APPROVED

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 282 J.R.

BETWEEN

EDWARD O'REILLY

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 April 2020

INTRODUCTION

1. These judicial review proceedings seek to challenge a decision to revoke an earlier direction that the Applicant be granted temporary release from prison. The period of temporary release had been cut short following a complaint by An Garda Síochána to the prison authorities to the effect that the Applicant had been found trespassing on private property in the company of a number of individuals. The Applicant says that he was on the lands for the purpose of hunting rabbits; and it is submitted on his behalf that this does not constitute a *criminal* trespass. The requisite criminal intent is said to be absent.

2. The two principal issues for determination in this judgment are as follows. First, was the informal inquiry conducted by the prison authorities into the alleged incident adequate. Secondly, does the fact that the one-month period of the temporary release has now expired by effluxion of time render the judicial review proceedings moot.

NO REDACTION NEEDED

STATUTORY FRAMEWORK

3. The provisions regulating the grant of temporary release to prisoners were subject to significant amendment by the Criminal Justice (Temporary Release of Prisoners) Act 2003. The amendments were achieved by the substitution of a new section in the place of the original section 2 of the Criminal Justice Act 1960 ("***the CJA 1960***"). Relevantly, the post-2003 version of the CJA 1960 now provides that the (temporary) release of a prisoner shall not confer an entitlement on that person to *further* such release. This amendment has been interpreted as "ushering in a different statutory regime", which has the effect of converting the grant of periodic temporary releases into discrete decisions in respect of each period for which it is granted. (*Rock v. Governor of Arbour Hill Prison* [2015] IEHC 45).

4. The above amendments were commenced on 12 November 2004 (S.I. No. 679 of 2004). This significant change in the statutory framework must be borne in mind when reading the pre-2004 case law. In particular, certain aspects of the judgment of the Supreme Court in *Dowling v. Minister for Justice* [2003] IESC 33; [2003] 2 I.R. 535 cannot necessarily be "read across" to the amended legislation. There, the Supreme Court had characterised the grant of a series of "monthly renewable temporary releases" as constituting a general temporary release, subject to the specified conditions of the release being complied with. The Supreme Court interpreted the wording of the original temporary release decision in that case as conveying that the prisoner was going to be indefinitely on temporary release, provided that he was of good behaviour.

5. Section 2 of the Criminal Justice Act 1960 (as amended) authorises the Minister for Justice and Equality ("***the Minister***") to direct that a person who is serving a sentence of imprisonment shall be released from prison for such temporary period, subject to such conditions, as may be specified in the direction or in rules made by the Minister.

6. Section 2(7) of the Criminal Justice Act 1960 (as amended) empowers the Minister to make rules as follows.

> (7)(a) The Minister may make rules for the purpose of enabling this section to have full effect and such rules may contain such incidental, supplementary and consequential provisions as the Minister considers to be necessary or expedient.
>
> (b) Rules under this section may specify conditions to which all persons released pursuant to a direction under this section shall be subject or conditions to which all persons belonging to such classes of persons as are specified in the rules shall be subject.

7. As appears, the Minister has discretion to specify what might be described as "mandatory" or "standard" conditions applicable to all prisoners granted temporary release. The Minister has exercised this discretion by way of the Prisoners (Temporary Release) Rules 2004 (S.I. 680 of 2004). The following conditions apply to all grants of temporary release.

> 3. In addition to any conditions specified in a direction, the release of a person pursuant to a direction shall be subject to the following conditions:
>
> (a) that the person shall keep the peace and be of good behaviour during the period of his or her release,
>
> (b) that the person shall be of sober habits during that period, and
>
> (c) that the person shall return to the prison from which he was released on or before the expiration of the period for which he was released.

8. As appears, one of the mandatory conditions is that the released prisoner shall keep the peace and be of "good behaviour" during the period of his or her release. The Court of Appeal has recently had cause to consider what is meant by the concept of "good behaviour" in its judgment in *McNamee v. Director of Public Prosecutions* [2017] IECA 230; [2017] 3 I.R. 347. This issue arose in the context of a pending prosecution pursuant to section 6 of the Criminal Justice Act 1960. The applicant for judicial review was being prosecuted for being "unlawfully at large". The alleged

offence was said to have occurred as a result of the applicant having broken a condition of his temporary release from prison by failing to be of "good behaviour", by attempting to commit an offence of trespass.

9. The applicant sought to challenge the constitutionality of section 6 on the basis that the offence was impermissibly vague. Mahon J., delivering the unanimous judgment of the Court of Appeal, identified the issue before the court as follows (at paragraph 21 of the judgment).

> "What is meant by 'good behaviour' in the context of a requirement to 'be of good behaviour' as a condition of temporary release? Can it be said that the term is sufficiently capable of definition that a person subject to its strictures knows what is required of him or her in the situation of being granted temporary release? Is it simply a requirement not to commit further crime of any sort, or are the words reasonably capable of also embracing activity (or lack of activity) which is not, and could never be criminal? Is a person on whom such a requirement is imposed left in a position of uncertainty as to what is expected of them?"

10. Having conducted a careful review of the authorities, Mahon J. then stated as follows (at paragraph 37).

> "The requirement to be 'of good behaviour' is a condition commonly imposed in the criminal courts in Ireland since at least the foundation of the State, and almost certainly for many decades prior to that. It most frequently arises in the context of the suspension of a prison sentence, or part of such sentence, or upon the granting of conditional bail. However, it can also arise in the related context of the exercise by the executive of its statutory power to grant temporary release to a person serving a sentence of imprisonment under s. 6 of the 1960 Act. It is a term which has acquired the status of a legal term of art, when used within the context of criminal law proceedings, both pre- and post-conviction, or in the context of executive action taken in the course of the administration of a sentence of imprisonment imposed by a criminal court consequent upon the subject person's conviction of an offence. It is clearly understood to involve a requirement not to breach the criminal law during the currency of the condition requiring the subject person to be of good behaviour. It is completely fanciful, and flies in the face of common sense, to suggest that when used in either of those contexts, it could refer to or include behaviour of a non-criminal nature, and I am satisfied that the point advanced does not even reach the low threshold of 'arguability'. Where it is alleged that the good behaviour condition has been breached it is, of

> course, necessary that the basis for such allegation is clear to the person so charged, as indeed happened in this case."

11. I will return to consider the application of the concept of "good behaviour" to the facts of the present case at paragraph 43 below.

12. Before concluding this overview of the statutory framework, it may be useful to explain what is meant by being "unlawfully at large". Section 6 of the Criminal Justice Act 1960 provides that a prisoner on temporary release who is at "large" will be deemed to be "unlawfully at large" in either one of the following two contingencies:

    (a) the period for which he was temporarily released has expired, or

    (b) a condition to which his release was made subject has been broken.

13. It is an offence to be "unlawfully at large". Further, a member of the Garda Síochána may arrest, without warrant, a person whom he suspects to be unlawfully at large, and may take such person to the place in which he is required in accordance with law to be detained. (Section 7 of the Criminal Justice Act 1960).

IS POWER EXERCISABLE BY MINISTER OR BY GOVERNOR?

14. On the facts of the present case, it appears that the temporary release was directed, not by the Minister, but by the Governor of the Midlands Prison. Both parties were in agreement that the Governor's authority to direct the temporary release of a prisoner derives from Rule 3 of the Prisoners (Temporary Release) Rules 1960 (S.I. No. 167 of 1960), as follows.

> 3.(1) The Governor or other officer in charge for the time being of a prison may, subject to the directions of the Minister and subject to any exceptions which may be specified in directions of the Minister, release temporarily for a specified period a person serving a sentence of penal servitude or imprisonment in that prison.

15. The precise relationship between the 1960 Rules and the 2004 Rules (discussed earlier) is not entirely clear. There is an overlap between the two sets of Rules insofar as both

impose an obligation on a released prisoner to be of "good behaviour". The 2004 Rules do not, however, formally amend the 1960 Rules in this regard.

16. Further, it may be doubtful whether the 1960 Rules are consistent with the amended version of section 2 of the Criminal Justice Act 1960, which, on one reading at least, appears to envisage that a direction would be issued to a Governor by the Minister in respect of each individual grant of temporary release. The Minister's power is itself to be exercised by reference to prescribed statutory criteria. It would seem anomalous if a prison governor were to have a broader discretion than the Minister, yet the 1960 Rules have not been amended to apply the statutory criteria, introduced by the Criminal Justice (Temporary Release of Prisoners) Act 2003, to decisions of a prison governor. Put shortly, the statutory power under which the 1960 Rules were made had been in very different terms than the post-2003 Act wording.

17. At all events, in circumstances where no issue has been raised in these proceedings as to the authority of the Governor or the Assistant Governor to grant temporary release, it is not necessary to address these issues further for the purposes of resolving the proceedings. The observations made above are *obiter dicta* only.

FACTUAL BACKGROUND

18. The Applicant is serving custodial sentences in respect of certain road traffic offences, and offences under the Criminal Justice (Theft and Fraud Offences) Act 2001. The Applicant had been committed to prison on 4 January 2020 to serve a combined sentence of 6 months, 3 weeks and 4 days. Allowing for remission, the Applicant would have completed his sentence and would have been due to be released on 8 June 2020.

19. The Applicant had been granted temporary release commencing on 18 March 2020. Initially, the temporary release was to have been for a period of one week. The period

of release was, however, subsequently increased to one month. This was done, seemingly, as part of a policy at a national level to reduce the unnecessary movement and travel of released persons around the country for public health reasons related to the coronavirus pandemic.

20. The Applicant's period of temporary release was set to expire on 18 April 2020.

21. The Applicant had been required to sign a Temporary Release Notice as prescribed under the Prisoners (Temporary Release) Rules 2004. The relevant part of the notice reads as follows.

> "This notice is to inform you that you Edward O Reilly, Prisoner number […], of 2 St Mary's Crescent, Hebron Halting Site, Kilkenny, Kilkenny City, Ireland, are being granted Reviewable period of temporary release for the period from 18/03/2020 08:00 to 18/04/2020* 11:00 for the reason of Community Support Scheme, to address 2 St Mary's Crescent, Hebron Halting Site, Kilkenny, Kilkenny City, Ireland.
>
> Your release is also subject to the following conditions, with which you are obliged to comply during this period of temporary release:
>
> 1. Be of Good Behaviour
> 2. Do not convey messages in/out of Prison
> 3. Keep the Peace
> 4. Return to Midlands Prison on date and time listed above
> 5. Shall be of sober habits
> 6. Shall not enter a pub, club or other licensed premises or off-licence premises
> 7. Shall reside at 2 St Mary's Crescent, Hebron Halting Site, Kilkenny, Kilkenny City, Ireland
> 8. Agree not to change address from 2 St Mary's Crescent, Hebron Halting Site, Kilkenny, Kilkenny City, Ireland without new TR form
> 9. Must link in with and attend all appointments arranged by the community support worker.
> 10. No Garda sign on at present due to public health issues
>
> Note: Failure to return on or before the expiration of the period of temporary release or breach of any of the conditions attached to the period of temporary release is an offence under section 6 of the Criminal Justice Act, 1960 and punishable on conviction by imprisonment for a term not exceeding six months.
>
> I hereby acknowledge that I am aware of the terms and conditions of my temporary release stated above which have been explained to me and of the time when my period of release expires. I also acknowledge that the grant of

> this period of temporary release shall not confer an entitlement on me to grant of further such releases. I have been given a copy of this notice."
>
> * The date has been amended in manuscript.

22. The circumstances giving rise to the Applicant being returned to prison are as follows. It is common case that on 6 April 2020 members of An Garda Síochána had come across the Applicant, together with a number of other male members of his extended family, on private property. They had a number of dogs with them. The explanation offered by the family members to the Gardaí for their presence on the lands is that they had been hunting rabbits.

23. The Applicant was subsequently arrested on the evening of 9 April 2020, and conveyed to the Midlands Prison. The Applicant had been placed in quarantine within the prison as part of the standard procedure applicable to all new admissions as a precautionary measure to prevent the spread of coronavirus within prisons.

24. The Applicant had a conversation with the Assistant Governor the following day (10 April 2020). It was put to the Applicant that he had been trespassing on private property. The Applicant replied by saying that he had been on the lands for the purpose of hunting rabbits.

25. The Assistant Governor of the Midlands Prison, Desmond O'Shea, has sworn an affidavit setting out his involvement in the return of the Applicant to the prison. The Assistant Governor explains that An Garda Síochána had sent an email to the Governor in the following terms on 9 April 2020. (This email was subsequently forwarded to the Asst. Governor).

> "I refer to the above captioned matter and detection of Edward O'Reilly Snr - DOB 27/5/1976 - 2 Saint Marys Crescent Hebron Road, Kilkenny on 6-4-2020 at 18.20pm by Garda members engaged on Covid-19 crime prevention patrols in industrial estates around Kilkenny City.

> On this date Edward O'Reilly was discovered in a field leading into the back of Gaeltec, IDA Business Park, Kilkenny in the company of a number of known serious criminals.
>
> Edward O'Reilly was trespassing on property owned by the IDA and I am in no doubt that his presence was for the purposes of engaging in criminal activity. Edward O'Reilly will be prosecuted for trespassing in due course.
>
> Edward O'Reilly is on early release from the Midlands Prison owing to the Covid 19 outbreak however it is my belief that his continued release presents a risk to public safety in Kilkenny.
>
> I request that you consider revoking Edward O'Reilly's early release with immediate effect."

26. The Assistant Governor's affidavit then summarises the events surrounding the return of the Applicant to prison. Relevantly, it is averred that an interview took place between the Applicant and the Assistant Governor as follows.

> "12. I say that I afforded fair procedures to the applicant. He was told of the allegation made by Gardaí and he was given time to consider his response. He was given an opportunity to explain his version of events to me, which he did. I say further that he had an opportunity to ask questions, which he did, questions relating to the process for money or property to be handed in for him, which were all answered.
>
> 13. I say that during the committal interview which I conducted with the applicant, I asked him why he had been brought back to prison. At this point, the applicant gave me a full account of his version of events, namely that he was out hunting with his 3 sons and son in law when he was approached by the Gardaí. He claims that he was instructed to leave the area and that he did so but was subsequently arrested for breach of temporary release and returned to prison. The applicant stated that he didn't think he had done anything wrong although he accepted that he might have been hunting on private ground. When I asked the applicant if he had permission to be in that area, he replied that he is around that area all his life and wasn't going to stop as he was doing nothing wrong. When it was put to him that he may have been trespassing, he repeated his assertion that he has been using that ground all his life.
>
> 14. I say that the issue to be determined by me was whether there was a likelihood that a breach of a condition of temporary release had occurred. I say that I enquired of the applicant and gave him the opportunity to explain whether he was involved in the alleged events and to ensure that there was no wrongful identification or other error made about his presence at the alleged place. I say further that the

> possibility of mounting a successful defence to a prosecution would be a matter for the Courts in any proceedings and I do not engage in determining the Applicant's guilt or innocence. I established that there was no manifest error or mistake in relation to the information provided to me by the Garda Superintendent. I say that I accepted the Garda assertion that the applicant would be prosecuted at face value."

27. Garda Superintendent Derek Hughes has also sworn an affidavit in the proceedings. This affidavit sets out details in respect of the police investigation. Superintendent Hughes confirms that the investigation into the events of 6 April 2020 is at an advanced stage, and that a file will be forwarded shortly to the Director of Public Prosecutions for directions about charging.

28. Counsel for the Applicant has emphasised that the decision under review in these proceedings is that of the Assistant Governor, and not of An Garda Síochána; and that the additional detail in the Garda Superintendent's affidavit is not material which has been referred to in the Assistant Governor's own affidavit.

29. One of the unusual features of this case is that the Applicant himself has not sworn an affidavit in the proceedings. Instead, an affidavit has been sworn by the Applicant's solicitor setting out a record of the narrative provided by the Applicant to the solicitor by way of telephone conversation. The solicitor has explained that this approach had been adopted because it had not been possible to procure a verifying affidavit from the Applicant urgently due to the visiting restrictions in prisons arising from the coronavirus pandemic. (As noted earlier, the Applicant had been placed in quarantine within the prison). It was further explained that a verifying affidavit from the Applicant would be procured at the earliest opportunity.

30. In the event, the court was able to list the case for full hearing a number of days after the application for leave to apply for judicial review had been made. No verifying affidavit has been filed by the Applicant. The absence of a verifying affidavit did not present any

practical difficulties given that there is no relevant factual dispute between the parties as to the circumstances surrounding the arrest of the Applicant and his return to prison. (Rather, the dispute turns on the inferences to be drawn from his admitted presence on private property).

31. The unusual approach to the filing of affidavits allowed in these proceedings should not, however, be regarded as a precedent for any other case. The general rule is and remains that an applicant for judicial review should swear an affidavit verifying the proceedings. (See *McNamee v. Director of Public Prosecutions* [2017] IECA 230; [2017] 3 I.R. 347 at 355). Whereas the public health measures imposed in order to contain the coronavirus pandemic—including restrictions on prison visits—present certain practical difficulties in this regard, there is an obligation on all parties, including the prison authorities, to facilitate this. Where possible, use should be made of email to allow the exchange of written documents between an applicant and his legal team.

JUDICIAL REVIEW PROCEEDINGS

32. An application for leave to apply for judicial review was made *ex parte* to the High Court (Simons J.) on Friday 17 April 2020. Given that the matter was urgent, involving as it does an allegation that the Applicant had been returned to prison unlawfully, I directed that the substantive application for judicial review be heard the following week, on Thursday 23 April 2020. To the great credit of the legal teams on both sides, the pleadings were closed, and excellent written submissions were filed, within this very tight timeline.

33. The papers were made available to the court in electronic form in advance, and this shortened the length of the subsequent oral hearing. (The oral hearing only took approximately one hour).

DETAILED DISCUSSION

(1). ADEQUACY OF THE INQUIRY

34. The principal issue for determination in these proceedings is whether the inquiry carried out by the Assistant Governor into the events of 6 April 2020 had been adequate.

Submissions of the parties

35. Leading counsel for the Applicant, Mr John Fitzgerald, SC, emphasises that the "good behaviour" condition attached to a temporary release notice connotes a requirement not to breach the criminal law (citing *McNamee v. Director of Public Prosecutions* [2017] IECA 230; [2017] 3 I.R. 347). It is insufficient to merely rely on an *allegation* of criminal conduct to ground a revocation of a period of temporary release (citing *State (Murphy) v. Kielt* [1984] I.R. 458).

36. It is submitted that the Assistant Governor failed to address his mind to the question of whether the presence of the Applicant on private property constituted a *criminal* trespass.

37. One of the ingredients of a criminal trespass is an intent to commit an offence or an intent to unlawfully interfere with any property. Counsel cites section 11(1) of the Criminal Justice (Public Order) Act 1994 as follows.

> 11.(1) It shall be an offence for a person—
>
> (a) to enter any building or the curtilage of any building or any part of such building or curtilage as a trespasser, or
>
> (b) to be within the vicinity of any such building or curtilage or part of such building or curtilage for the purpose of trespassing thereon,
>
> in circumstances giving rise to the reasonable inference that such entry or presence was with intent to commit an offence or with intent to unlawfully interfere with any property situate therein.

38. The Applicant's explanation that he was present on private property for the purpose of hunting did not and could not amount to an admission of criminal trespass. Nothing

further emerged from the informal inquiry carried out by the Assistant Governor which was sufficient to provide proof that the Applicant had breached the condition of "good behaviour" by committing the criminal offence alleged.

39. Whereas much greater detail in relation to the events of 6 April 2020 has now been put before the court by way of the affidavit of the Garda Superintendent, a detailed consideration of the circumstances of the alleged trespass is entirely missing from the narrative set out in the affidavit filed by the actual decision-maker, namely the Assistant Governor.

40. In response, leading counsel for the Prison Governor, Ms Anne-Marie Lawlor, SC, submits that the case law establishes that a prison governor is to carry out an informal inquiry, and is not required to embark upon a procedure equivalent to that applicable to a criminal trial. Counsel cites the judgments in *Dowling v. Minister for Justice* [2003] IESC 33; [2003] 2 I.R. 535; *Rock v. Governor of Arbour Hill Prison* [2015] IEHC 45; and *McNamee v. Director of Public Prosecutions* [2017] IECA 230; [2017] 3 I.R. 347.

41. Counsel then turned to apply these principles to the facts of the case. The impugned decision to revoke the temporary release is grounded on a finding that the Applicant had breached the condition of his temporary release that he be of "good behaviour". The incident said to represent that breach is his admitted presence on private property on 6 April 2020. The allegation that this represented a trespass had been put to the Applicant by the Assistant Governor, and the Applicant did not deny his presence on private property as alleged.

42. An offence of criminal trespass is not generally a complex or involved offence. At the time of making his decision, the Assistant Governor had before him the allegation set out in the email from the Garda Superintendent. The factual circumstances surrounding the

commission of the alleged offence were not disputed by the Applicant. The decision was one made in accordance with law, and was neither unreasonable nor arbitrary.

Findings of the court

43. The grant of temporary release from prison is subject to a mandatory condition that the prisoner be of "good behaviour" during the period of his or her release. The concept of "good behaviour" in this context connotes a requirement not to breach the criminal law during the currency of the condition (*McNamee v. Director of Public Prosecutions* [2017] IECA 230; [2017] 3 I.R. 347).

44. The potential consequences of breaching the "good behaviour" condition are two-fold. First, the prisoner is deemed to be unlawfully at large (section 6(1) of the CJA 1960). A member of the Garda Síochána may arrest, without warrant, a person whom he suspects to be unlawfully at large, and may take such person to the place in which he is required in accordance with law to be detained (section 7 of the CJA 1960). Secondly, breach of the condition is itself a criminal offence (section 6(2) of the CJA 1960).

45. One of the curious features of the Criminal Justice Act 1960, even allowing for its amendment in 2003, is that the (initial) decision as to whether a released prisoner has breached the conditions of his release (including the "mandatory" condition to be of "good behaviour") is made by a non-judicial authority, namely the prison governor (or their deputy). The decision of the governor is, however, amenable to judicial review. The case law confirms that it is not legitimate to rely on a *mere allegation* that the released prisoner has committed an offence as a basis for revoking their temporary release. This is so even if charges have been preferred against the prisoner by the prosecuting authorities. Rather, the prison authorities must undertake some form of inquiry of their own.

46. The dispute between the parties is as to the nature and extent of the inquiry which a prison governor is required to undertake. The parties are agreed that the inquiry is not expected to equate to a criminal prosecution, but are in disagreement as to whether the steps taken by the Assistant Governor in the present case were adequate.

47. The steps required of a prison governor have been set out in the judgment of the Supreme Court in *Dowling v. Minister for Justice* [2003] IESC 33; [2003] 2 I.R. 535 as follows.

> "Where a prisoner on temporary release is arrested in connection with a garda investigation into an alleged offence (such as the offence of murder, as in this case) such an investigation is entirely separate and distinct from his status as a convicted prisoner enjoying the privilege of temporary release. It is a professional police investigation pursued solely for the purpose of ascertaining whether there is sufficient evidence to charge him with an offence or to warrant a file being sent to the Director of Public Prosecutions for a decision as to whether he should be charged with an offence.
>
> However, this does not mean that those who have responsibility for the possible termination of a prisoner's temporary release when a condition of that release has been breached must remain passive or do nothing when the fact of such an investigation, particularly in relation to a very serious offence, comes to their attention. They must be entitled to inquire into any circumstances which give rise to a concern that a prisoner may have breached a condition of his release. This may include obtaining information or material from the garda authorities. If, having made such inquiries, they conclude, reasonably and on the basis of objective material, that the prisoner has breached a condition of his release, then the prison governor or the respondent, as the case maybe, may be entitled to terminate the temporary release subject to an inquiry of the nature referred to by Griffin J. in *The State (Murphy) v. Kielt* [1984] I.R. 458 before there is a definitive decision to terminate the temporary release.
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> Such a decision is an administrative one for the purpose of withdrawing a discretionary privilege to a convicted prisoner whose sentence has not expired. Provided the principles and procedures to which I have referred are followed, neither the respondent nor the governor are constrained from taking such a decision pending the outcome of any existing garda investigation into an alleged offence which is a separate and distinct matter."

48. As appears, a decision to terminate a prisoner's temporary release will be lawful provided, first, that the conclusion is reasonable and based on objective material; and, secondly, that the prisoner has been afforded fair procedures.

49. A similar approach is evident from the more recent judgment of the High Court (Kearns P.) in *Rock v. Governor of Arbour Hill Prison* [2015] IEHC 45.

> "The question in cases of this sort must immediately be: what sort of hearing is required prior to the revocation of temporary release?
>
> Counsel on behalf of the applicant readily accepts that it need only be a short informal hearing - there is certainly no requirement to prove, where an applicant has been charged with some offence, that he has in fact, and beyond reasonable doubt, been guilty of the commission of that offence. That would be an absurdity. Accordingly, it must follow that the nature of any hearing must be dictated by the facts of the particular case and by having regard to the purpose for which such a hearing is required to be held.
>
> In this regard the answer as to what is necessary is outlined in the judgment of Griffin J. in the Supreme Court in *Murphy v. Kielt* (at p. 472). In pointing out that, absent some inquiry, an injustice may in fact be done, he proceeded to say the following:-
>
> > 'For example, the apparent breach of condition on the part of a person so released may be due to a mistake or such person may be able, if he is given the opportunity, to satisfy the governor that it is likely that he was not involved in an incident in which it is alleged that a breach of the peace took place; or the breach of a condition may be due to an excusable reason such as illness, accident, misadventure or the like in the case of, say, a failure to report to the welfare officer at the time and place designated by her.'
>
> In other words, the purpose and function of a hearing in these circumstances is to ensure that a mistake or mistakes of the sort cited above (which can be cured by an inquiry) have not in fact happened. It is interesting to note that this rationale for an inquiry was specifically endorsed by Murray J. in *Dowling v. Minister for Justice Equality and Law Reform* [2003] 2 I.R. 535 at 538."

50. I turn now to apply these principles to the facts of the present case. The evidence before the court establishes that a complaint in writing had been made to the Governor by An

Garda Síochána to the effect that the Applicant had allegedly been trespassing on private property. The property in question forms part of an industrial estate.

51. The Assistant Governor put this allegation to the Applicant on the morning following the latter's committal to prison on 9 April 2020. Crucially, the Applicant admitted to having been present on private property. The Applicant did, however, state that his presence on the property had been for the purpose of hunting rabbits.

52. The Assistant Governor was entitled to rely on this admission, in the context of the information provided by An Garda Síochána to the effect that the Applicant had been in the company of known criminals on lands within an industrial estate, in reaching the conclusion that the Applicant was in breach of his undertaking to be of "good behaviour". The Assistant Governor was also entitled to place some weight on the fact that An Garda Síochána had indicated an intention to pursue a prosecution against the Applicant.

53. A prison governor is not required to carry out an inquiry equivalent to a criminal prosecution. Nor is a prisoner governor required to be satisfied beyond all reasonable doubt that a prisoner has breached his undertaking to be of "good behaviour". It is sufficient that the conclusion is reasonable and based on objective material.

54. The decision of the Assistant Governor meets these criteria. The Assistant Governor was not required to negate a possible defence to a criminal prosecution, namely that it had not been proved beyond a reasonable doubt that the Applicant had criminal intent. It is sufficient for the purpose of the decision to cut short a period of temporary release by a number of days that the circumstantial evidence is such to allow an inference to be drawn.

55. The Assistant Governor also complied with the requirement to afford fair procedures to the Applicant. The allegation had been put to the Applicant, and he had been afforded an opportunity to respond to same. His response, namely an admission to having been present on private property without the owner's permission, was enough to remove any

concern as to mistake or reasonable excuse, as identified in the case law (in particular, *State (Murphy) v. Kielt* [1984] I.R. 458 at 472).

(2). WHETHER PROCEEDINGS MOOT

56. Counsel on behalf of the Governor has submitted that these judicial review proceedings are now, in effect, moot in circumstances where the month-long period of temporary release had expired prior to the substantive hearing of the proceedings. Emphasis is placed in this regard on the provisions of section 2(6) of the Criminal Justice Act 1960 (as amended) to the effect that the (temporary) release of a prisoner shall not confer an entitlement on that person to *further* such release.

57. With respect, this submission is not well-founded for the following reasons. First, as of the date the within proceedings were instituted on 17 April 2020, the period of temporary release was still extant. It did not, in fact, expire until the following day.

58. Secondly, the gravamen of the complaint made by the Applicant is that his arrest and recommittal to prison on 9 April 2020 had been unlawful. Had this complaint been well founded, then it would not have been an answer to same for the Governor to say that the month-long period had expired in the interim. The complaint made is that the Applicant had been denied the benefit of temporary release for the last nine days of the month-long period. If this complaint had been made out, then the Applicant would, in principle, be entitled to relief from the High Court. If the period had already expired, then the relief might be confined to declaratory relief only (or, possibly, damages). The Applicant would nevertheless be entitled to seek redress in respect of an alleged deprivation of his liberty.

59. In this regard, the distinction drawn in the earlier case law—in particular, by the Supreme Court in *Dowling v. Minister for Justice* [2003] IESC 33; [2003] 2 I.R. 535—between

(i) the grant of temporary release, and (ii) its revocation, is relevant. Whereas a prisoner does not have an entitlement to temporary release, where they have been granted such release same may only be lawfully revoked if proper procedures are followed. See *Dowling* as follows (at page 538 of the reported judgment).

> "It follows that the temporary release of a prisoner before the sentence imposed by a court has expired is a privilege accorded to him at the discretion of the executive. The liberty which a prisoner enjoys while on temporary release, being a privilege, is clearly not on a par with the right to liberty enjoyed by an ordinary citizen, although the early termination of the period of release must be carried out in accordance with the essential principles of constitutional justice […]."

60. As observed by O'Higgins C.J. in *State (Murphy) v. Kielt* [1984] I.R. 458 (at 470), were it to transpire that the breach of condition relied upon to revoke the temporary release of a prisoner could not be established, then any arrest and return of a prisoner to detention which had been effected in the interim would have been done without lawful authority.

61. As it happens, this court has found, for the reasons set out under the previous heading above, that the decision to revoke the temporary release was lawfully made. The judicial review proceedings will, therefore, be dismissed on this basis.

62. It is unnecessary, therefore, for the Governor to rely on the alternative defence, namely that the proceedings are a moot. It should be reiterated, however, that had the Applicant's detention during the period between 9 April 2020 and 18 April 2020 been found to be unlawful, he would be entitled to some form of relief notwithstanding that after the latter date he would have had to return to prison in any event.

CONCLUSION AND FORM OF ORDER

63. For the reasons outlined herein, the application for judicial review is dismissed.

64. Insofar as costs are concerned, counsel on behalf of the Applicant had applied at the commencement of the proceedings for the Legal Aid – Custody Issues Scheme ("***the***

Scheme"). The making of that application has been noted on the order of 17 April 2020 granting leave to apply for judicial review.

65. A formal recommendation that the Scheme be applied to the Applicant will be included as part of the final order. I am satisfied that the proceedings fall within the scope of the Scheme as set out in Section 4 thereof. The urgency and complexity of the case were such that it warranted the assignment of both senior and junior counsel, and a solicitor (Mr Chris Hogan). A certificate for senior counsel will be included in the order.

66. As this judgment is being delivered electronically, the attention of the parties is drawn to the practice direction of 24 March 2020, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

67. In circumstances where it is proposed that the issue of costs will be dealt with by way of a recommendation that the Scheme be applied, it is not anticipated that any submissions will be required from the parties in relation to the finalisation of the order in this case. If, however, for whatever reason one or other of the parties wishes to make submissions on the proposed form of order, written submissions to that effect should be filed electronically with the Central Office within fourteen days of today's date, and a copy of same emailed to the High Court Registrar assigned to this case.

Appearances

John Fitzgerald, SC and Mark Lynam for the Applicant instructed by Poe Kiely Hogan Lanigan & Co. Solicitors
Anne-Marie Lawlor, SC and Siobhán Ní Chúlacháin instructed by the Chief State Solicitor

Approved