

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

**[2015 No. 72JR]**

**BETWEEN:**

**KETH DOYLE**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE**

**AND**

**THE GOVERNOR TRAINING UNIT MOUNTJOY PRISON, THE IRISH PRISON SERVICE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Kearns P. delivered on the 20th day of November, 2015**

The applicant seeks a declaration that section 27C of the Firearms Act, 1964 as inserted by section 61 of the Criminal Justice Act, 2006 is repugnant to the Constitution of Ireland.

**BACKGROUND**

In a judgment delivered on 30th July, 2015, this Court determined a number of non-constitutional arguments advanced on behalf of the applicant in relation to the interpretation of the relevant statutory provisions governing the granting of temporary release. The background to the present application is set out in detail in that decision and can be briefly summarised as follows.

On the 10th June, 2013 the applicant was sentenced to five years in prison in the Dublin Circuit Court for possession of a controlled drug, at which point in time he also received a concurrent five year sentence for possession of a firearm in suspicious circumstances contrary to s.27A of the Firearms Act 1964, as substituted by s.59 of the Criminal Justice Act 2006, as amended.

Having applied for temporary release in order to pursue a course of study, the applicant's request was refused on the basis that the granting of temporary release to the applicant in respect of his firearms offence is precluded by s.27C(4) of the Firearms Act 1964 (as inserted by s.61 of the Criminal Justice Act 2006) as the applicant is serving a "minimum term of imprisonment" as defined in s.27C(1) of the 1964 Act.

Following this decision, the applicant commenced legal proceedings challenging the respondents' interpretation of the various statutory provisions and those non-constitutional grounds of attack were determined by the decision of this Court delivered on 30th July, 2015. The Court refused the relief sought by the applicant and submissions from both parties in relation to the remaining constitutional challenge were then heard on 14th October, 2015.

**STATUTORY PROVISIONS**

Section 27 of the Firearms Act, 1964 has been amended on a number of occasions, including by the insertion of certain provisions by the Criminal Justice Act, 2006 and sections 37 and 38 of the Criminal Justice Act, 2007. The annotated section provides, in relevant part, as follows –

*"27A.— (1) It is an offence for a person to possess or control a firearm or ammunition in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person possesses or controls it for such a purpose.*

*(2) A person guilty of an offence under this section is liable on conviction on indictment—*

*(a) to imprisonment for a term not exceeding 14 years or such shorter term as the court may determine, subject to subsections (4) to (6) of this section or, where subsection (8) of this section applies, to that subsection, and*

*(b) at the court's discretion, to a fine of such amount as the court considers appropriate.*

*(3) The court, in imposing sentence on a person for an offence under this section, may, in particular, have regard to whether the person has a previous conviction for an offence under the Firearms Acts 1925 to 2006, the Offences against the State Acts 1939 to 1998 or the Criminal Justice (Terrorist Offences) Act 2005.*

*(4) Where a person (other than a person under the age of 18 years) is convicted of an offence under this section, the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person.*

*(4A) The purpose of subsections (5) and (6) of this section is to provide that in view of the harm caused to society by the unlawful possession and use of firearms, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under this section, shall specify as the minimum term of imprisonment to be served by the person a term of not less than 5 years, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of it, it would be unjust in all the circumstances to do so.*

*(5) Subsection (4) of this section does not apply where the court is satisfied that there are exceptional and specific*

*circumstances relating to the offence, or to the person convicted of it, which would make the minimum term unjust in all the circumstances, and for this purpose the court may (subject to subsection (6)), have regard to any matters it considers appropriate, including—*

*(a) whether the person pleaded guilty to the offence and, if so—*

*(i) the stage at which the intention to plead guilty was indicated, and*

*(ii) the circumstances in which the indication was given,*

*and*

*(b) whether the person materially assisted in the investigation of the offence...”*

Section 27B contains various provisions relating to the carrying of a firearm with criminal intent.

Section 27C, which forms the basis of the applicant’s challenge, relates to minimum sentences and the grant of temporary release and provides as follows –

*“27C.— (1) In this section, “minimum term of imprisonment” means a term specified by a court under—*

*(a) section 15 of the Principal Act,*

*(b) section 26, 27, 27A or 27B of this Act, and*

*(c) section 12A of the Firearms and Offensive Weapons Act 1990, less any reduction in the period of imprisonment under subsection (3) of this section.*

*(2) The power to commute or remit punishment conferred by section 23 of the Criminal Justice Act 1951 does not apply in relation to a minimum term of imprisonment.*

*(3) The rules or practice whereby prisoners generally may earn remission of sentence by industry and good conduct apply in relation to a person serving such a minimum term.*

*(4) Any powers conferred by rules made under section 2 of the Criminal Justice Act 1960, as applied by section 4 of the Prisons Act 1970, to release temporarily a person serving a sentence of imprisonment shall not be exercised during a minimum term of imprisonment, unless for grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by that reason.”*

## **SUBMISSIONS OF THE APPLICANT**

It is submitted on behalf of the applicant that section 27C of the 1964 Act is repugnant to the Constitution in a number of respects.

Counsel for the applicant submits that the offence for which the applicant was convicted, namely one pursuant to s.27A of the 1964 Act, covers a wide range of criminal wrongdoing of varying degrees of seriousness and without regard to personal circumstances. In those circumstances, it is submitted that s.27C operates as a blunt instrument which precludes consideration of the granting of temporary release to a particular category of convicted persons. While it is accepted that s.27C(4) contains a “saver” in relation to the denial of temporary release, the applicant submits that the saver, confined as it is to grave reasons of a humanitarian nature, is unduly narrow in that it relates only to family funerals or other short term exigencies.

It is submitted that the provisions of s.27C must be read in light of the presumptive mandatory sentences proscribed by s.27A, and that it is of relevance that similar presumptive mandatory sentencing regimes have been deemed to be unconstitutional and disproportionate in other jurisdictions. In this regard, counsel relies upon the decision of the Canadian Supreme Court in *R v Nur* [2015] SCC 15 in which the court considered the proportionality of mandatory minimum sentences. The Court held that such sentences “function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range” and infringed the Canadian Charter of Rights and Freedoms. It is submitted that the reasoning of the Canadian court can be applied to s.27C of the 1964 Act, which the applicant contends also has a disproportionate impact on a particular category of prisoner.

The applicant submits that s.27C is disproportionate and inflexible and refers the Court to the decision of Costello J. in *Heaney v Ireland* [1996] where it was held that the objective of any impugned provision must be proportionate to warrant overriding a constitutionally protected right.

In relation to the status of the temporary release scheme, the applicant submits that while the granting of temporary release does not amount to a constitutional right, this does not mean the Constitution is not engaged by virtue of the impact of the statutory provisions on other constitutional rights. It is submitted that the applicant’s rights to personal liberty under Article 40.4.1 and his guarantee of equality pursuant to Article 40.1 are infringed by the disproportionate interference of the provisions of s.27C. In this regard, the applicant relies on the decision of Hogan J. in *Byrne (a minor) v the Director of Oberstown School* [2012] 12 JIC 1002 where Hogan J. stated –

*“it can be said a custodial regime which brings about such a stark difference in terms of the release dates of the offenders simply because of the location of the place where they serve their period of detention as a result of the application of the remission rules to one place of detention (S. Patrick’s Institution), but not to another (Oberstown) immediately engages the application of Article 40.1 with its fundamental command of equality before the law. This is especially so given that such sharply different treatment in terms of custodial release dates impacts significantly on the core constitutional right of personal liberty as protected by Article 40.4.1.”*

It is submitted that while the granting of temporary release has the potential to protect mandatory minimum sentences from attacks as to their constitutionality, where a consideration of temporary release is precluded, as in the applicant’s case, there is a doubly unconstitutional effect of the relevant provisions.

It is further submitted that s.27C is unconstitutional insofar as it removes the discretion of the executive to consider a person's suitability for temporary release. The applicant relies on the Supreme Court decision in *Dowling v The Minister for Justice* [2003] 2 IR 535 to support the contention that the granting of temporary release is an executive function. Fennelly J. stated that –

*"It is, of course, true that temporary release decisions are entirely within the discretion of the respondent acting in the exercise of executive clemency on behalf of the State."*

In the case of *Gilligan v Ireland and Others* [2013] JIC 1403 McMenamin J. considered the case law surrounding the principle of separation of powers and the boundaries of the respective roles of the executive, legislature, and judiciary. His judgment refers to the case of *Deaton v Attorney General* [1963] IR 170 where interference by the executive in sentencing was found to be unconstitutional as it offended against the principle of separation of powers.

In *Whelan v The Minister for Justice and Others* [2010] 1 IR 1 the Supreme Court considered the constitutional validity of the mandatory life sentence for murder and held that –

*"the Oireachtas in the exercise of its legislative powers could choose to impose a fixed or mandatory penalty for a particular offence where there was a rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified..."*

The Court also held that –

*"A decision to grant discretionary temporary release did not constitute a termination let alone a determination of the sentence judicially imposed and any release of a prisoner pursuant to the temporary release rules, both in substance and form, the grant of privilege in the exercise of an autonomous discretionary power vested in the executive exclusively in accordance with the constitutional doctrine of the separation of powers."*

The applicant contends that the legislature cannot interfere with what properly lies in the executive domain and that the removal by s.27C of the executive discretion to grant temporary release in the case of persons convicted of offences under s.27A of the 1964 Act has that effect and is therefore unconstitutional.

The applicant submits that, for the reasons outlined, the Court should declare s.27C of the 1964 Act as amended to be unconstitutional.

#### **SUBMISSIONS OF THE RESPONDENT**

The respondent submits that much of the applicant's submissions on unconstitutionality are directed towards the presumptive mandatory sentences set out in s.27A, which is not a ground of challenge for which leave was sought or granted. In any event, it is submitted that any proportionality argument raised in relation to presumptive mandatory sentences is met by the saver inserted by the 2007 Act at s.27A(4A) which states –

*(4A) The purpose of subsections (5) and (6) of this section is to provide that in view of the harm caused to society by the unlawful possession and use of firearms, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under this section, shall specify as the minimum term of imprisonment to be served by the person a term of not less than 5 years, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of it, it would be unjust in all the circumstances to do so.*

Furthermore, it is submitted that the preclusion in s.27C is not absolute, and provision is made to allow for temporary release "for grave reason of a humanitarian nature." It is submitted therefore that the issues raised in the Canadian Supreme Court decision in *Nur* do not arise.

Insofar as the applicant contends that there is some form of unconstitutional discrimination caused by s.27C, the respondent submits that the Supreme Court decision in *Gilligan* states that in considering questions of discrimination –

*"The litmus test is whether this classification made by the Oireachtas is for a legitimate legislative purpose, is relevant to its purpose, and treats members of each class fairly. The fact of classification always involves a degree of exclusion or inclusion; whether that inclusion is legitimate can be measured by relevance to its purpose, fairness and the category of its classification."*

In the present case, it is submitted that the reasons underpinning the provisions are made clear and no question of arbitrary discrimination arises. S.27A(4A) specifically refers to the harm caused to society by the unlawful possession and use of firearms and it is submitted that the restriction on the granting of temporary release to persons serving mandatory minimum sentences for firearms-related offences is entirely justified and proportionate in circumstances where a wide range of alternative rehabilitative options are open to such persons within prison. The possibility of enhanced remission also remains as an increased incentive to rehabilitate.

The respondent submits that there is no constitutional right to eligibility for temporary release and that the power to grant temporary release is a purely statutory one. It is submitted that the case of *Kinahan v Minister for Justice* [2001] 4 IR 454 supports this view. In *Kinahan*, Hardiman J. stated –

*"In the course of this hearing there was some debate about the nature of temporary release. It does not appear to me that temporary release is a specific exercise of the general power of commutation or remission envisaged in the Constitution. Rather, it appears to be a statutory creation administered under the Prisoners (Temporary Release) Rules, 1960, which instrument was in turn made under the powers conferred by the Criminal Justice Act, 1960."*

Hardiman J. went on to state –

*"It is clear from the above-mentioned Statute and Rules that temporary release is envisaged as a release from custody for a limited period during the currency of a sentence, subject to conditions and carrying an obligation to return to the prison at its conclusion. In this it seems quite distinct from the general executive power of remission."*

It is submitted that in *Grogan v Parole Board* [2008] IEHC 204 McMahon J. made the same distinction between the constitutional power to pardon and commute and the purely statutory power to grant temporary release –

*"Although there are powers to pardon and commute sentences there is no constitutional obligation on the Executive to introduce schemes for early or temporary release of prisoners, and if it does so the exercise of such executive powers can only be criticised by the courts if they are carried out in "a capricious, arbitrary or unjust way" as stated by Finlay C.J. in Murray v. Ireland [1991] I.L.R.M. 465, and cited with approval by Hardiman J. in Kinahan v. Minister for Justice [2001] 4 I.R. 454 at p. 459"*

The respondent contends that the applicant has incorrectly conflated the constitutional power to commute or remit punishment with the purely statutory power of the first respondent to grant temporary release under s.2 of the Criminal Justice Act, 1960. In any event, it is submitted that even if the Court is of the view that the power to grant temporary release originates from the executive power to commute or remit punishment under Article 13.6 of the Constitution, which the respondent does not accept, this power may nonetheless be restricted by statute. In this regard, counsel refers the Court to the decision of Keane J. in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 IR 26 where it was held that Article 13 of the Aliens Order 1946 was unconstitutional. Keane J. stated –

*"It cannot be too strongly emphasised that no issue arises in this case as to whether the sovereign power of the State to deport aliens is executive or legislative in its nature: it is clearly a power of an executive nature, since it can be exercised by the executive even in the absence of legislation. But that is not to say that its exercise cannot be controlled by legislation and today is invariably so controlled: any other view would be inconsistent with the exclusive law making power vested in the Oireachtas. The Oireachtas may properly decide as a matter of policy to impose specific restrictions on the manner in which the executive power in question is to be exercised: what they cannot do, in my judgment, is to assign their policy making role to a specified person or body, such as a Minister."*

It is submitted therefore that the applicant's contention that s.27C somehow breaches the principle of the separation of powers and is unconstitutional is misconceived.

## **DISCUSSION**

Much of the applicant's oral submissions in this matter and the authorities relied upon in support of them are directed towards s.27A of the 1964 Act. While the applicant correctly submitted that s.27C must be read in light of the mandatory provisions set out in s.27A, it is important to indicate that this Court is constrained by the terms on which judicial review was granted and must confine its scrutiny of constitutionality to s.27C.

S.27C(4) provides that –

*"Any powers conferred by rules made under section 2 of the Criminal Justice Act 1960, as applied by section 4 of the Prisons Act 1970, to release temporarily a person serving a sentence of imprisonment shall not be exercised during a minimum term of imprisonment, unless for grave reason of a humanitarian nature, and any release so granted shall be only of such limited duration as is justified by that reason"*

The applicant contends that this provision is unconstitutional as it disproportionately affects the applicant's constitutional rights to personal liberty and equality before the law. It is further submitted that the provisions of s.27C are in breach of the principle of separation of powers as the discretion of the executive to grant temporary release to a particular category of convicted person has been removed by an act of the legislature.

In relation to this latter submission, the Court finds that the decision of Keane J. in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 IR 26 makes clear that, even if the granting of temporary release is a purely executive function, such executive discretion can be controlled by an act of the legislature. It cannot be said therefore that s.27C interferes with the separation of powers in a manner which renders the provision unconstitutional.

In relation to the assertion that section 27C is disproportionate and inflexible to such a degree as to render it unconstitutional, the Court does not accept that this is so. While no challenge to the constitutionality of s.27A has been pleaded in these proceedings, it is of relevance that the purpose of the presumptive minimum sentences contained in s.27A is expressly set out at s.27A(4A) which also confers a discretion on the sentencing judge to deviate from the minimum sentence in certain circumstances. In this regard, the provision for presumptive minimum sentences at s.27A distinguishes this case from the Canadian Supreme Court decision in *Nur* as relied upon by the applicant. In any event, s.27C, which precludes the granting of temporary release to those convicted of specified firearms offences, is not an absolute provision. It allows for the granting of temporary release to all such convicted persons in certain circumstances.

In considering the proportionality of the impugned provision, the Court has also had regard to the European Prison Rules which state that assistance and special programmes provided to prisoners in order to enable them to make the transition from life in prison to a law-abiding life in the community can take place within the prison or outside the prison. Hardiman J. emphasised this discretion when citing the relevant provisions in *Kinahan*, although he did note that the Rules are not binding. The Court also accepts the respondent's submission that the entitlement to enhanced remission tempers the perceived harshness of the rule that temporary release may not be granted to persons such as the applicant and offers an increased incentive to participate in rehabilitation programmes within the prison.

The Court does not accept that s.27C infringes upon the applicant's right to equal treatment before the law under Article 40.1 of the Constitution. The purpose of the presumptive minimum sentences is expressly stated in s.27A, the constitutionality of which is not challenged in these proceedings. The Court accepts the submission of counsel for the respondent that the restrictions on the granting of temporary release to persons sentenced in accordance with s.27A as set out in s.27C are justified having regard to the purpose of the sentence itself and the wide range of alternative rehabilitative options available to persons such as the applicant.

## **DECISION**

For the reasons set out above, the Court refuses to grant the declaration of unconstitutionality sought by the applicant.