rule of *audi alteram partem*) in that the respondents wrongfully committed and continue to detain the applicant in the absence of a fair hearing.

4. The decision was not supported by any or any adequate material to allow the respondents to commit the applicant to Castlereagh prison.

5. The respondents acted in breach of the rules of natural and constitutional justice in that they failed to afford the applicant or his legal advisors an opportunity to make submissions and representations regarding the revocation at the subsequent review meetings.

(a) The applicant was not in breach of his temporary release conditions and in the circumstances he had an expectation that his temporary release would be renewed.

(b) The premise by which his temporary release was revoked was not related to the conditions of his temporary release. Moreover, when asked to cease his relationship with R. McD, the applicant did so promptly even though he was not obliged to do so.

(c) The respondents took irrelevant matters into consideration in terminating his temporary release and failing to afford him a new temporary release.

(d) If the respondents were contending that the applicant's conduct was such that caused them to terminate his temporary release and/or refused to renew the temporary release, there was an obligation on them to afford him fair procedures and an opportunity to address any issues arising. This was not done.

6. The applicant is entitled to fair procedures and a hearing in due course of law, in accordance with the Constitution and the European Convention on Human Rights.

8. In his grounding affidavit, the applicant avers, *inter alia*, as follows:

"16. I say that I returned to Castlereagh Prison for the purposes of signing in on the 11th May, 2016 for the purposes of my weekly temporary release which I had been doing so for the previous 23 weeks. I say that I had not been provided with any advance notice or communication that anything other than signing in as per normal was to occur on this day. I say that when I approached the general entrance, I was waved around to the side entrance which allows for the transfer of vehicles in and out of the prison. I say that when the gates opened I went inside, the gates were closed behind me and I meet an ICO who brought me to the Governor's office.

17. I say that when I arrived in the Governor's office I was met by the Governor of Castlereagh prison, Mr. Martin Reilly, and Mr. Paul Mannering of the Irish Prison Office. I say that I was asked by the Governor, "did I know why I was there?". I say that I replied "Probation, because of a minor offence" referring to my relationship with [R. McD]. I say that the Governor responded that Probation treat the minor offences as serious as major offences. I say that I was informed that I was not going to be going anywhere for the next 4 to 5 months. I say that I was then told there would be a meeting the following week in which it would be determined what was to be done with my case. I say that the meeting lasted for no longer than two minutes. I say that prior to the meeting finishing, Mr. Paul Mannering asked was the relationship over and I indicated that it was. I say that I was subsequently sent to the Grove part of Castlereagh prison.

18. I say that following a review of my case in September, I was informed in the second week of October that I was to be put back on the parole board.

19. I say that I was not provided with any opportunity to contest the grounds for the termination of my temporary release during my meeting with the Governor nor was there any reasons provided as to why my temporary release should not have been extended.

...

21. I was not furnished with any material which was put before the Respondents at the time of making the decision to revoke my temporary release. I have not been furnished with any information as to when the decision to revoke my temporary release was made...

22. I say that my temporary release did not include any condition regarding your deponent entering into a relationship. However, the Probation service in Castlereagh prison, prior to my release, did express their concerns to the Applicant regarding the Applicant entering into a relationship in circumstances where I was incarcerated for the murder of my girlfriend. However, the Probation Service did not seek that the conditions of my temporary release would include such an irrational and unreasonable term as to prohibit your deponent from being in a relationship."

9. In his supplemental affidavit sworn 19th April, 2017, the applicant states:

"4. I say that I was shocked and surprised when I was detained in Castlereagh Prison on the [11th] May, 2016. I did not know what to do. I say that I was told by the Governor they would be meeting the following week to see what would be done about me. Following this there were further reviews in June. I was of the belief that I had not breached my temporary release and that my temporary release would be reinstated.

5. I was aware that my case was the subject of a number of reviews in June and September 2016. I did not know what was occurring/discussed in these reviews. At all times I firmly believed that my temporary release would be re-instated following the reviews. ...

6. I say that [I] was informed on the day after the review meeting in September by Chief Perry of Castlerea prison that the decision in relation to my temporary release was to be made by a Martin Smyth of the Irish Prison Service and that the matter laid in his hands.

7. I say that [I] did not find out the outcome of this review until the second week of October when I was informed that my temporary release was not going to be reinstated and that I was being placed back onto the Parole Board system. I was informed of this by Governor Martin Reilly of Castlerea prison. Governor Reilly said that they tried to avoid this but they couldn't and that this would now hold me up a bit."

10. On 19th January, 2018, the applicant swore a further supplementary affidavit outlining the time of his return to Castlerea prison on 11th May, 2016. He avers: at para. 3 "it was prior to 11.00am when I was taken inside the prison. I say that I was still on temporary release when I was taken into the prison by the prison staff."

11. In their statement of opposition, the respondents deny that the applicant's TR was revoked. They assert as follows:

"13 The Applicant was granted one week's temporary release on 4th May, 2016. On the expiration of that week, on 11th May, 2016, he presented himself to Castlerea Prison as required. He was informed that the First Named Respondent his servants or agents had determined that it was not appropriate to grant him a further period of temporary release at that time."

It is also pleaded that the first named respondent had been informed by the Irish Prison Service ("IPS") of "grave concerns" regarding the applicant and that the decision of the first respondent "took into account all relevant factors, including the nature of the offence committed by the Applicant, the potential threat to the safety and security of members of the public, the recommendations of the Probation Service and the risk that the Applicant would not comply with any conditions attaching to his temporary release."

12. The applicant's periods of temporary release were at all relevant times supervised by Ms. Helen Claffey, Probation Officer with the Prison Service. In her affidavit sworn 31st July, 2017, Ms. Claffey outlines her interactions with the applicant between October, 2015 and May, 2016. She avers that her role was to discuss with him all aspects of his reintegration to the community setting. The purpose of the discussions were to prepare the applicant for the expectations required of him prior to and during his temporary release in relation to addressing the presenting risk factors in the case, with a view to the probation service managing the applicant's risk of re-offending within a community setting. Ms. Claffey goes on to state:

"7. I say that the Applicant inquired regarding the possibility of him being able to visit [R. McD] in Mountjoy Woman's Prison on 29th of January 2016. The Applicant expressly stated that [R. McD] was just a friend and he stated that he was not in a relationship with her, stating that he met her when she was visiting her brother who was serving time in Castlerea Prison. He requested permission to visit the following weekend, or the weekend after that. I say that I discouraged him from such a visit and contacted the Lifer Unit of the Probation Service to seek direction on the matter. I say that I was informed that if the Applicant wished to pursue such a visit he would need to make a formal application to the Prison Governor. I say that I advised the Applicant of the requirement to make a formal application to the Prison Governor at that point. I say that the Applicant then informed me that he would not be pursuing such an application and similarly he stated that he would not be visiting [R. McD]. I say that the Applicant visited [R. McD] in Mountjoy Women's Prison on 13th of February 2016 and the 5th of March 2016. I say that he withheld that information from me and failed to advise regarding either visit.

8. I say that I did ask the Applicant on a number of occasions whether he was in a relationship, and that the reason for this was because I was concerned that he avoid putting himself in circumstances similar to those which led to the killing of his previous partner Ms. Bindon. I say that the Applicant at all times denied that he was in a relationship and only confirmed same on 22nd April 2016.

9. I say that on 19th April, 2016 the Applicant informed Probation Services that he wanted to go on a holiday on an unspecified date in August that year. I say and believe that on that date Detective Garda Shane Killeen carried out an unannounced home visit to the Applicant's house at the request of the Probation Service. I say that I received information from Mr. Jim McNamee, Co-Ordinator, The Stepping Out Programme, National Learning Network, Belhavel, Athlone on the 18th April 2016 and was advised that the Applicant was co-habiting with a female. I was also informed during that contact that the Applicant was enquiring how to access his then partner's phone messages and furthermore I was advised that he was trying to establish the identity of those contacting his then partner via her mobile phone. This presented as a concerning development in light of the Applicant's past issues with paranoid thinking and relationship issues. The Applicant's alleged co-habitation status at that time was new information that neither the Probation Service nor the Irish Prison Service were aware of which required verification. Detective Garda Killeen reported that the Applicant presented well with no evidence of alcohol use, but that a woman was present in the apartment who refused to give her name. Detective Garda Killeen also reported that the Applicant would not give the woman's name, nor did he state that the woman was living there.

10. I say that the first time the Applicant disclosed that he was in a relationship was during a scheduled interview on 22nd April 2016. The Applicant was asked about his relationship status following the refusal of both him and the female present at his residence on the 19th April 2016 to provide Detective Garda Killeen with the name of the female. The Applicant denied being in a relationship with anyone, initially stating he had a female friend staying with him for a few days. This interview took place in the presence of Mr. Jim McNamee ... The Applicant then informed your Deponent that he had begun this relationship in August 2015, some eight months earlier, prior to his release from Castlerea Prison. The Applicant initially stated that the woman's name was (K.M.). However he later said that her name was [R. McD]. He stated that [R. McD] and her three children from a previous relationship had been residing at his address for approximately an eight-week period. The Applicant had not notified any state agency of his change in living arrangements.

11. I say that [R. McD] was actively known to the Probation Service and before the courts at that time. I say that issues had arisen in relation to her compliance the Probation Service, including failure to provide her new address. I say that the Applicant acknowledged that [R. McD] consumed alcohol but that there was no alcohol use in his apartment.

...

15. I say however that phone contact occurred [with the Applicant on 29th April, 2016] and I did encourage him to terminate his relationship with [R. McD]. I did outline to the Applicant that the Irish Prison Service and the Probation Service Senior Management Team had been informed of the relationship. I advised him that his circumstances would be closely considered in the coming weeks and I encouraged him to resume a single status which had been the understanding of his situation upon release and at the time he had been granted permission to move residence on 1st February 2016. I also outlined my concerns regarding the Applicant's exposure to [R. McD's] continued alcohol use, the pressures of a co-habiting relationship with [R. McD] and her three children at such an early stage post-release, and that his failure to disclose all aspects of his personal relationship displayed a lack of openness and honesty with the supervision process. I had concerns for the safety of [R. McD] and her three children.

16. I say that the Applicant stated that he would end his relationship and ask [R. McD] to move out of the apartment. I say that I advised him that his decision to conceal such significant information regarding his circumstances from the Probation Service from the outset was very concerning.

17. I say that the Applicant attended an interview with the Probation Service on 6th May 2016. I say that I did ask the Applicant whether the relationship was over. I have no recollection of the Applicant's allegation that I said he almost had his freedom and blew it away. I say that I did tell the Applicant that he was taking very serious risks with his freedom in concealing information from all state agencies, reiterating that he was a life sentence prisoner on temporary release.

18. I say that serious concerns had arisen at this time about the Applicant's lack of honesty regarding his relationship with [R. McD]. The Applicant had failed to disclose same repeatedly despite being specifically asked about his relationship status. I say that an LSIR (Level of Service Inventory-Revised) Risk and Need Assessment was conducted in relation to the Applicant in August, 2015. This was completed by his prison-based probation officer. The Applicant was assessed as being at a moderate risk of re-offending. I say that the pre-dominant issues identified at the time related to his criminal history, education/employment, anti-social acquaintances, past alcohol use and past mental health treatment. I say that the Applicant had addressed some of these issues. He did not disclose any current mental health problems. I say that the information received on the 18th April 2016 suggesting the Applicant was checking his then partner's phone, gave rise to some concerns regarding possible paranoid behaviour.

...

20. I say that I informed the Senior Probation Officer and the Regional Manager of my concerns on the 22nd April, 2016. I say that on the 4th May 2016, file records indicate that further correspondence was forwarded to the Irish Prison Service by the Senior Probation Officer as directed by the Regional Manager."

13. Ms Claffey's "Life Sentence Prisoner Progress Report" dated 25th April, 2016 advised, *inter alia*, as follows:

"Mr. O'Neill has complied with his sign on conditions ... Similarly he returns to Castlerea Prison each Wednesday. He has not come to the adverse attention of the Gardaí since his release ... During a scheduled interview on the 22.4.2016 Mr. O'Neill eventually disclosed that he was in a relationship with a female for the past nine months.

...

Serious issues arise at this time in relation to Mr O'Neill's dishonesty regarding the nature of his relationship with [R. McD]. Mr O'Neill failed to disclose same repeatedly stating that he was fearful of doing so [as] he felt the Service/IPS will take issue with [R. McD's] criminal record. I have discussed the need for this Service to meet with [R. McD] and discuss with her issues prevailing. [The Applicant] consented to same.

...

Identified Risk Factors and how these are being managed in the community. An LSIR Risk and need assessment tool was applied on 17.8.2015. Mr O'Neill presents at moderate risk of re-offending in the next twelve months. The predominant issues prevailing pertain to his criminal history, education/employment at that juncture, antisocial acquaintances, past alcohol use and past mental health treatment. Mr O'Neill has addressed his education/employment issues and is working and training in a full time capacity. He is not disclosing issues with his mental health although his contact with another trainee in Stepping Out appears to indicate that he may have been checking his partner's phone. Mr O'Neill reports continued sobriety stating that he is attending AA three times weekly. Conclusion/Recommendations

This Service remains very concerned regarding Mr O'Neill's current relationship and in particular the level of secrecy surrounding same. Mr O'Neill denied any relationship in each of the seven scheduled interviews post release. Mr. O'Neill advises that [R. McD's] ex-partner had issues with violence. Concerns exist regarding [R. McD] and her children's vulnerability at this juncture. Furthermore it appears that [R. McD] consumes alcohol albeit not in the company of Mr O'Neill. Mr O'Neill was in his previous relationship a brief six months prior to the commission of the original offence."

14. The report of the Senior Probation Officer, Ms Alva Gavin, of 4th May, 2016 advised as follows:

"Whilst Mr. O'Neill has made [a] positive concerted effort to reintegrate back into the community the Probation Service has serious concerns regarding

- His apparent lack of openness with his supervising Probation Officer about his relationship with [R. McD].
- Although he appears to be maintaining sobriety and engaging with AA, his ongoing association with [R. McD] increases his exposure to alcohol related behaviour as it is reported that she goes to her family in Castlerea to drink. The Probation Service have linked with the Child and Family Agency to highlight any child welfare issues.
- It is a lot of responsibility and premature at this point for Mr. O'Neill to share limited accommodation and family responsibilities with [R. McD] and her three children.

Mr O'Neill did inform his supervising Probation Officer on the 29th of April 2016 that it was his intention to end his relationship with [RMCD], however the current status of this is not known at this stage.

The Probation Service are of the view that Mr O'Neill is in breach of his TR conditions by not disclosing his relationship with [R. McD] to his supervising Probation Officer. Furthermore, it is a concern that [R. McD] has a history of offending and is herself vulnerable.

On balance, it is recommended that these issues are fully explored with Mr O'Neill on recall at Castlerea, and that [the] expectations of Probation supervision are revisited and fully outlined to him."

15. In his affidavit sworn 1st August, 2017, Mr. Paul Mannering, of the Operations Directorate, IPS, avers that he reviewed the reports of Ms Claffey and Ms Gavin. He goes on to state:

"24. I say that having considered this information the First Named Respondent his servants or agents were not prepared to grant a fresh period of temporary release to the Applicant on 11th May [2016], for reasons including the nature of the offence committed by the Applicant, the potential threat to the safety and security of members of the public, the recommendations of the Probation Service and the risk that the Applicant would not comply with any conditions attaching to his temporary release. As his period of temporary release had expired, and no further period was being granted at that time, the Applicant was required to return to Castlerea Prison.

25. I say that the reasons for this decision not to grant a further period of temporary release were fully explained to the Applicant on 11th May 2016 by both me and the Second Named Respondent and he stated that he understood same. I say that it is not usual to inform prisoners in advance as to the decisions regarding further temporary release, for reasons including that this could give rise to the risk that such persons would not present themselves to prison as required at the end of their period of temporary release. I say that insofar as the Applicant suggests he was simply "signing in" at the prison on 11th May, this is incorrect. The Applicant was required to present himself to [the] prison at the end of the period of one week's temporary release granted on 4th May.

26. I say that the Applicant indicated that he understood why he has not been granted further temporary release and asked what would happen to him now. I say that the Applicant was told the matter would be reviewed by the [IPS] Operations Directorate in June 2016, that he had been a Parole Board prisoner prior to the periods of temporary release and that all options pertaining to his case would now be under consideration."

16. Mr. Mannering further avers:

"32. I beg to refer to paragraphs 19-21 of the Applicant's verifying affidavit. I say that the Applicant's temporary release was not revoked. Rather, he was not given a fresh period of temporary release on 11th May. The Applicant was informed of the reasons for same at the time and indicated that he understood these. Insofar as the Applicant claims that he should have been given the opportunity to contest the grounds for refusal of temporary release, such is not required under law and in any event the Applicant discussed the matter with the Respondent's both on 11th May 2016 and subsequently."

The applicable statutory provisions

17. The executive power to direct the temporary release of a serving prisoner is contained within s. 2 of the Criminal Justice Act, 1960, as fully substituted by the Criminal Justice (Temporary Release of Prisoners) Act 2003 which provides:

"1. The Criminal Justice Act 1960 is hereby amended by the substitution of the following section for section 2:

"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.

(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 the Minister to be—

- (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.”.

Considerations

18. The starting point of the present case is that, as provided for in s. 2(2) of the 1960 Act as set out above, a decision on whether a prisoner is to be granted temporary release is an executive decision for the first named respondent. There is no right under statute to temporary release from prison. (See *Lynch and Whelan v. Minister for Justice* [2012] 1 I.R. 1, para 61 and *Callely v. Minister for Justice* [2015] IEHC 485)

19. As put by Murray C.J. in *Lynch and Whelan*:- at p.27

"[67] Refusing temporary release is a decision not to grant a privilege to which a prisoner has no right. Any such decision or policy on which it is based must serve the purpose or objects of the provision of the Act of 1960 only. It cannot be seen in any sense as converting a subsisting punitive sentence into some form of preventative detention."

The Supreme Court also found that there was nothing in the system of temporary release that affected the penal nature of a life sentence. A decision to grant temporary release did not constitute a termination of the sentence judicially imposed.

20. That is not to say that a refusal to grant temporary release or a revocation of temporary release cannot be challenged. However, the courts have emphasised that the standard of review applicable to decisions on temporary release is that the applicant must show that the decision is "arbitrary, capricious or unjust", such as to warrant the intervention of the court. In *Kinahan v. Minister for Justice* [2001] 4 I.R. 454, Hardiman J. cited with approval the following *dictum* from *Murray v. Ireland* [1991] I.L.R.M. 465:-, where Finlay C.J. stated at p. 473

"The exercise of these powers by the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way."

It is not, however, in my view, permissible for the court to intervene merely on the grounds that it would ... have reached a different conclusion on the appropriateness ... of temporary release."

21. Hardiman J. went on to state:- at p. 459

"This decision properly emphasises the importance of the constitutional separation of powers in dealing with the implementation by the executive of a judicially imposed sentence of imprisonment. It also correctly identifies the sole circumstances in which the court would be justified in interfering with a decision in relation to temporary release."

22. The forgoing is therefore the legal backdrop against which the within application must be assessed.

23. From the pleadings and the submissions of the parties, I consider that the following issues arise for determination:

(1) Was the decision of 11th May, 2016 a revocation of the applicant's temporary release or a refusal to grant him a further period of temporary release?

(2) Was the applicant denied fair procedures?

(3) Was the decision not to grant the applicant made without reasons such as to render it irrational?

(4) Was the decision not to grant a further period of temporary release arbitrary, capricious or unjust, or otherwise irrational?

Was the decision of 11th May, 2016 a revocation of the applicant's temporary release or a refusal to grant him a further period of temporary release?

24. The applicant maintains that all the factors in the present case suggest that his temporary release was revoked. As deposed to by the applicant, he arrived back at Castlerea Prison prior to 11am on 11th May, 2016, i.e. prior to the expiry of his temporary release period. Counsel for the applicant submits that there is no suggestion from the available evidence that there was any consideration by the respondents on the 11th May, 2016 of a new temporary release being granted; rather the curtain was simply brought down on the applicant's subsisting temporary release, without reasons having been given.

25. It is submitted that while the applicant's evidence that he had returned to Castlerea Prison prior to the expiry of his temporary release period is not determinative whether what occurred on 11th May, 2016 was a revocation of temporary release or a refusal to grant a new temporary release period, it is however a straw in the wind which the Court can take account of in forming a view as to what was the nature of the decision made by the first respondent on 11th May, 2016.

26. On the other hand, the respondents contend that there is no basis for the applicant's contention that his temporary release was

revoked. It is further submitted that even if the Court were to find that the events of 11th May, 2016 amount to a revocation by virtue of the applicant having been apprised of the first respondent's decision prior to 11am on 11th May, 2016, thereafter, at 11a.m., the applicant was required to present himself at Castlerea Prison, pursuant to the terms of his temporary release granted on 4th May, 2016. It is thus submitted that insofar as any error occurred in the decision by dint of a failure to afford a hearing before the temporary release was revoked, the effect of that procedural irregularity was dissipated by the requirement on the applicant, in any event, to return to Castlerea Prison at 11a.m. on 11th May, 2016.

27. That being said, the respondents' fundamental position is that the decision that was taken on the said date was not to grant the applicant a further period of temporary release.

28. Counsel for the applicant submits that it is untenable for the respondents to assert that the temporary release was not revoked and to assert that the applicant was not granted a new temporary release on 11th May, 2016.

29. I find that I cannot accept the argument that the applicant's temporary release was revoked. The factual matrix is clear. The applicant presented at Castlerea on 11th May, 2016 in accordance with the terms of his temporary release and in the knowledge that his temporary release was to expire at 11.00am. The fact that he may have presented prior to the clock striking eleven cannot, to my mind, convert what occurred on 11th May, 2016 into a revocation of his temporary release. His temporary release was for all intents and purposes spent by the time of his return to the prison. Condition 10 of his temporary release conditions required him to return to Castlerea Prison on 11th May, 2016 at the appointed time.

30. Much was made by the applicant's counsel of the absence of any record of the applicant having applied for a further period of temporary release on the date in question. While that may indeed be the case, it remains the view of the Court that, given that the temporary release granted to the applicant on 4th May, 2016 had run its course, the only decision that could have been made on the day was whether to grant him a further period of temporary release. No decision was required to be made to return him to prison since, upon the expiration of his period of temporary release, he was obliged in any event to return to prison. It is clear from the records put before the Court that a number of successive decisions regarding temporary release had been made in respect of the applicant between December 2015 and 4th May, 2016, all of which were decided in favour of the applicant, as can be seen from the contents of the temporary release forms put before the Court for the relevant periods. A decision to the contrary was made on 11th May, 2016, however.

Was the applicant denied fair procedures by reason of the failure to afford him a hearing?

31. The applicant maintains that the rules of natural and constitutional justice were breached by the failure to afford him a hearing on 11th May, 2016 on the issue of his temporary release.

32. It is contended that irrespective of whether what occurred on 11th May, 2016 was a revocation of the applicant's temporary release or a refusal to grant a further period of temporary release, in the particular circumstances, the applicant was entitled to a hearing on the issue. In this regard, counsel for the applicant relies on *State (Murphy) v. Kieft* [1984] I.R. 458 and *Dowling v. Minister for Justice, Equality & Law Reform* [2003] 2 I.R. 535.

33. The respondents argue that there is no basis for the applicant's contention that he was not afforded fair procedures. It is submitted that the applicant's arguments in this regard are based on an entirely incorrect factual premise. What the applicant seeks to do is to characterise his case as one in which his temporary release was revoked, and thus invoke a right to a hearing. It is submitted that the premise upon which the right to a hearing is invoked in this case is factually incorrect as the first named respondent's decision was not a revocation decision. Accordingly, the respondents contend that the applicant's reliance on *State (Murphy) v. Kieft* and *Dowling v. Minister for Justice* is misplaced.

34. The respondents further contend that when the applicant signed his temporary release form on 4th May, 2016, he acknowledged that he was required to return to Castlerea Prison on 11th May, 2016 at the expiration of his period of temporary release. He was advised on the temporary release form that a failure to return at this time would be an offence under s. 6 of the 1960 Act. Furthermore, the applicant specifically acknowledged that the grant of one week's temporary release did not confer on him any entitlement to a grant of further such releases. It is thus submitted that insofar as the applicant relies on a legitimate expectation of a further period of temporary release such as warranted a hearing prior to any decision not to afford him such further period of temporary release, he cannot maintain such a claim either as a matter of law or fact.

35. The respondents also argue that the applicant's reliance on *Sherlock v. Governor of Mountjoy* is misconceived. In this regard, they point to s. 2(6) of the 1960 Act, which provides:

"...the release of a person pursuant to a direction under this section shall not confer an entitlement on that person to further such release".

36. By way of response, counsel for the applicant asserts that it is the respondents' reliance on the provisions of s. 2 (6) of the 1960 Act that is misconceived, given the applicant's particular circumstances. It is submitted that the purpose of s. 2 (6) of the 1960 Act is to prevent prisoners relying upon the fact that they are the recipients of a number of periods of temporary release as a basis to argue that the first named respondent has no discretion not to grant them further periods of temporary release. Counsel argues that that is not the case the applicant makes: rather, it is that the respondents had followed a certain procedure with regard to the applicant for the previous twenty three releases. It is submitted that following on from that the applicant had a legitimate expectation that his temporary release would be renewed and failing which he would be subject to fair procedures.

37. As this is not a case where the applicant's temporary release was revoked, I find that the case law cited by the applicant in aid of his submission that a hearing was required is not applicable to his particular circumstances. In so far as reliance is placed on *Dowling v. Minister for Justice*, I find that the applicant's circumstances cannot be said to equate with the factual matrix that prevailed in *Dowling*. In *Dowling*, the prisoner had been granted temporary release on a monthly reviewable basis. His conditions of release were that he sign on at Mountjoy prison on the 23rd day of each month and that he see a probation and welfare officer. Following the arrest and questioning of the prisoner in relation to a murder, he was informed that his temporary release would not be renewed while he was the subject of a garda investigation.

38. The Supreme Court held that the mere fact that the prisoner was questioned in relation to another offence was insufficient reason to revoke his temporary release. It held that before revoking the release, the respondent should have investigated the matter to establish whether the prisoner had breached his conditions of release. It also held that the grant of monthly temporary release did not constitute a discrete decision to release the prisoner each successive month. It found that the exercise of executive discretion was to grant an indefinite release subject to the conditions under which the prisoner was released, which conditions were to be

monitored on a monthly basis.

39. As far as the present case is concerned, I am satisfied that the applicant was not on indefinite temporary release; rather, notwithstanding that he had successive periods of temporary release, he was released on each specific occasion for a period of one week only. Moreover, in respect to each period of temporary release, and more particularly with regard to the temporary release for the period 4th May, 2016 to 11th May, 2016, he specifically acknowledged that the grant of temporary release did not confer on him any entitlement to a grant of further such releases. This is specifically provided for in s. 2(6) of the 1960 Act.

40. In *Rock v. Governor of Arbour Hill Prison* [2015] IEHC 45, Kearns J. opined, with regard to s.2(6):

"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."

This observation is entirely pertinent to the present case, in my view.

41. It is also of note that in *Dowling v. Minister for Justice*, Fennelly J. observed: at p. 543

"It is, of course, true that temporary release decisions are entirely within the discretion of the respondent acting in the exercise of executive clemency on behalf of the State. The present case is concerned only with the interpretation of a decision already made. It is not suggested that the respondent can be compelled to grant temporary release. If the applicant's temporary release came to an end, by mere effluxion of time on the 23rd December, 1999, the respondent was not bound to renew it."

42. Counsel for the applicant also cited *Sherlock v. Governor of Mountjoy* [1991] 1 I.R. 451 in support of the argument that the applicant's circumstances were such that he had a legitimate expectation that his temporary release would continue. Accordingly, if it was not going to be renewed he should have been afforded an opportunity to be heard and answer any allegations which might be made against him by the respondents.

43. In *Sherlock*, the prisoner had been granted fifteen successive periods of temporary release which had altogether lasted twelve years. Upon the expiry of the last period of temporary release, when the applicant surrendered himself to prison, he was informed that he was to be returned to prison. Johnson J. held that the prisoner had a legitimate expectation that he would be given a further temporary release and that if that was not to happen he should have been given an opportunity to be heard and to answer any allegations which might be made against him.

44. I note that, apart altogether from the fact that *Sherlock* (like *Dowling*) predates the current statutory regime, the factual matrix in *Sherlock* was quite specific, namely it concerned a period of some twelve years where the prisoner was on temporary release, a situation thus factually quite different to the present case.

45. As to what must arise in the context of a decision as to whether to grant temporary release, the law is clear. In *McAlister v. Minister for Justice* [2003] 4 I.R. 35, Finnegan P. held that while there was a right to reasons for a refusal to grant temporary release, there was no requirement to hold a hearing before a decision to grant temporary release or otherwise is made. Finnegan P. quoted with approval the dictum of Murphy J. in *Ryan v. Governor of Limerick Prison* [1988] I.R. 198:

"Mr. Ryan complains that no allegation of any kind of wrongdoing was made against him and that he was given no reason for the revocation of his release under supervision. This complaint would be material if indeed a release was being revoked for breach of a condition. There is no requirement that allegations should be made or substantiated for failure to grant a release as opposed to the revocation of an existing continuing release ..."

The temporary release is a privilege or concession to which a person in custody has no right and indeed it has never been argued, so far as I am aware, that he should be heard in relation to any consideration given to the exercise of such a concession in his favour. That being so, it seems to me that the only right of the applicant or other person in custody is to enjoy such temporary release as may be granted to him for whatever period is allowed and subject to such conditions as are attached to it. The fact that the release may be renewed on a number of occasions and not renewed subsequently does not confer any additional or new right on the prisoner." (at pp. 199-200)

Was it made clear to the applicant on 11th May, 2016 why he was not being granted a further period of temporary release?

46. It is submitted on the applicant's behalf that the respondents proffered no reasons on 11th May, 2016 as to why a further period of temporary release was not forthcoming. Counsel submits that insofar as Mr. Mannering avers that the applicant was advised on 11th May, 2016 of the reason for the refusal to grant a further period of temporary release, such reasons are not alluded to in his affidavit. Counsel also points to the applicant's evidence that the meeting on 11th May, 2016 lasted no more than two minutes.

47. It is further submitted that insofar as Mr. Mannering relies on the review meeting which took place in June, 2016, the position at that juncture was that the applicant was already back in jail, his liberty having been taken away on 11th May, 2016 in circumstances where he had no representation.

48. Counsel also contends that the respondents are not entitled to rely on an acceptance by the applicant at the June 2016 meeting that he had "messed up" as the basis for not granting him a further period of temporary release. It is argued that the applicant's admission cannot retrospectively validate the respondents' actions of 11th May, 2016.

49. Similarly, with regard to the respondents' 4th October, 2016 report which details the outcome of a review of the applicant's case on 28th September, 2016, as exhibited in Mr. Mannering's affidavit, the applicant asserts that the respondents cannot rely on its contents as this report post-dates the relevant decision.

It is submitted that it was only in October 2016 that a *de facto* decision was made not to grant the applicant a further period of temporary release. Counsel argues that this is evident from Mr. Mannering's correspondence to the IPS of 11th October, 2016 wherein the decision was made to refer the applicant's case back to the Parole Board. The applicant asserts that this correspondence mirrors the applicant's own evidence that it was only in October 2016 that he was told that no further temporary release would be forthcoming.

50. It is also submitted that the first formal indication the applicant received as to why no further period of temporary release would be granted was on 9th December, 2016 when his solicitor was advised that the applicant had not been granted another period of temporary release in May 2016 "due to concerns raised that he would not comply with the conditions of this release", a decision which, counsel contends, was in fact arrived at in the absence of any new application by the applicant having been made in May, 2016 for temporary release.

51. Counsel for the applicant also submits that it is unusual that the respondents have not adduced any contemporaneous note of what was said to the applicant on 11th May, 2016 or adduced any contemporaneous note of the applicant having admitted in June 2016 that he had "messed up".

52. The respondents position is that the contents of Mr. Mannering's affidavit make it clear that reasons were provided to the applicant on 11th May, 2016 as to why he was not being granted a further period of temporary release.

53. As acknowledged by counsel for the applicant, there was no requirement on Mr. Mannering to provide the applicant with reasons in advance of his return to Castlereagh for the reasons set out by Mr. Mannering in his affidavit.

54. Overall, I am satisfied that the applicant was made aware on 11th May, 2016 as to why a further period of temporary release was not being granted at that time.

55. Mr. Mannering avers that both he and the second named respondent apprised the applicant of the reasons as to why a further period of temporary release was not being granted and that moreover the applicant indicated that he understood why he was not being granted further temporary release. These averments have not been challenged by way of any application by the applicant to cross-examine Mr. Mannering.

56. I am also satisfied that support for the respondents' position can be found in the applicant's own grounding affidavit. He states, at para. 17 thereof, that he was aware that the reason he was in the second respondent's office on 11th May, 2016 related to the Probation Service's concern regarding his relationship with R.McD. It is also clear from the applicant's affidavit that he and Mr. Mannering discussed whether the applicant had ended his relationship with R.McD.

57. Moreover, the Court cannot lose sight of the meetings which the applicant had with his Probation Officer, Ms. Claffey, on 22nd April, 2016 and 6th May, 2016 when the issue of the applicant's relationship with R.McD and the Probation Service's concerns were discussed in some detail. Therefore, while it may well be the case that the discussion between the applicant and Mr. Mannering and the second respondent was of short duration on 11th May, 2016, I am nevertheless satisfied, overall, that the applicant was made aware as to why a further period of temporary release was not forthcoming on 11th May, 2016.

Was the decision not to grant a further period of temporary release arbitrary, capricious or unjust or otherwise irrational?

58. Counsel for the applicant advances the following arguments in contending that the decision of 11th May, 2016 was arbitrary, capricious and unjust: Firstly, he submits that an important aspect of the present case, as is apparent from Ms Claffey's affidavit, is that at no stage during Ms Claffey's oversight of the applicant's temporary release did she actually prohibit contact with R. McD. At its height, the approach of the Probation Service was to discourage the relationship, given the applicant's particular background. Counsel emphasises that the applicant was at no stage advised that he could not have a relationship with R. McD. It is contended that this may well be because Ms Claffey did not believe that it was necessary to tell him that he could not have a relationship. Equally, it may well be that she recognised that she did not have the power to advise him to terminate his relationship with R.McD.

More fundamentally, the conditions of the applicant's temporary release did not preclude him from having a relationship.

59. Secondly, when it was made clear to him by Ms Claffey that he should cease his relationship with R McD, the applicant did so. There is no suggestion from the respondents that the applicant did not cease the relationship upon being requested to do so. Yet, having committed to doing so on 22nd April, 2016, the applicant's temporary release was nevertheless revoked. This is a serious matter since the consequences for the applicant is that he has now been returned to the parole system in prison and his prospects of returning to his pre 11th May, 2016 position are remote. It is also contended that the applicant was never told by Ms. Claffey that he was in breach of the conditions of his temporary release.

60. It is acknowledged on the applicant's behalf that in April 2016, the Probation Service had concerns regarding the applicant's relationship with R. McD, particularly given the applicant's circumspection about the relationship when the issue was initially raised with him by Ms Claffey. Nevertheless, counsel maintains that it must have been apparent to the respondents from the outset that during his temporary release periods, the applicant might well engage in a relationship. Accordingly, the respondents' apprehensions were immediately foreseeable. It is contended that in those circumstances, it could have been made a condition of his temporary release that he would not engage in a relationship. This did not happen however.

61. Insofar as the respondents rely on information provided by Mr. McNamee with regard to alleged enquiries being made by the applicant as to how he might access his girlfriend's mobile telephone, it is submitted that this information amounts to no more than innuendo. Moreover, the information was provided to Mr. Mannering without context. Nor was any subsequent investigation embarked on by the respondents to ascertain the reason for the applicant's enquiry with regard to accessing R. McD's telephone. Counsel suggests that the nature of the applicant's enquiry may have been no more than a wish to assist R. McD in some regard. It is submitted that there was no basis for Ms Claffey to have equated the applicant's enquiry to paranoid behaviour on his part.

62. Insofar as the respondents had issues in relation to R. McD's use of alcohol, counsel points out that it was accepted at all times by Ms Claffey that the applicant had remained sober and there is no suggestion that he breached the terms of his temporary release by consuming alcohol.

63. Insofar as Ms. Claffey's report refers to the applicant's risk of re-offending, counsel states that it is noteworthy that despite his risk of re-offending having been assessed as in the "moderate" range, it was not made a condition of the applicant's temporary release that he would refrain from engaging in relationships.

64. While it is accepted that Ms Claffey's concerns regarding the level of secrecy which surrounded the applicant's relationship with R. McD might well be a factor to be considered by the first named respondent, the applicant's position is that this concern had abated as of 22nd April, 2016, by reason of his agreement to terminate his relationship. Likewise, insofar as the first named respondent may have had a concern for R. McD as a member of the public, this concern could not have subsisted on 11th May, 2016 since the applicant had specifically advised Ms Claffey on 6th May, 2016 that his relationship had ended.

65. Counsel also submits that insofar as Mr. Mannering relies on the contents of Ms Claffey's report of 25th April, 2016 as a basis for the decision taken on 11th May, 2016, the thrust of her report was aimed at managing the applicant's situation and not that he would be returned to prison.

66. Similarly, it is suggested the tenor of Ms Gavin's recommendations is that it was intended by her that the applicant would be taken aside on his return to Castlerea Prison on 11th May, 2016 in order that the issues raised in her report would be explored with the applicant and matters explained to him as to what was expected of him in the course of his temporary release. It is submitted that Ms Gavin's report did not conclude that the applicant's temporary release should be revoked or not renewed.

67. Counsel further contends that the factors relied on by Mr. Mannering at para. 24 of his affidavit as the basis for the decision not to grant a further period of temporary release to the applicant are purely generic. It is submitted that there was no evidence before the decision-maker to suggest that R. McD was in danger from the applicant, particularly in circumstances where he had terminated his relationship.

68. Notwithstanding the applicant's submissions, I am not satisfied that the applicant, on whom the onus rests, has established that the first respondent's discretion was exercised in a capricious, arbitrary or unjust way. I am further satisfied that no irrationality attaches to the decision.

69. The contents of Ms Claffey's affidavit, and the report prepared by her on 25th April, 2016, which was duly furnished to Mr. Mannering, make clear the concerns which the Probation Service had regarding the applicant, in particular the concerns surrounding his relationship with R. McD and evidence pointing to paranoid thinking on his part, in circumstances where the applicant is serving a life sentence for the murder of a previous girlfriend. Coupled with these concerns was the applicant's failure to disclose his relationship with R. McD until 22nd April, 2016, despite a number of opportunities for him to do so. Furthermore, Ms Claffey evinced concern regarding the potential effect of R. McD's history of alcohol on the applicant in circumstances where it was a condition of the applicant's temporary release that he would refrain from drinking alcohol. All of these concerns were before Mr. Mannering for the purpose of his making a decision on 11th May, 2016 as to whether to grant the applicant a further period of temporary release.

70. Accordingly, there can be no suggestion that the respondents are now seeking, *ex post facto*, to provide reasons for the refusal to grant a further period of temporary release to the applicant. Given the contents of Ms. Claffey's and Ms. Gavin's respective reports, there can be no question of the decision being irrational by dint of the absence of any basis for the refusal to grant the applicant a further period of temporary release.

71. I note that Ms Gavin's report refers to the applicant having breached the conditions of his temporary release by not disclosing his relationship with R. McD. The applicant makes the case that the terms of the applicant's temporary release did not provide that he should not engage in a relationship. It is thus submitted that the first named respondent acted on foot of an erroneous report. Moreover, counsel points to the fact that there is no reference in Ms Gavin's report to any concern on her part with regard to the applicant having enquired how to access R. McD's mobile telephone.

72. As to the latter issue, I accept that Ms Gavin's report did not express concern regarding the applicant's enquiry regarding access to R. McD's mobile telephone. The issue was however dealt with in Ms Claffey's report and thus was a factor to which the first respondent was entitled to have regard. I accept, however, the applicant's argument that Ms Gavin's report is erroneous to the extent that it asserts that the applicant was in breach of his temporary release conditions. Nevertheless, I am not persuaded that this error is such that it renders the decision of 11th May, 2016 arbitrary, capricious or unjust, or irrational. This is so given the myriad factors set out, in particular, in Ms Claffey's report. As conceded by counsel for the applicant, there was "red flags" in Ms Claffey's report which the first named respondent was entitled to take account of.

73. Section 2(2) of the 1960 Act, quoted above, sets out the factors which the first named respondent is obliged to have regard to when making a decision on temporary release. These include, at s. 2(2)(h):

"any report of, or recommendation made by-

...

(iii) a probation and welfare officer".

74. Moreover, s. 2(3) of the 1960 Act provides:

"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..."

75. To my mind it is an over simplification of the factual matrix which had presented by 11th May, 2016 for counsel for the applicant to suggest that the first named respondent did not grant a further period of temporary release because he simply took issue with the applicant having a relationship with R. McD. This is not a fair assessment of the reports which were before the decision maker.

76. It is clear that a major aspect of Mr. Claffey's concern related to the applicant's lack of transparency over a period of time with regard to his relationship with R. McD, particularly in circumstances where in February, 2015, the Parole Board in recommending that the applicant's sentence and phased release into the community also recommended that the applicant would maintain "an open and honest discussion" with the Probation Service. The reality of the case is that from August 2015 to 22nd April, 2016, the applicant was not forthcoming with the Probation Service about his relationship with R. McD and only admitted to same after an unannounced visit of the gardaí to his apartment. It is clear that this and the other factors referred to in Ms Claffey's report gave the Probation Service cause for concern. These were factors which the decision-maker was legitimately entitled to take account of. Thus, the fact that the applicant is now emphasising that he had ended his relationship with R. McD by the time of the decision not to grant him a further period of temporary release cannot be dispositive of the concerns set out in the two reports which the first respondent had. Nor is the fact of the termination of the relationship sufficient for the Court to conclude that the decision was arbitrary, or capricious or unjust, or indeed irrational.

77. I am satisfied that that there was more than sufficient information in the reports of Ms Claffey and Ms Gavin in order for the first respondent to take the decision he did on 11th May, 2016.

Summary

78. For the reasons set out herein, I find that the challenge to the decision of 11th May, 2016 has not been made out. The reliefs sought are thus denied.