[2018] IEHC 288

THE HIGH COURT

[2016 No. 179 J.R.]

BETWEEN

JOHN SHAW

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 9th day of March, 2018

1. This is a telescoped hearing in which the applicant seeks the leave of the Court for judicial review by way of declaratory orders and/or orders of *mandamus* and/or *certiorari* arising from the decision of the first respondent dated 29th November, 2016, refusing to grant the applicant limited temporary release, specifically, the first respondent's refusal to support the recommendation of the Parole Board that the applicant be granted two days per annum of escorted outings.

Background

2. The applicant is the longest serving prisoner in the history of the State. He is an English national. He has been in custody in this jurisdiction since September 1976. The background to his incarceration is set out in a garda report dated 14th July, 2003, which is part of the applicant's file as exhibited in the grounding affidavit sworn by his solicitor in the within proceedings. It states as follows:-

> "Shaw travelled to Ireland in 1974 with Geoffrey Evans. In February 1975, having committed a number of burglaries they were sentenced to two years imprisonment. On their release in 1976, they travelled around the country again committing a number of crimes. On 28/08/76, they went to Fethard and borrowed a car from a local man. They travelled to Dublin to collect property belonging to Evans. Following this, they drove to Wicklow, they passed a girl, Elizabeth Plunkett, walking near Brittas Bay. They offered her a lift to Dublin and she accepted. She was then subjected to horrific sexual assaults and her body subsequently dumped in the Irish Sea.
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> On Wednesday, 22/09/76, they travelled to Castlebar where he observed the victim, Mary Duffy walking alone. They dragged her into their car and repeatedly raped her while they drove to Ballynahinch. There she was abused and raped over a period of two days until 24/09/76 when they murdered her and disposed of the body by weighing it down and dumping her in Lake Inagh. Shaw was charged with and convicted of (1) Murder, (2) Rape, (3) False Imprisonment at the Central Criminal Court, Dublin, on 09/02/1978."

3. Both the applicant and Geoffrey Evans were charged with the murder of Elizabeth Plunkett but a *nolle prosequi* was entered following their convictions for the murder, rape and false imprisonment of Mary Duffy.

4. Over the years of his incarceration, the applicant's case has been the subject of a number of reviews which were undertaken in April 1990, May 1991, June 1994, June 1997, and May 2000 by the Sentence Review Group, and subsequently on five occasions by the Parole Board, the body which replaced the Sentence Review Group. Reviews by the Parole Board took place in 2006, 2008, 2010 and 2013. The fifth review – the subject of the within application – commenced in early 2016, and culminated with the decision of the first respondent of 29th November, 2016.

5. In the course of its reviews over the years, the Parole Board made various recommendations in respect of the applicant. Following the conclusion of the first review in 2006, the Board noted, *inter alia*, that the applicant had then been in custody for more than twenty nine years, more than half his life, but the Board was of the view that a recommendation for any type of temporary release "was not appropriate at this time". It was, however, satisfied that the applicant be considered for transfer to a more open custodial setting and recommended a transfer to Castlerea Prison with the view to his being accommodated ultimately in the Grove area of that institution. On 14th February, 2006, the first respondent's predecessor agreed with the recommendation that the applicant be transferred to Castlerea. It was stated, however, that this was "not an indication that Mr. Shaw will be given release in the foreseeable future". In April 2006, the applicant was duly transferred to Castlerea and he moved to the Grove area of the prison in May 2006.

6. The applicant had in fact previously been transferred to Castlerea, following a recommendation of the Sentence Review Group. However, as he had not been moved to the Grove area as had been recommended, he requested a transfer back to Arbour Hill prison, where he remained until the move to Castlerea in April, 2006.

7. In the course of the Parole Board's second review, the applicant requested that he be considered for escorted visits out, a request which was considered reasonable in the report of the Probation Officer dated 6th November, 2007, albeit there was "some degree of risk attached".

8. The upshot of the second review is contained in the letter of 17th November, 2008 from the Parole Board to the first respondent's predecessor wherein, *inter alia*, the Board noted that the applicant had settled well in the Grove area of Castlerea and that his behaviour was recorded as being impeccable. The letter went on to state:-

> "The Board accepted that the risk of Mr. Shaw committing offences has been reduced by the passage of time but it was concerned by his pattern of offending and the difficulties his case presents in terms of a risk assessment. While cognisant that Mr. Shaw has been in custody on his current sentence for more than thirty years, the Board was not prepared to recommend release or a transfer to more open custodial conditions for him. The Board recommends that Mr. Shaw be considered for occasional escorted outings to support the progress he has made in adapting to the more normal conditions in the Grove. The Board proposes to review Mr. Shaw's case again in about two year's time."

9. The first respondent's predecessor did not agree with the Board's recommendation. This was communicated to the applicant by letter of 9th January, 2009.

10. The third review commenced in or about June 2010. The report of the Prison Review Committee noted the applicant's wish for "an escorted day out which has been refused to date". It also noted that the applicant "was assessed as a very high risk to re-offend, due to the static values in his case, which are mainly due to his previous offending". The Probation Officer's report noted that the applicant's "risk level is assessed as very high, despite his age". The risk assessment was carried out using "the RM2000 Risk Assessment" tool, which was based on static factors such as the previous sexual convictions and victim characteristics. The report noted that "[a]s a result, this risk level will never decrease as those factors do not change. It is important to note that it is 34 years since his last sexual conviction. The other sexual convictions were 40 years old."

11. The Probation Officer's recommendation was as follows:-

> "John Shaw has served 34 years of a life sentence and has thus far been granted no concessions. He is anxious to receive some acknowledgment for the work he has done with all relevant services and for his good prison conduct. I would recommend that he receive an escorted day out and Mr. Shaw has indicated that he would abide with any and all conditions associated with this. Mr. Shaw should also continue his work with the Probation Service in a meaningful manner."

12. In its letter to the first respondent's predecessor dated 21st January, 2010, the Parole Board noted that while the first respondent had previously accepted the Board's recommendation to transfer the applicant to Castlerea, the recommendation in the second review for occasional escorted days out had not been accepted. In the context of the third review, the Board advised as follows:-

> "In considering the case, the Board again noted the brutality of Mr. Shaw's offending and was cognisant of the fact that he was now some thirty-four years in prison. The Board noted that his behaviour since its last review of the case had continued to be good and that he appeared to be well settled in the Grove Area. The Board was also pleased to note the positive engagement with the Minsters from the Baptist Church and the Church of Ireland as well as the Prison Chaplin.
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> The Board noted Mr. Shaw's more recent health concerns and the consequent contact with members of his family. He expressed hope that he would be released to the supervision of the British Probation Service was also noted. However, while mindful of the static nature of the factors, the Board noted the risk assessment tool applied showed Mr. Shaw to be at very high risk of re-offending and, hence, was not disposed to consider recommending any form of temporary release.
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> The Board was aware of Mr. Shaw's unwillingness throughout his time in prison to apply for a transfer to the UK to serve his sentence. The Board was unsure as to his reasons for this, particularly in view of the fact that his chances of release from custody could have improved if such an application had been successful. While emphasising that he had to apply and that there could be no assurances as to what decision might emerge, the Board was of the view that, in all the circumstances of his case at this point in time, Mr. Shaw should reconsider his position on this matter. Hence, it was decided to recommend that Mr. Shaw should work with the Probation Service to explore possible options with regard to transferring to the UK."

13. In a letter dated 14th February, 2011, to Castlerea Prison for transmission to the applicant, the first respondent's predecessor noted the Board's recommendation, and advised that the applicant should be informed that it was open to him to apply for a transfer to the UK under the Transfer of Sentenced Persons Acts 1995 and 1997.

14. By the time the fourth review commenced in 2013, the applicant continued to be accommodated in the semi-open Grove area of Castlerea Prison. The Prison Review Committee noted the applicant had at this stage serious medical issues which would require attendance at the Mater Hospital. His refusal to countenance a transfer to the UK, as had been recommended by the Parole Board in the third review, was also noted.

15. The Probation Officer's report dated 21st March, 2013, noted, *inter alia*, that the RM2000 Risk Assessment tool had been previously applied in the applicant's case and that he had been assessed as being at a high risk of future re-offending. It noted that "this tool measures static factors such as age, sexual offending history/criminal offending history and victim characteristics therefore as these factors will never change, he will remain a high risk, despite his age and health circumstances".

16. The report documented the applicant's continued distress at the length of time he had spent in custody and that he had not been granted temporary release or a day out since his incarceration. It was reported that the applicant found his risk assessment "difficult to comprehend as he feels he does not pose a risk to society in light of his age and deteriorating health". It also noted the applicant's willingness to return to the UK, but not in a custodial setting, as a move "from Custody in Ireland to Custody in the UK would be like starting the sentence from the beginning". The report concluded by stating:-

> "At this stage, Mr. Shaw has asked if an escorted day out may again be given some consideration by the Board. As per the previous report, Mr. Shaw is requesting that some concessions might be considered as a form of acknowledging the time spent and the conduct shown by him throughout his sentence."

17. The Parole Board's recommendation to the first respondent's predecessor, in December, 2013, was that the applicant should remain in Castlerea; that he should avail of any educational opportunities available to him and continue to engage constructively with the relevant services on offence focused work.

18. The first respondent agreed with the Board's recommendations. This was communicated to the applicant in a letter dated 23rd December, 2013.

19. In 2014, the applicant initiated a repatriation application to the UK. The request was refused by the UK authorities in May, 2016.

20. On 10th June, 2014, the applicant's solicitors, Tarrant and Tarrant, wrote to the first respondent's predecessor in the following terms:-

> "[The applicant's] case has been reviewed on a number of occasions. The Probation and Welfare Service have recommended that he receive an escorted day out (Report for the Parole Board, May 2010). The Parole Board has recommended that he be considered for occasional escorted outings (9th January, 2009). Neither of these recommendations has been accepted by your predecessors. No reasons for failing to grant any form of release have been communicated by your office directly to Shaw. We ask that the reasons for so deciding be furnished to Shaw.

> Shaw's case was again reviewed by the Parole Board in 2013. No recommendation was made in respect of escorted days out or in respect of release generally.
>
> We ask that you consider granting release in this case. Moreover, in the event that you decide not to grant any form of release we ask that you provide detailed reasons for failing to do so."

21. The response from at that time was that the applicant's case was to be reviewed in approximately two years time and that the Parole Board would make its recommendations to the Minister who would then consider all recommendations put before her before making any decisions on the applicant's sentence management.

22. The applicant's solicitors wrote again on 27th April, 2015, asking that he be considered for some form of temporary release and stating that a review every three was inadequate for someone who had served more than thirty eight years in prison. It was also stated that should the first respondent refuse any form of release then detailed reasons for such refusal should be provided. The Minister was advised that a failure to provide detailed reasons would prompt proceedings.

23. The within proceedings commenced in March, 2016, by which time the Parole Board's fifth review was underway. As a result, the judicial review proceedings were adjourned from time to time to allow the review to proceed.

24. By the time of the fifth review, the applicant had been facilitated, in August, 2015, by a temporary transfer from Castlerea prison to Arbour Hill for medical reasons. In his report dated 14th March, 2016, to the Parole Board, the Governor of Arbour Hill advised that it had been deemed prudent that the applicant remain in Arbour Hill to facilitate his medical needs. It noted that the applicant was seventy years of age had served thirty nine years of a life sentence and that he had requested temporary releases in the Dublin area. It was considered, given the lengthy sentence served, that the Parole Board might go forward with "occasional temporary releases for John accompanied by prison staff".

25. In its report of 11th April, 2016, the Prison Review Committee noted that the applicant was "very frustrated that he has never got a day out of the prison in his 38 years in custody. He has had numerous escorts to hospital over the years and they have always gone off without any incident. He has no family in Ireland and has only received one family visit over the course of his sentence. He would be deeply appreciative of an escorted day out of the prison in the company of prison staff. Prison Management are of the view that this would present no security issues and would be willing to escort him to an isolated location. The Committee discussed this request and the consensus was that Mr. Shaw does not present a security issue and from a compassionate point of view, this request merits approval."

26. The Probation Officer's report dated 12th April, 2016, again noted, *inter alia*, that in 2012, a static risk assessment (RM2000) was applied to the applicant's case and that applicant had been "assessed as in the high risk category for both sexual and non-sexual offending in the long term". It went on to state:-

> "As outlined this particular static risk score did not change over time and it must be noted that in reality, Mr. Shaw's age and current medical condition as described elsewhere, would influence any dynamic assessment of his current risk."

27. The report noted the applicant's continued expression of distress at the length of time he had served in custody and his preoccupation as to why has never been granted a programme of temporary release of any description in circumstances where others serving life had been given concessions and temporary release. The report went on to state:-

> "In terms of a recommendation, humanitarian considerations would suggest that Mr. Shaw be granted a few escorted outings. Mr. Shaw has asked that the Board give consideration again to the granting of escorted days out in acknowledgement of the time served and his record of good conduct, throughout his sentence. I understand that prison management are of the view this would not present a security risk and would be willing to provide an escort for such outings."

28. On 26th May, 2016, the applicant's solicitors furnished detailed submissions to the Parole Board outlining, *inter alia*, the history of the reviews which had taken place to that point in time. The case was made that the applicant's risk of re-offending had been assessed only by reference to the RM2000 Risk Assessment tool which had been acknowledged by the Probation Service as "static" and where the Probation Service, in November, 2007, were of the opinion that "there is a need…for more detailed assessment by a forensic psychologist that might give a clearer view of those risks". The letter went on to state:

> "If this ground is to be relied on to deny Mr. Shaw release, it is submitted that there should be a body of evidence which can justify a high risk rating rather than simply reflecting static factors from 40 years ago. In stark contrast to this "very high" risk rating is the fact that Mr. Shaw has not been reported for a single infraction of prison discipline in 40 years of incarceration. This is before any other factor such as age, medical condition, degree of remorse, engagement with Probation Services, employment within the prison or humanitarian factors are considered."

29. It was also submitted that no reason was given by the Parole Board for their reversal of their 2008 recommendation that the applicant be given escorted days out, and that no reason "other than a recitation of certain factors considered" had ever been given by the Minister for the refusal to act on "the consistent recommendations of some form of temporary release" for the applicant.

30. In June, 2016, the Parole Board requested the Probation Service to carry out a dynamic risk assessment on the applicant "in order to present a fuller picture of the risk factors involved in the case". This was duly undertaken, using the "Staple 2007" risk assessment – an assessment instrument used to identify the risk of further sexual offending over twelve months if the offender is in the community, albeit used with caution in cases where it is used for long serving offenders.

31. The results of the dynamic risk assessment are contained in the Addendum Report of the Probation Officer dated 29th July, 2016. The report sets out, *inter alia*, as follows:-

> "The Staple 2007 assessment indicates a high level of risk of re-offending in John Shaw's case with the following risk areas being particularly important to target for intervention."

32. The report then goes on to cite the risk areas which were considered by the assessors. These were: poor problem solving skills; negative emotionality; deviant sexual preference; cooperation with supervision; significant social influences; hostility towards women; general social rejection; and lack of concern for others.

33. The Probation Officer's conclusion was in the following terms:-

> "In John Shaw's case, it is important to consider the extent to which his long incarceration, together with his age and health mitigate his risk in the community. Another protective factor is the absence of any indication of impulsivity over the course of sentence. While his age, health problems and length of sentence served, undoubtedly reduce his capacity for re-offending, it is of concern that John Shaw's level of offence related needs have endured. A clinical review of risk of serious harm placed him in a medium category. Persons in this category are defined as having identifiable indicators of risk of harm, the potential to cause harm but are unlikely to do so in the community unless there is a significant deterioration of protective circumstances and/or escalation of risk factors."

34. The applicant was subsequently interviewed by two members of the Parole Board on 13th September, 2016. Consequent on the report of that interview, the applicant wrote to the Parole Board on 20th September, 2016, taking issue with the manner in which some of his responses at the interview were recorded.

35. The applicant's case was ultimately reviewed by the Parole Board on 21st September, 2016. On 12th October, 2016, the Board wrote to the first respondent's predecessor in the following terms:-

> "At its meeting of 21st September 2016, the Board reviewed this case on the basis of Mr. Shaw's full dossier and an addendum to the Probation Services Report containing a dynamic risk assessment. Following a discussion by the Board Members and a verbal report given by the two members who interviewed Mr. Shaw in May and September 2016, the Board considered the Addendum Probation Report and noted the dynamic risk assessment indicates that Mr. Shaw is in the High Level Risk Category of re-offending.
>
> In [addition], the Board noted that in the conclusion of the dynamic risk assessment the report refers to the concern that his level of offence related needs have endured and states that a clinical review that a risk of serious harm placed him in a medium category. The Board also noted that, given Mr. Shaw's need to readily access hospital facilities, Arbour Hill Prison was his only practical option.
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> The Board were very conscious of the length of time Mr. Shaw has spent in custody and also his declining health. Hence, the Board recommended Mr. Shaw to remain in Arbour Hill to allow speedy access to medical treatment should it be required. The Board also recommended that he should be granted 2 days per annum of escorted outings dependant on his continuing good behaviour and at the discretion of the Irish Prison Service.
>
> The Board proposed to review Mr. Shaw's case again in two years."

36. The first respondent's decision was communicated to the applicant in a letter dated 29th November, 2016. After reprising the contents of the Parole Board's report, the letter continued, as follows:-

> "The Tánaiste and the Minister for Justice and Equality has considered the Parole Board's report in this matter and has agreed with their recommendation with regard to Mr. Shaw remaining in Arbour Hill prison, to allow him speedy access to medical treatment should it be required.
>
> However, the Tánaiste does not support the Parole Board's recommendation that Mr. Shaw be granted 2 days per annum of escorted outings.
>
> The Tánaiste in reaching her decision took into account a range of factors, including:
>
> (a) he nature and gravity of the offence to which the sentence of imprisonment being served by Mr. Shaw relates;
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> (b) he sentence of imprisonment concerned;
>
> (c) the period of the sentence of imprisonment served by Mr. Shaw;
>
> (d) the conduct of Mr. Shaw while in custody;
>
> (e) reports of, or recommendations made on Mr. Shaw by –
>
> (i) the governor of, or the person for the time being performing the functions of the governor in relation to the prison concerned,
>
> (ii) An Garda Síochána,
>
> (iii) Probation Officer,
>
> (iv) the Parole Board, and,
>
> (v) the Prison Review Committee."

The grounds of challenge

37. At the outset, counsel for the applicant accepts that the applicant has no right to temporary release. It is well established that the power to direct the temporary or early release of a prisoner is an executive function which is to be exercised by the first respondent.

38. It is also accepted that, as set out in *Lynch and Whelan v. Minister for Justice* [2012] 1 IR 1, a life sentence does not incorporate any element of preventative detention. As said by Murray C.J.

> *"It is a sentence which subsists for the entire life of the person convicted of murder. That person may, by virtue of the discretionary power vested in the executive be temporarily released under the provisions of the relevant legislation on humanitarian or other grounds but he or she always remains liable to imprisonment on foot of the life sentence should the period of temporary release be terminated for good and sufficient reason."* (at para. 64)

Later in the judgment, Murray C.J. states:

> *"The [The Criminal Justice Act 1960] specifies a range of grounds upon which a Minister may consider granting temporary release. They include preparing [the prisoner] for release upon expiration of his sentence, the reintegration of a rehabilitated prisoner in society, release on grounds of health or other humanitarian grounds. It is a necessary incident to the exercise of a purely executive discretion that the decision-maker would be bound to have , before directing a person's release on any of the possible grounds, regard to a whole range of matters of which some 12 are specified in s.2(2) of the Act of 1960 ...A decision to grant temporary release even for a short period as to permit a prisoner to attend a family funeral would necessarily involve a consideration of any potential risk that that would have for the members of the public. Such a consideration is incidental to the discretionary power and its purpose. It is not a decision on the sentence to be served. Refusing temporary release is a decision not to grant a privilege to which the prisoner has no right."* (at para. 67)

39. Furthermore, the concept of a whole life sentence, being a punitive sanction with no element of preventative detention, does not offend Article 3 of the European Convention on Human Rights ("the Convention"), once there is a possibility of a release mechanism. (The decision of the European Court of Human Rights ("ECtHR") in *Kafkaris v Cyprus* (2009) 49 EHRR 877 refers). *Kafkaris* was considered by Murray C.J. in *Lynch and Whelan:*

> *"…The European Court of Human Rights continues to recognise that a mandatory life sentence as a punitive measure for a serious crime imposed in accordance with national law does not as such offend against any provision of the Convention provided at least that national law affords the possibility of review with a view to its commutation or conditional release (see Kafkaris v. Cyprus…"* (at para. 94)

40. In the case of *Lynch and Whelan v. Ireland (Apps. Nos. 70495/10 and 74565/10* (18th June, 2013)), the ECtHR considered the issue of mandatory life sentences in the Irish context in the following terms:

> "*The Court has already accepted…that preventative considerations are not part of Irish criminal law generally, and a fortiori when it comes to the imposition of a mandatory life sentence. The existence of an executive power of temporary release, which takes account of factors of security and risk and which is routinely exercised, does not entitle the applicant to a judicial procedure to test the ongoing legality of his current imprisonment…The Court notes in any event that the power of the Minister is subject to legal safeguards…*" (at para. 44)

41. In the within proceedings, the applicant challenges the decision of 29th November, 2016, on the basis that:

> (i) it fails to meet the natural law requirement to give reasons for decisions;
>
> (ii) the operation of the current system governing the granting of temporary release did not afford the applicant a fair and effective system for applying for rehabilitative release.

42. The applicant also challenges, as unconstitutional, the requirement on him to pay stamp duty in order to allow the within proceedings to be taken.

43. Each of these grounds of challenge will be considered in turn.

44. At this juncture, and before turning to the grounds of challenge, it is apposite to set out the applicable statutory provisions governing temporary release.

45. The executive power to direct the temporary release of a serving prisoner (including those serving life sentences) is contained within s. 2(1) of the Criminal Justice Act, 1960 ("the 1960 Act") (as fully substituted by the Criminal Justice (Temporary Release of Prisoners) Act 2003. It provides:

> "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 (including if appropriate, any condition under s.108 of the Criminal Justice Act 2006) 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…"

The "reasons" ground

The applicant's submissions

46. The case made on the applicant's behalf is that in circumstances where he has only a limited opportunity to make representations in writing in respect of any proposed temporary release, and where he has spent in excess of forty years in prison, there should be detailed reasons given as to why the first respondent did not accept the recommendation of the Parole Board that the applicant be granted two days per annum of escorted outings. It is submitted that even where the grounds of review by the Court are limited to a consideration as to whether the first respondent's discretion has been exercised arbitrarily, capriciously, or unjustly (which, it is accepted, is the requisite test, as set out in *Kinahan v. Minister for Justice* [2001] 4 I.R. 454), that does not absolve the first respondent of the obligation to provide reasons for the decision. It is contended that no reasons are provided for the refusal to accept the Parole Board's recommendation.

47. The absence of reasons hampers the applicant's right to make representations. Moreover, access to reasons is required in order that the applicant might better prepare for any future release, and so that he might seek to modify his behaviour in a fashion deemed credit worthy by the Parole Board. As matters stand, in the absence of reasons, the applicant does not know what he should now do to change the first respondent's mind. It is contended that the reference in the decision letter of 29th November, 2016, to the Parole Board's proposal to review the applicant again in two years time is rendered meaningless and devoid of logic given that the first respondent's predecessor has not said why she disagreed with the Board's recommendation. Accordingly, the applicant does not know what deficit exists on his part as such deficits have not been identified. Effectively, the first respondent has not said how she reached her decision.

48. The applicant submits that both he and the Court are unaware as to why the first respondent has not accepted the Parole Board's recommendation and that, accordingly, this offends against the rationale as to why reasons are important, as referred to by Blaney J. in *International Fishing Vessels Limited v. the Minister for Marine* [1989] I.R. 149, and as quoted by Fennelly J. in *Mallak v. Minister for Justice* [2012] 3 I.R. 297 (at para. 57).

49. The applicant contends that it is impossible for him to address the first respondent's concerns and thus make a further effective application for temporary release when he is completely ignorant of those concerns. For the same reason, it is not possible for him to ascertain whether he has a ground for judicial review and, by extension, it is not possible for the Court to exercise its power of judicial review. Accordingly, it is submitted that the applicant's right of access to the court has been diminished.

50. It is submitted that the deficits of knowledge are all the more important in the applicant's case given that he is on his fifth review. Furthermore, it has not been suggested that the applicant would be wasting his time were he to re-apply for temporary release, nor

has it been suggested that he will never get temporary release. However, the facility of a further application is rendered meaningless given that no reasons for the present refusal have been given.

51. Counsel also submits that the Parole Board's recommendation of two escorted outings per year was a realistic approach, the only concern being a lack of insight on the applicant's part. That notwithstanding, all of the agencies involved with the applicant had recommended escorted days out which was , it is submitted, indicative of the step by step approach being adopted. Yet, against all of this, the first respondent does not say how the decision not to adopt the Parole Board's recommendation was reached.

52. While it is accepted that the quality of reasons may not be the same in all cases, in the instant case, given the nature of the respondent's power, the history of the case and the successive rejections of temporary release to date, the law requires that a reason be given, no matter how cursory, so that the applicant knows why the Parole Board's recommendation was rejected.

The respondents' submissions

53. Contrary to the applicant's submissions, the respondents contend that appropriate and sufficient reasons for the decision to refuse the applicant's request for temporary release have been provided, given that the first respondent clearly informed the applicant of the matters which were taken into account in reaching her decision.

54. Citing *Murphy v. Ireland* [2014] 1 I.R. 198 and *Bradley v. the Minister for Justice, Equality and Law Reform* [2017] IEHC 422, the respondents maintain that it is not the position in a case such as the present, and having regard to the particular statutory regime in issue, that the first respondent was required to analyse and parse matters to the extent claimed by the applicant.

55. It is further submitted that the reasons set out in the letter of 29th November, 2016, must be viewed in the context of what preceded the decision, including the four earlier reviews, which were never challenged by the applicant.

56. It is submitted that, as is clear from the decision of 29th November, 2016, the first respondent had regard to the statutory factors which were considered relevant to the applicant's circumstances. The first respondent had regard to the dynamic risk assessment, which was specifically referred to in the decision letter. The report of the Parole Board is also specifically referred to. Accordingly, there is no basis for the applicant to argue that no reasons were provided.

57. The respondents maintain that it is not the case that *Mallak* requires there has to be extensive reasons in every case. Moreover, the factual matrix in *Mallak* was a world away from the applicant's circumstances.

58. While it maybe argued that the decision in issue here might have been better phrased, it is submitted that both from the decision letter, and the process which preceded it, the applicant knows the rationale for the refusal of the Parole Board's recommendation; this is clear from the first respondents specific reference to the dynamic risk assessment and the Parole Board's letter of 12th October, 2016.

59. It is not the case that the first respondent has to expand the reasons given to the extent of providing "the gist of the information" which lies behind the reasons which have been provided, as is made clear in *Campbell v. Minister for Justice, Equality and Law Reform* [2010] IEHC 197 and *McKevitt v. Minister for Justice, Equality and Law Reform* [2015] 1 I.R.16.

The applicant's reply

60. In reply to the respondents' submissions, counsel for the applicant maintains that the respondents' reliance on *Bradley* is misplaced given that reasons were in fact set out in the decision letter in *Bradley*. Moreover, in *Kinahan* (also relied on by the respondent), a reason was given for the refusal of temporary release and the decision letter in that case advised the applicant to take a certain course which would be of benefit for future applications. It is submitted that this did not occur in the present case. Counsel submits that the respondents wrongly conflate the giving of information with reasons.

Consideration

61. It is not in dispute, notwithstanding the discretion vested in the first respondent as regards the granting of temporary release, and notwithstanding the narrow confines of a judicial review where executive privilege is involved, that reasons have to be given for a decision such as the present, for the reasons articulated in *Mallak*. In *Mallak*, Fennelly J. put the matter as follows:

> *"[45] It cannot be correct to say that the "absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons. As Henchy J. put it, in a celebrated passage in his judgment in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642, at p. 658, "the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires,* inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.*
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> *…*
>
> *[47] The fact that a power is to be exercised in the "absolute discretion" of the decision maker may well be relevant to the extent of the power of the court to review it. In that sense, it would appear potentially relevant principally to questions of the reasonableness of decisions. It could scarcely ever justify a decision maker in exceeding the limits of his powers under the legislation, in particular, by taking account of a legally irrelevant consideration. It does not follow from the fact that a decision is made at the absolute discretion of the decision maker, here the Minister, that he has no reason for making it, since that would be to permit him to exercise it arbitrarily or capriciously. Once it is accepted that there must be a reason for a decision, the characterisation of the Minister's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply.*
>
> *…"*

62. *Mallack* is also authority for the proposition that the giving of reasons is aligned to the entitlement of an individual to challenge an administrative or executive decision in the courts. Fennelly J. put it as follows:

> *"[66] In the present case, the applicant points to the effective invitation to him to "reapply for the grant of a certificate of naturalisation at any time". That statement might reasonably be read as implying that whatever reason the Minister*

had for refusing the certificate of naturalisation was not of such importance or of such a permanent character as to deprive him of hope that a future application would be successful. While, therefore, the invitation is , to some extent, in ease of the applicant, it is impossible for the applicant to address the Minister's concerns and thus to make an effective application when he is in complete ignorance of the Minister's concerns.

[67] More fundamentally, and for the same reason, it is not possible for the applicant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, it is not possible for the courts effectively to exercise their power of judicial review.

[68] In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

63. The approach in *Mallak* was considered in K*elly v. The Commissioner of An Garda Síochána* [2013] IESC 47, albeit in relation to the duty on the Board of Inquiry to give reasons for its findings. In *Kelly*, an appeal to the Board of Appeal by a member of An Garda Síochána, whose dismissal had been recommended following a disciplinary inquiry, was rejected as being without merit, with the Board of Appeal failing to give any reasons for the decision. O'Donnell J. opined:

"Unlike the decision on naturalisation at issue in Mallak *the decision here cannot be described as conferring a privilege. Again unlike* Mallak*, the decision is subject to a formal appeal process. Accordingly it might be possible to say that the case is a fortiori the position in* Mallak *and that reasons are required as a matter of general law. However, in my view, such a conclusion can be arrived at without recourse to more general propositions, and by an analysis of the Regulations themselves.*

…

In my view, therefore, a proper interpretation of the Regulations requires that reasons be given for any determination made by the Board of Inquiry unless it can be said that the issue is so self-evident and narrow that the mere fact of the decision discloses the reason." (at pp.19, 22)

While acknowledging that it was quite possible that the Board of Appeal correctly and scrupulously applied the requisite test under the applicable Regulations, O'Donnell J considered it "*fatal*" that "*neither this Court nor the High Court has any way of knowing that it did so*." (at p. 25).

64. In *Rawson v. Minister for Defence* [2012] IESC 26, Clarke J. addressed the requirement for sufficient information as to the basis of a decision as follows:

"However, if a person affected does not have any sufficient information as to the question which the decision maker actually addressed then it surely follows that that person's constitutional right of access to the courts to have the legality of the relevant administrative decision judicially reviewed is likely to be, in the words of Murray C.T. in Meadows, "rendered either pointless or so circumscribed as to be unacceptably ineffective". (at para. 6.10).

65. In *EMI Records Limited v. Data Protection Commis*sioner [2013] IESC 34, with reference to *Rawson* and *Meadows*, Clarke J. opined:

"*It follows that a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends."* (at para.6.5)

66. In the within application, the applicant contends that the simple recitation of statutory provisions and information gleaned from reports (as, it is submitted, happened in this case) does not equate to reasons. It is said that this is clear from the decision of Kelly J. in *Deerland v. Aquaculture Licences Appeals Board* [2009] 1 I.R. 673. The learned judge stated:

"I do not accept that a pro forma recitation of the matters which are contained in the first respondent's decision amounts to a compliance with its statutory obligation to state its reasons for such decision. The reference to it being satisfied that it was in the public interest to make the determination is a conclusion reached by it but no clue is given as to how such a conclusion was reached." (at para. 59)

67. The respondents submit however that there is no obligation on the first respondent to provide a detailed analysis or a weighting of factors, as the statutory framework does not require such an approach. They point to what is said by O'Donnell J. in *Murphy v. Ireland* [2014] 1 I.R. 198. That case concerned the decision of the Director of Public Prosecutions to try the applicant before the Special Criminal Court for tax offences. In respect of the obligation of the Director to provide reasons for the decision, O'Donnell J., with reference to *Mallak*, opined:

"[40] However, the decision in Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 I.R. 297 was rather more nuanced than a simple citation in these paragraphs would suggest. The judgment points to s. 18(2) of the Freedom of Information Act 1997, which introduced in to Irish law a statutory entitlement to reasons. However, the Director is not subject to that Act in respect of prosecutorial decisions. Mallak v. Minister for Justice undoubtedly brings the common law on the duty to give reasons into line with the obligations of statute, but it does not address the question whether the common law requires decision makers to go further than the statutory requirement. Put another way, the considerations which underpin the limitation and the scope of the statutory right to reasons may also be effective at common law. The decision in Mallak v. Minister for Justice refers, without disapproval, to the decision in Eviston v. Director of Public Prosecutions [2002] 3 I.R. 260 and also to The State (Lynch) v. Cooney [1982] I.R. 337 where there was limited right of review and no reasons were provided until the High Court hearing. Perhaps most notably, the decision in Mallak v. Minister for Justice contemplated the possibility, at para. 77, p. 324, that a decision maker could comply with the requirements of the law not by disclosing reasons but rather by providing justification for refusing to do so.

> *[41] The obligation to give reasons is, as has been observed, dependent upon and a reflection of the reviewability of the decision and the scope of that review. The decision made here is at the end of the spectrum, where review is most limited and attenuated.*
>
> *…*
>
> *[43] …It follows, however, that the entitlement to obtain such reasons does not carry with it any right contended for by the plaintiff to obtain the gist of information grounding such a decision or to have a hearing or to make submissions before a decision is made. The facts and argument in a case such as this lie in a fairly narrow compass. The question, in any case, is whether the Director was entitled to consider that the ordinary courts were inadequate to secure the administration of justice in a particular case. Review of such a decision should be the exception and never the routine, and only when an accused person can put forward a substantial case that the decision making process has miscarried. The legal position outlined above balances the desirability of reasoned decision making to strengthen the administration of justice with the necessity to ensure that the process is tightly controlled to avoid routine disclosure and review, which could undermine it."*

68. Thus, what is in issue in the present case is the extent to which the first respondent was obliged to set out the basis of the refusal to accept the recommendation of the Parole Board that the applicant be afforded two escorted outings per annum. The first thing to be observed is that the decision as to whether to grant temporary release is one reserved to the first respondent as an executive function, and not the Parole Board or other agency which may have an input into any recommendation made by the Board. The next thing to be observed is that the first respondent is not at large on the question of temporary release. What must be considered is prescribed by statute, as set out above. It is stated in the decision letter that regard was had to a range of factors, (as prescribed by Statute) including the nature and gravity of the offence for which the applicant was imprisoned, the sentence of imprisonment concerned, the period of imprisonment served by the applicant, his conduct while in custody and the reports and/or recommendations of the governor, gardaí, Probation Officer, Prison Review Committee and Parole Board. On their face, these are valid reasons as expressly provided for by s.2(2) of the 1960 Act.

69. Moreover, the Parole Board's report of the applicant's fifth review is fully set out in the letter of 29th November, 2016. The Board's report makes specific reference to the applicant's contention that he was no longer a risk and to the Probation Officer's Addendum Report which contained the results of the dynamic risk assessment undertaken in mid 2016.

70. It is specifically stated that the first respondent considered the Parole Board's report. That such a consideration was in fact afforded is in any event clear from the reprise of the Board's fifth review in the decision letter, and to the fact that the Board's recommendation that the applicant remain at Arbour Hill was accepted by the first respondent. Overall, I am satisfied that the applicant's application for temporary release, and indeed the Parole Board's recommendation, received requisite individual consideration by the first respondent.

71. As effectively put by counsel for the applicant, the fulcrum upon which the "reasons" challenge turns is the extent to which the first respondent was obliged to be more discursive than she was in rejecting the recommendation that the applicant be afforded two escorted outings per year.

72. In submitting that adequate reasons are set out by virtue of the reference to the statutory factors to which the first respondent had regard coupled with the recitation of the results of the dynamic risk assessment in the decision letter, counsel for the respondents relies on the *dictum* of O'Donnell J. in *Murphy v. Ireland*, already quoted above. While I do not necessarily agree with the respondents' suggestion that the reviewability of the present decision is "*at the end of the spectrum, where review is most limited and attenuated*", it remains the case that what is under consideration by the Court is an executive decision in which the Court may only interfere where the decision can be said to have been arrived at capriciously, arbitrarily or unjustly.

73. Insofar as the applicant relies on the decision of Kelly J. in *Deerland Construction*,I am not persuaded that the situation in the present case can be said to be analogous with *Deerland Construction* in circumstances where, as regards the latter case, it was specifically provided by the relevant statute (the Fisheries (Amendment) Act 1997) that both the Aquaculture Licences Appeals Board's determination of the appeal from the grant of a licence and its notification of that determination "*shall state the main reasons and considerations on which the determination is based"* (Section 40(8)). Moreover, as observed by Kelly J., given that the legislature positively required the Aquaculture Licences Appeals Board to state its reasons, "*[t]he giving of these reasons and indeed their adequacy is a condition of the legality of the determination*" of the Aquaculture Licences Appeals Board (at para. 85).

74. In *Bradley*, an enhanced remission case, (and upon which the respondents rely) Ní Raifeartaigh J. affirmed the approach of Finlay C.J. in *Murray v. Ireland* [1991] ILRM 465 that the court was not to look beyond the decision-making of the first respondent unless there was clear evidence that the decision was arbitrary, capricious, or unjust. She stated:

> *"8. It is clear that when the Minister, or an official on her behalf, is making an assessment of whether a prisoner should be given enhanced remission, she is exercising an executive function in accordance with the powers provided for under Article 13.6 of the Constitution and as provided for by legislation. There was no dispute between the parties that, in those circumstances, the standard of review by the courts is whether the Minister's decision was capricious, arbitrary or unjust, as described in Murray and Anor v. Ireland [1991] I.L.R.M. 465, and* Kinahan v. Minister for Justice and Equality and Ors *[2001] 4 I.R. 454 . The test is emphatically not whether the court would have reached a different conclusion itself and the range or scope of review is narrow. This was confirmed as recently as 2015 by the Court of Appeal in McKevitt v. Minister for Justice & Ors [2015] IECA 122.*
>
> *…*
>
> *10. It seems to me that, similarly, although the scope for judicial review of decisions on applications for enhanced remission is, for good reasons related to the constitutional separation of powers, limited in scope, this does not mean that such review is non-existent. However, the Court should be careful not to overstep the boundaries and the underlying good reasons for the narrow scope of the zone of reviewability must at all times be borne in mind."*

75. In *Kinahan*, Hardiman J. referred to the earlier dicta of Murray C.J. in *Murray v. Ireland*, stating:

> *"Having dealt with other contentions in relation to the conditions of imprisonment, the learned Chief Justice at p.473 continued:-*

> *'The exercise of these powers of 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.'*
>
> *In my view, 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 circumstance in which the court would be justified in interfering with a decision in relation to temporary release."*

76. Counsel for the respondents also relies on *O'Brien v. The Minister for Justice, Equality and Law Reform* [2017] IEHC 199, again an enhanced remission case. In *O'Brien*, Barrett J. considered the parameters of *Mallak* and *Kelly*, and the decision of the Supreme Court in *McEnery v. the Commissioner of An Garda Síochána* [2016] IESC 66.

77. In *McEnery*, the Supreme Court quashed the decision of the Garda Commissioner confirming a proposed decision to dismiss Sergeant McEnery from An Garda Síochána. The basis for the quashing was the failure of the Garda Commissioner, following receipt of final submissions from Sergeant McEnery, to rationalise his conclusion to dismiss in the wake of the those submissions. With regard to the remission case before him, Barrett J. opined as follows:

> *"9. The actions of the decision-maker that are "at issue" in the within proceedings are far removed from those which the Supreme Court considered in McEnery. Here, an application was made, the application was given individual consideration by a civil servant by reference to the criteria in the Prison Rules, and the Minister thereafter decided that while the applicant had 'engaged in some authorised structured activity', having given regard to 'the extent to which [the applicant had]…taken steps to address [his]…offending behaviour, the nature and gravity of [his]…offence to which the sentence of imprisonment relates and the potential threat to the safety and security of members of the public ' was not satisfied that the applicant was both less likely to re-offend and better able to re-integrate into the community. That is an entirely rationalised consideration by the Minister of the applicant's application in precisely the manner contemplated by McEnery. Neither McEnery nor the preceding case-law referred to above requires that the Minister should engage with every aspect of an applicant's application for enhanced remission in exhaustive detail, providing a comprehensive compendium of answers to each aspect of every point raised. The Minister is required to provide a suitably rationalised response by reference to the facts of the application before her, and this she has done.*
>
> *10. If it is claimed, and there is a hint of this in the pleadings, that the Minister's response came in a somewhat standardised form (notwithstanding that it involved a rationalised engagement with the individual application) that, with respect, is to be expected. There are only so many reasons why one-third remission would be granted or refused. It is likely that similar reasons may ultimately be offered in many, perhaps even most cases, notwithstanding that each is individually considered. It demands the impossible of decision-makers tasked with the everyday operation of government that they should be required constantly to conceive innovative and different ways to convey what seems likely ultimately to be a broadly similar message (save as to conclusion) regardless of which way the Minister's discretion is exercised. Consistency in messaging can be compatible with individualised decision-making."*

78. Can it be said that the decision in issue in the present case admits of no reasons and merely comprises a recitation of statutory criteria, as contended by the applicant? I am not satisfied that that is the case. It is sufficiently patent from the decision letter that the applicant's present factual circumstances, and the circumstances surrounding his offences, were to the forefront in the consideration afforded to the temporary release recommendation. It is also patent that the first respondent considered the most recent report of the Probation Service which indicated that the applicant was "in the High Level Risk Category of offending" and that there was concern that his level of offence related needs have endured" and that a "clinical review of risk of serious harm placed him in the medium category." The first respondent was entitled (and indeed statutorily obliged) to consider this and indeed the other factors outlined in the letter. It cannot be said to be arbitrary, capricious or unjust on the first respondent's part that regard was had to the Probation Officer's Addendum Report in circumstances where it was procured on foot of the applicant's contention that he no longer posed a risk and that the prior risk assessment was compiled using static factors.

79. It is argued that the Parole Board's report was merely recited in the decision letter without any indication of how the first respondent viewed the Board's recommendation that two days escorted outings be afforded to him.

Counsel for the applicant queried how recommended escorted outings for a seventy two year old man in poor health could reasonably be viewed as a risk that the applicant would re-offend. It was further submitted that the decision does not in fact give the likelihood of the applicant re-offending as a reason for the decision.

80. The merits of the decision are not a matter for this Court. Equally, the fact that this Court might take an entirely different view to that of the first respondent of the Parole Board's recommendation is not the test. Furthermore, in my view, the inclusion of the Board's finding in the decision letter is indicative that all aspects of the report were considered by the first respondent. The first respondent was not obliged to adopt the Board's recommendations. What has to be established in this application (and the onus is on the applicant), is whether the applicant has been left in a position where it can be said that he is unaware of the basis for the first respondent's refusal to accept the Parole Board's recommendation for escorted outings to such extent as renders the first respondent's refusal to accept the recommendation arbitrary, capricious and unjust. I am not persuaded that the applicant has met the requisite threshold for the Court to intervene, having regard to the course of dealing between him and all relevant agencies in the course of the fifth review, and more particularly, having regard to what is in fact set out in the decision letter.

81. I accept that the manner in which the decision letter is framed leaves something to be desired. In the penultimate paragraph, the decision letter does not recite in bald terms why the first respondent did not accept the Parole Board's recommendation. In the circumstances of this case however, that frailty is not synonymous with there being no reasons given. The letter of 29th November, 2016, must be construed in its entirety and against the process which preceded it. In my view, there is sufficient information therein for the applicant to know what informed the first respondent's decision to decline the request for temporary release.

82. The applicant also submits that in his replying affidavit on behalf of the first respondent, Mr. Lynn attempts to put forward reasons for the first respondent's refusal to accept the Parole Board's recommendation which did not appear in the decision, something which is not permissible in judicial review.

83. Mr. Lynn refers, *inter alia*, to the recommendation of the Parole Board as "quite limited in terms and was made in the context of the dynamic risk assessment indicating that the Applicant remains, despite the long period of his incarceration at a high level risk of re-offending, and despite the long period of his incarceration 'his level of offence related needs have endured'". Mr. Lynn avers that "the decision of the First Named Respondent was taken after due consideration by the First Named Respondent of the substantive process and consideration of relevant issues, reports and submissions undertaking by the Parole Board, and as such the decision by the First Named Respondent was a careful and considered decision that could not be said to be arbitrary, capricious, or unjust". Counsel for the applicant contends that the Court should not take account of these averments as they constitute justification for the decision which does not appear in the decision itself. Overall, I do not accept that what is averred to by Mr. Lynn is anything other than what is recited in the decision letter itself, save Mr Lynn's comment about the limited nature of the Parole Board's recommendation. As regards the latter averment, to my mind that does no more than state what is obvious, namely that the Board's recommendation as to temporary release was in limited terms.

84. An issue raised in this case is the extent to which the forty or so years served by the applicant should have informed the first respondent's decision-making. The period of imprisonment served by the applicant was stated in the decision as a factor taken into account by the first respondent. Indeed, it is a factor which is required by statute to be considered in looking at temporary release. How the period served by the applicant was weighed against other factors in the case is not elaborated on in the decision. The failure to state how the applicant's long incarceration was weighed against other factors does not, to my mind, impugn the decision once it is clear that the first respondent took account of the factor, as required by statute. If the Court were to decide otherwise, it would, to my mind, be trespassing on a function which is solely reserved for the first respondent.

85. In all the circumstances of this case, I am satisfied that the first respondent has provided, in the words of Barrett J. in O'Brien, "*a suitably rationalised response*" to the Parole Board's recommendation that the applicant be granted two days escorted outings per year. Accordingly, I do not find that the "reasons" challenge to be made out.

Alleged unfair procedures
86. In May, 2016, the applicant's solicitors sought an opportunity to make oral representations to the Parole Board, advising of the applicant's wish to have legal representation at such meetings. This request was not acceded to.

The parties' submissions
87. It is submitted on the applicant's behalf that the refusal his request for legal representation at the interview with the Parole Board members was unfair. This is so in circumstances where the applicant is one of the longest serving prisoners in Ireland. Accordingly, the Parole Board hearings are of the greatest possible importance for him. It is submitted that the blanket prohibition on legal representation at these interviews, coupled with the inability to make an oral submission to the Parole Board itself is capable of being capricious, arbitrary and unjust. The fact that the Parole Board is not a statutory body does not absolve it of the requirement to operate in a manner consistent with fair procedures.

88. It is contended that the applicant has only one opportunity in the process as it currently exists to make oral representations, and then only to two members of the Parole Board. He has no opportunity to make any oral representations to the first respondent. In those circumstances, and in order to ensure that he is capable of advocating his case as well as can be done, it is submitted that the applicant is entitled to the benefit of legal assistance.

89. As is made clear by the ECtHR, a person who is serving a life sentence is entitled to access to a fair and effective mechanism to apply for rehabilitative release. (*Vinter & Ors. v. UK* Apps. Nos. 66069/09 130/09 and 3896/10 (9th July, 2013) and Hutchinson v. UK Application 7592/08 (3rd February, 2015) refers). It is the applicant's contention that in light of the requirement for a "*dedicated mechanism*" guaranteeing a review of a life sentence, the refusal of the applicant's request for legal representation and the right to an oral hearing before the Parole Board was unfair.

90. The basis for the refusal to allow physical legal representation before the Parole Board is set out in Mr. Lynn's affidavit, as follows:

> "12…I say that when a prisoner [indicates] his willingness to participate in a review process, the Parole Board aims to make that process responsive, sympathetic and conciliatory.
>
> …
>
> 16. I say that once [all relevant reports] and any other relevant material has been obtained the material is assembled into a Review Dossier, which when completed is furnished to the prisoner and the prisoner is given an opportunity to submit written comments thereon or provide further information. I say as is the case herein whilst legal representation was not permitted at the interview, written submissions were accepted. An informal interview is then arranged with two Members of the Parole Board where an opportunity is made available to discuss with Parole Board Members in person the contents of the Review Dossier. I say that the emphasis is always on speaking to the prisoner as informally as possible and discussing his progress with them. The review process is not at all adversarial in nature, and I say that it is not a "hearing" in the sense of inter parties court proceedings.
>
> 17. I say that following the informal review, a report of the interview is furnished to the prisoner to which she is afforded a further opportunity to make submissions thereon. The report and any further submissions are then added to the Review Dossier which is presented to each Member of the Parole Board prior to its monthly meeting to which the particular prisoner's case will be reviewed by them.
>
> 18. I say and believe that any written submissions made by the prisoner or representative of the prisoner will be considered by the Parole Board, however in the circumstances of the nature of the proceedings they are not such that require or permit of the attendance of legal representation. I say and am advised accordingly that the Parole Board does not permit legal representation for a prisoner at this informal interview or any subsequent review. … I say and am advised that legal representation at this interview would wholly undermine the non-adversarial and informal nature of the process and would be contrary to its purpose.
>
> 19. I say and believe that at all stages of the process, however, from preparation of the review dossier onwards, the prisoner is afforded an opportunity to speak on his own behalf and furnish additional information and to offer any observations or submissions that he might wish to make. I say that this includes a facility defy any written legal submissions that a prisoner believes would be helpful to the Board. The reason for permitting a prisoner to furnish written submissions on his behalf is to ensure that all relevant material including points of law are before the Parole Board when they come to make their recommendation to the First Named Respondent".

91. In aid of his submissions as to the importance of having an oral hearing before the Parole Board, counsel for the applicant cites the decision of the UK Supreme Court in *Osborn v. Parole Board* [2014] NI 154 where, *inter alia*, Lord Reed outlined the virtues of "*procedurally fair decision-making*" as incorporating, *inter alia*, "t*he avoidance of a sense of injustice which the person who is the subject of the decision will otherwise feel*" and the value to the rule of law in promoting "*congruence between the actions of decision-makers and the law which should govern their actions*". In *Osborn*, the UKSC gave guidance on the circumstances in which fairness requires an oral hearing as being "*whenever fairness to the prisoner requires such a hearing on [the] assumption … that an oral hearing has the potential to make a difference*". Lord Reed stated:

> *"82.The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.*
>
> *…*
>
> *86. An oral hearing is also necessary when for other reasons the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend upon the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist.*
>
> *87. As is illustrated by the judgments of the European Court of Human Rights in Hussain v. United Kingdom (1996) 22 EHRR 1, Singh v. United Kingdom 21 February 1996, Reports of Decisions and Judgments, 1996-I, p 280 and Waite v. United Kingdom (2003) 36 EHRR 54, cases concerning prisoners who have spent lengthy periods in custody are likely to fall into the first of these categories, since an independent assessment of their continuing dangerousness will require a judgment to be made of the extent to which they have developed over the period since their conviction: a matter which cannot normally be independently and fairly assessed without seeing the person concerned".*

92. It was also made clear in *Osborn* that the grant of an oral hearing should not be dependant on a realistic prospect of success. Citing Article 5(4) of the Convention, Lord Reed stated:

> *"112. The conditions mentioned by the European court are likely to apply to most indeterminate sentence prisoners who have served their minimum terms. That is not to say that they will necessarily apply on every occasion when such a prisoner's case is considered by the board: a prisoner's case may be considered in different circumstances and at different intervals of time. Bearing in mind however that the continued detention of a post-tariff prisoner must be justified by his continuing dangerousness as independently assessed by the board, and taking account of the importance of what is at stake, it will in most cases be necessary as a matter of fairness that he should have an opportunity to appear in person before the board. That is consistent with the common law, as explained earlier."*

93. By reason of the foregoing, counsel for the applicant contends that it is not sufficient for the respondents to say that the process is an informal matter. While it is acknowledged that Article 5(4) of the Convention applies to post tariff situations as occur in the UK, it is nevertheless the applicant's contention that the fair procedures requirements as outlined in *Osborn* apply in the present case. Accordingly, it is submitted that the Parole Board cannot rely on the discretionary nature of the ministerial power being exercised to decline a request for an oral hearing.

94. It is submitted that in the applicant's case, in circumstances where he has been incarcerated for over forty years, and where the Parole Board have on earlier occasions made mistakes of fact in dealing with his case (as were outlined in the applicant's solicitor's submissions to the Parole Board and by the applicant himself), the applicant should have the fullest level of participation possible at the Parole Board hearing. The applicant maintains that it is axiomatic that a person whose interests are affected by a decision should be given an opportunity to make representations to the decision maker. The applicant does not contend for a full court process; rather what is sought is that the review procedure be of a judicial character. It is thus submitted for all of the reasons set out, and in particular in the absence of an oral hearing before the Parole Board with physical legal representation, the applicant has not had access to a fair and effective system of applying for rehabilitative release such as amounts to arbitrariness, capriciousness and unfairness in the decision-making of the first respondent.

95. The respondents contend that the applicant's fair procedures complaint is entirely misconceived. It is submitted that his representations were taken account of throughout the various engagements he had in the course of the fifth review, which itself makes reference to the prior reviews, where again the applicant's representations were considered. It is submitted that there can be no basis to suggest the applicant's representations were not taken on board by the Parole Board in the course of the fifth review, as evidenced by the entire of the process involved in the fifth review and by the recommendations which the Board ultimately made.

Consideration

96. In the first instance, in so far as reliance is placed by the applicant on the decision of the UK Supreme Court in *Osborn*, I am satisfied that that case has no particular application to the applicant given that his circumstances relate only to a wholly punitive sentence and not the preventative detention scenario which operates in the UK.

97. The right to legal assistance before the Sentence Review Group (the precursor to the Parole Board) was considered in *Barry v. Sentence Review Group* [2001] 4 I.R. 167. Butler J. opined, at para. 9:

> *"As indicated, the applicant has at all material times had the benefit of independent legal advice and representation and his entitlement thereto is not at issue. What is at issue is whether he should be entitled to representation at an oral hearing before the first respondent. I do not believe that this is necessary to satisfy the requirements of fair procedures. The function of the first respondent is purely an advisory one and it exercises no power akin to a disciplinary body. It meets for the purpose of coming to a recommendation in a non-adversarial way. To introduce full legal representation at a formal hearing would, in my view, be disproportionate and would have the effect of changing the whole character of the procedure set up by the second respondent."*

98. The approach of Butler J. was adopted by McMahon J. in *Grogan v. Parole Board* [2008] IEHC 204.

99. The respondents submit that the relevant jurisprudence on the question of the entitlement to an oral hearing is that set out in *Barry* and *Grogan*, both of which state that there is no requirement for the granting of an oral hearing with physical involvement of lawyers before the Parole Board.

100. The applicant contends that *Barry* and *Grogan* must now be viewed in light of the comments of the ECtHR in *Vinter* and *Hutchinson*, as to the requirement for a "*dedicated mechanism*" guaranteeing a review of a life sentence. Counsel for the applicant also submits that the jurisprudence of the Supreme Court in *Director of Public Prosecutions v. Gormley & White* [2014] IESC 17 admits of a greater tolerance for the presence of lawyers in situations where previously they had not been welcome.

101. The applicant submits that in that context, *Barry* and *Grogan* no longer reflect the law in Ireland, as these cases do not incorporate the experience of lawyers in non-adversarial settings, the increased role for lawyers in *quasi* judicial and administrative settings and the increasing understanding of the role of Article 3 of the Convention in whole life sentences. It is submitted that the stark exclusion of lawyers from the Parole Board setting is a fixed, invariable and blanket prohibition and that it is, accordingly, arbitrary and unjust.

102. I cannot agree with this submission. In the first instance, I am satisfied that there clearly exists what is in effect a "*dedicated mechanism*" for the review of sentences such as that being served by the applicant, albeit that the Parole Board is not on a statutory basis. The Parole Board reviews the cases of prisoners serving life sentences and fixed sentences of eight years or more. More importantly, I find nothing in the jurisprudence of the ECtHR which prescribes the form which a review of a sentence (including a life sentence) should take. On the contrary, in Vinter, the ECtHR opines as follows:

> "*However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing…it is not its task to prescribe the form(executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. That being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews hereafter…*" (at para. 120)

103. In *Lynch and Whelan v. Ireland*, the ECtHR reprised this view:

> *"It is well established in the Court's case law that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention…Further it is not this Court's task to prescribe the form (executive or judicial) which review of a life prisoner's sentence should take…It is also settled case-law of the Court that Article 6(1) covers criminal proceedings in their entirety, including appeal proceedings and the determination of sentence…*" (at para. 49)

104. I am also satisfied that the following *dictum* of McMahon J. in Grogan remains a correct statement of the law.

> *"…the stage of the process which the applicant wishes to participate in is the advisory stage. The parole board does not make a decision to reduce or leave the sentence stand. The parole board can only make representations to the Minister who is the decision maker in the process. The phase at which the parole board operates is very much preliminary to the decision making stage. There is nothing preventing the applicant from writing or making a submission to the Minister if he so wishes. I am not, for a moment, suggesting that State aid would be available to him to make such a submission, but to argue that it should be available at an advisory stage prior to the decision maker's role is difficult to sustain. No legal skills associated with lawyers are required or needed to persuade the board to make a positive recommendation. This is not affected in my view by the allegation by the applicant that the Minister follows the recommendation of the parole board in most cases. The legal position is that he is not obliged to and does not do so in some cases.*
>
> *…*
>
> *The procedure before the parole board is one, where to allow humanitarian intervention to be considered in a rehabilitatory context, formality is dispensed with. The board's primary function is to encourage the prisoner and to suggest programmes which if embraced by the prisoner, may commend themselves to the board to make a positive advisement to the Minister. The board is not there to determine the innocence or guilt of the applicant, much less to second guess the sentence imposed by the court. To attempt to do so would be to usurp the functions which reside elsewhere under our constitution. Neither is the process an adversarial one. It is not even a fact finding tribunal, rather it is more of an assessment process made on the prisoner's willingness to reform. To acknowledge the need for fair procedures in such a situation would be to overstate the significance of the board's powers and would detrimentally distort the nature of the process."*

105. In the course of his submissions, counsel for the applicant relied on *DPP v Gormley & White.* There, Clarke J. opined:

> *"…the question as to whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of this case for the questioning in respect of which complaint is made occurred before the relevant lawyer even arrived. However, it does need to be noted that the jurisprudence of both the ECtHR and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present*." (at para. 9.10).

106. In the same case, Hardiman J.stated:

> *"For many years now judicial and legal authorities have pointed to the likelihood that our system's option for the very widespread questioning of suspects who are held in custody for that purpose, was very likely to attract a right on the part of such suspects, not merely to be advised by lawyers before interrogation, but to have lawyers present at the interrogation, and enabled to intervene where appropriate. This has now come to pass in countries with similar judicial systems…"*

107. I am not persuaded that what was said by the learned judges in that case has any particular bearing on the applicant's circumstances given that the core issue which arose in *Gormley & White* was whether a person arrested on foot of serious criminal

charges is entitled to the benefit of legal advice prior to the commencement of any interrogation and prior to the taking of samples for the purpose of forensic examination. These issues were considered in the context of the constitutional entitlement to a trial in due course of law. That is, to my mind, a considerable remove from what is in issue in the present case.

108. In all the circumstances, I am not persuaded that the applicant has made out his challenge on the fair procedures ground. It cannot be said that he was not given full opportunity to make his case in the course of the fifth review. The opportunities afforded to him to make his case are clear from the process in which he engaged, as evidenced by the materials put before the Court, and as referred to in Mr. Lynn's affidavit. The function of the Parole Board is to provide an advisory role to the first respondent in the exercise of the first respondent's discretion. There is no suggestion that the Parole Board did not abide by the processes set in place in order for it to be in a position to assist the first respondent in the consideration of the management of the applicant's sentence, and which are described in "A Guide to the Parole Board Information for Prisoners". As evidenced by the papers in this case, the applicant had a number of avenues through which his views could be and were expressed, not least through the reports of the Governor, Sentence Review Committee and Probation Officer. He participated in two interviews with the two members of the Parole Board who were designated to interview him. More importantly, the applicant had the benefit of legal assistance. Letters were written on his behalf by his solicitors prior to the commencement of the fifth review and written legal submissions were furnished on his behalf to the Parole Board in the course of that review. I note that it was following the complaint made in those submissions as to the static nature of the RM2000 risk assessment that the dynamic risk assessment of the applicant took place. Furthermore, the applicant availed of an opportunity to write to the Board taking issue with what was said to be the interviewers' misstatement of answers given by him in the course of the interview and with their having raised certain matters which the applicant contended were outside of their remit. All of this engagement took place as envisaged in the first respondent's information Guide for prisoners, as referred to previously.

109. I am also satisfied that the provision for a further review by the Parole Board of the applicant's case in late 2018, as advised by the decision of 29th November, 2016 is a sufficiently proportionate response to the factual matrix which presents, namely the length of time the applicant has spent in prison, his age and health issues.

110. In all the circumstances of this case, I am satisfied that the applicant has been afforded the full panoply of fair procedures due to him. Accordingly, the fair procedures ground has not been made out.

The Stamp duty challenge

111. In the context of the present application for leave for judicial review, the applicant was obliged to pay stamp duty. The payment of such fees is prescribed in the Supreme Court, Court of Appeal and High Court (Fees) Order 2014 S.I. 492 of 2014 ("the 2014 Order").

112. Section 5 of the 2014 Order provides that no fees shall be payable in connection with

> "(a) proceedings under Article 40.4 of the Constitution,
>
> (b) proceedings under the Extradition Acts 1965 to 2012
>
> (c) proceedings under the European Arrest Warrant Acts 2003 and 2012,
>
> (d) bail proceedings, or
>
> (e) an application (in proceedings for a criminal offence) for judicial review under Order 84, rule 18 … of the Rules of the Superior Courts …"

113. It is acknowledged by all concerned that the applicant does not qualify for an exemption from stamp duty as provided for in s. 5(e) of the 2014 Order. He was obliged to pay stamp duty. As he has been incarcerated since 1976 and has no assets or income, his solicitor paid the stamp duty fee in order that the within proceedings could be taken.

114. It is submitted on the applicant's behalf that albeit he can (and has) made an application to the Court for a recommendation under the Legal Aid – Custody Issues Scheme which applies to forms of litigation not covered by the Civil or Criminal Legal Aid Scheme, there remains the obligation on him to pay stamp duty in the within proceedings where he has invoked a formal application to the Court for leave for judicial review.

115. While it is accepted that the applicant is impecunious and that he cannot benefit from the exemption provided for in s. 5(e) of the 2014 Order, it is the respondents' case that the applicant has not been denied access to the courts given that he has commenced the within proceedings with legal representation and given the existence of a facility by prisoners for direct access to the High Court.

Consideration

116. The question to be addressed is whether the absence of an exemption from stamp duty for someone in the applicant's circumstances renders the 2014 Order unconstitutional.

117. The issue of whether the requirement to discharge stamp duty and other minor High Court costs could have the effect of denying an impecunious applicant access to the courts was considered by the Supreme Court in *Murphy v. the Minister for Justice, Equality and Law Reform* [2001] 1 I.R. 95. In that case, the Supreme Court held, *inter alia*, that the Constitution did not imply any general prohibition on the imposition of duties or charges which might have the effect of inhibiting civil litigation as all public services must be funded by monies derived from the public either by general taxation or by a charge related to the service rendered or by some combination of both of them; that Article 40.3 of the Constitution provided for an unenumerated personal right of recourse to the High Court to defend and vindicate a legal right and that this right must not be precluded by the State which must vindicate and respect the right of the citizen to have access to the courts; that, in order for a court to determine whether charges fixed by the Fees Order or any other order were unreasonable, regard would have to be had the nature of the charges as well as to the amounts and that the obligation on a litigant to pay court fees must be seen in the light of the obligation on the State to provide legal aid or comparable facilities in certain circumstances; and that in order to consider the impact of particular court fees, the court would need to know the full circumstances of the intended plaintiff and the options or facilities available to him.

118. Speaking for the Supreme Court, Murphy J. opined:

> *"The applicant is certainly correct in asserting that there is a right to have recourse to the High Court to defend and*

vindicate a legal right and this is one of the personal rights of the citizen included, but not enumerated, in the general guarantee provided by Article 40.3 of Bunreacht na hÉireann. That such a right exists was established by the decision of the High Court in MacAuley v. Minister for Posts & Telegraphs [1966] I.R. 345. The State may not preclude the right of access to the courts. More than that, the State must vindicate and respect the right of the citizen to have access to the courts.

The constitutionality of imposing duties or fees on civil litigation was considered by the High Court (O'Hanlon J.) in MacGairbhith v. Attorney General [1991] 2 I.R. 412. The plaintiff's claim in that case was expressed bluntly in the statement of claim in the following terms:-

> *"The plaintiff says that he should not have to pay money to gain access to any court in the country."*
>
> *In commenting generally on that assertion O'Hanlon J. said at p. 413:-*
>
> *"The plaintiff has raised an important issue and one which has caused considerable concern in legal circles as well as among ordinary laymen. The levies payable to the State by litigants in the form of stamp duty on legal documents and other charges have risen in our own time to levels which would have been unthinkable in former times. On top of these standard charges of which the plaintiff complains, the imposition of a value-added tax on solicitors' and barristers' fees (initially at 25%) must have had a calamitous effect on litigants who had no possibility of setting it off against value-added tax credits to which they might have been entitled. These charges levied by the State are the price the citizen has to pay for access to the courts where his rights under the Constitution and the ordinary law are to be protected, and disputes are to be resolved between parties in an orderly and acceptable manner. I have no doubt that the frightening cost of litigation, made up in part of these heavy charges levied by the State, are a major deterrent to people who wish to have access to the courts established under the Constitution and may in many cases actually prevent parties from availing of rights nominally guaranteed to them under the Constitution."*

Unfortunately O'Hanlon J. felt unable to express any view on the constitutionality of the impugned duties. He explained the problem which he faced in the following terms at p. 413:-

> *"I do not think, however, that the present case is an appropriate one for passing judgment on the constitutionality of the charges which are the subject of complaint by the plaintiff. Before such an important issue could be resolved it would be necessary to put before the court much more detailed evidence than has been given in the present case concerning every aspect of intervention by the State in the work of the law courts for the purpose of raising revenue for the public finances…"*

…The fixed fees imposed by the Fees Order range from £3 to £60 and the particular fees challenged by the applicant herein were £10 and £7 respectively. Nobody would dismiss these fees - even the lesser ones of them - as being irrelevant and it is clear that they could present a significant burden to a person whose only income was derived from social welfare payments. However, these obligations must be seen also in the light of the obligation on the State to provide legal aid or comparable facilities in certain circumstances. In criminal cases, not merely is a system of legal aid provided, but this court has held in The State (Healy) v. Donoghue [1976] I.R. 325, that a poor person facing a serious criminal charge has a constitutional right to such assistance. Again, the system of civil legal aid was a response to the judgment of the European Court of Human Rights in Airey v. Ireland (1979) 2 E.H.R.R. 305, which held that the failure to provide legal aid for the legal proceedings necessary to obtain a judicial separation was a violation of the European Convention on Human Rights. Again, there are a variety of proceedings such as habeas corpus, certiorari, mandamus *and prohibition which, insofar as they relate to the liberty of the subject, may be financed out of funds provided through the Attorney General at the request of the court.*

It would be impossible to consider the impact of particular court fees without knowing the full circumstances of the intended plaintiff and the options or facilities available to him but what can be said in the present case is that the two charges of which the applicant complains and amounting in total to £17 do not appear to have presented a significant obstacle to his engaging in litigation having regard to the other proceedings which he has pursued and in particular the appeal herein. One would not have thought there should be any significant difficulty in raising a sum of £17 to pursue the limited objective of applying for judgment in default at the stage when the defendants were several months in arrears with their pleadings.

Furthermore, the evidence has not negatived the availability to him of civil legal aid to pursue his claim.

Whilst the applicant made his argument with clarity and commendable restraint I am satisfied that his argument and the facts on which he relied fell well short of establishing that the Fees Order was unconstitutional or ultra vires the powers of the Minister by whom the same was made…" (at pp. 99-102)

119. On the applicant's behalf, it is submitted that since he had no assets, there is no proportionality argument that can be deployed for him. It is argued that if his solicitor had not been willing to fund the stamp duty requirement, the applicant could not have pursued his application. By way of persuasive authority, counsel for the applicant refers to the decision of the UK Court of Appeal in Hammerton v. Hammerton [2007] EWCA Civ 248, a case which involved the committal to prison of an unrepresented litigant for breach of an undertaking. In that case, Wall L.J. stated:

> *"The point raised by this case … is the propriety of sending an unrepresented litigant in person to prison. In my judgment, absent the type of impossible behaviour identified by Mance LJ … in Re K … a litigant in person who is liable to be sent to prison for contempt of court is entitled to legal representation, if necessary at public expense. It should not be a matter for the Bar's Pro Bono unit, or other charitable intervention. Where the liberty of the subject is at stake, as is it in contempt proceedings, nobody should be sent to prison without having had the benefit of legal advice and representation."* (at para. 51)

120. While reliance is placed on the aforementioned judgment of the UK court, in my view, it is not the case in the present proceedings that the applicant's liberty is at stake. Unlike the position in *Hammerton*, he has duly been convicted and sentenced

after a full trial which was also the subject of a full appeal. At all stages of the criminal proceedings, the applicant was legally represented.

121. For the purposes of the present proceedings, as matters stand, the applicant has not been deprived of access to the courts given that the stamp duty fee has been discharged by his solicitor. Moreover, as he has chosen legal representation, he has applied for a recommendation from the Court under the Legal Aid Custody Scheme. While this is not guaranteed, if a recommendation is made, this will ensure payment for the applicant's legal representatives on a parity basis with the provisions of the Criminal Legal Aid Act 1992. Given the applicant's circumstances, it is difficult to conceive of otherwise than a positive response to his application for a recommendation under the Legal Aid Custody Scheme.

122. It is also acknowledged that as a prisoner, the applicant had the capacity to apply directly to the Court for relief. This special jurisdiction allows a prisoner, by way of direct written petition, to apply to the High Court where the petition is then addressed by a judge and can result in the Court allowing a prisoner to instigate Article 40 proceedings or judicial review or other proceedings.

123. The particular features of prisoner applications were addressed by Charleton J. in *Walsh v. the Governor of Midlands Prison* [2012] IEHC 229, as follows:

> *"…Sometimes these complaints are serious. Each such complaint is investigated and where necessary a report is sought from the governor of the relevant prison. A ruling is then made on the complaint in open court. This is a highly effective means of ensuring that prisoners are not isolated and that they have an ultimate authority to which to turn on matters of law. The informality of the system is of core benefit to its administration. Nothing about that informal procedure disables any form of judicial review under Order 84 of the Rules of the Superior Courts. Nor could that system undermine the entitlement of an interested party to apply for habeas corpus by way of an application to a judge of the High Court in the ordinary course. The procedure is in addition to other rights and procedures. It amounts to an exceptional means of access to the High Court that is for the benefit of prisoners. There is no warrant for disturbing it."*

124. It is also well established however that access to a person's choice of lawyer who is willing to accept instructions is a constitutional right. As put by O'Neill J. in *Law Society v. Competition Authority* [2006] 2 I.R. 262:

> *"I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation does, as an incident or aspect of the right to fair procedures, have a constitutional right, pursuant to Article 40.3 of the Constitution of Ireland 1937, to freely select the lawyer that will represent him or her from the relevant pool of lawyers willing to accept instructions."* (at para. 50)

125. It is submitted by the applicant that while the informal petition approach was open to him, in circumstances where he wished to be legally represented from the outset he was obliged to pay stamp duty. It is thus contended that prisoners seeking to exercise their constitutional right of access to a lawyer, even if they can find lawyers willing to act on a *pro bono* basis, or no fee no foal no fee basis, face an additional hurdle in that they cannot be represented by these lawyers until they are able to convince someone to discharge the stamp duty on the pleadings for them. The applicant maintains that this is clearly an affront of the equality provisions in Article 40.1 of the Constitution. He submits that in those circumstances the 2014 Order constitutes a disproportionate interference with his right of access to the courts. Accordingly, he seeks a declaration that the failure to allow prisoners an exemption from the fees associated with pleadings related to their incarceration is contrary to the Constitution.

126. Overall, I am satisfied that the mechanism open to the applicant via the Custody Legal Aid Scheme, coupled with the existence of the prisoner application facility, constitutes, for all intents and purposes, equality of arms for the applicant as regards access to the courts. I find that, accordingly, the applicant is not disproportionately prejudiced by the failure of the 2014 Order to provide an exemption from stamp duty for the nature of challenge in which he is currently involved.

127. In all the circumstances, I am satisfied that it is not unconstitutional for the State to impose a stamping fee for the processing of documents.

Summary

128. Having regard to the findings I have made in this judgment and and this being a telescoped application, I propose to order as follows:-

> (ii) that leave be granted to apply for judicial review in terms of the applicant's amended statement of grounds;
>
> (iii) that the substantive application for judicial review be dismissed.