[2020] IESC 24

THE SUPREME COURT

[Supreme Court Appeal No: 180/2018]

Clarke C.J.

MacMenamin J.

Dunne J.

O'Malley J.

Irvine J.

BETWEEN:

M.

Appellant

AND

THE PAROLE BOARD AND THE MINISTER FOR JUSTICE & EQUALITY

Respondents

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 12th of May 2020.

Introduction

1. The issue in this appeal is whether a long-term prisoner who has been transferred to the Central Mental Hospital ("the CMH"), on foot of a diagnosis of mental illness, is entitled to be considered for conditional release.

2. The appellant pleaded guilty to murder in 2007 and was sentenced to life imprisonment, backdated to May 2006. During the first few years of his sentence he was transferred several times from prison to the CMH, under the provisions of the Criminal Law (Insanity) Act 2006, for treatment for schizophrenia. It appears that his condition regressed each time he was transferred back to prison, with the indications being that he did not comply with his medication regime and used illicit substances. His last transfer to the CMH was in January 2012 and he has been detained there since. As required by the Act he has been reviewed twice a year by the Mental Health (Criminal Law) Review Board. Each review since 2012 has concluded that he required in-patient treatment in the CMH and should not be transferred back to prison.

3. In 2017 the appellant applied to the first named respondent, the Parole Board, for an assessment for parole. The Board took the view that it could not consider his application while he was detained in the CMH. For the same reason, the second named respondent, the Minister, says that he cannot consider an application for temporary release.

4. It is accepted on behalf of the appellant that should he be released, he might be detained in a psychiatric facility under the provisions of the Mental Health Act 2001 as amended. However, he sees this as preferable to what he sees as the prospect of serving a full life term in the CMH.

5. The debate between the parties has focussed closely on the many and various legislative provisions relevant to the appellant's situation, and it may be helpful to consider these before setting out the arguments.

Temporary release from prison

6. Section 2 of the Criminal Justice Act 1960, in its original form, simply empowered the Minister to make rules providing for the temporary release of persons serving a sentence of penal servitude or imprisonment, or a sentence of detention in St. Patrick's Institution (a penal institution for young male offenders, now closed). The section was amended by several enactments, mostly for the purpose of restricting its application to various categories of prisoner by reference to their conviction for particular offences, or providing for particular conditions to be attached to a grant of temporary release. Rules have been made by various statutory instruments that prescribe the applicable forms and deal with particular prisons and their governors. No express provision appears to have been made at any stage for prisoners transferred to the CMH on mental health grounds.

7. Section 2 was replaced, by s.1 of the Criminal Justice (Temporary Release of Prisoners) Act 2003, (as amended by s.8 of the Prisons Act 2015) with a more comprehensive provision that enables the Minister to direct the temporary release "*from prison*" of a person "*serving a sentence of imprisonment*", where a reference to a person serving a sentence of imprisonment includes "*a person being detained in a place provided under section 2 of the Prisons Act 1970*". Section 2 of the Prisons Act 1970 provides that the Minister may, for the purpose of promoting the rehabilitation of offenders, provide places other than prisons for the detention of persons who have been sentenced to imprisonment.

8. The word "prison" is not defined in the Act of 1960. However, s.2 of the Prisons Act 2007, as amended, defines a prison as a place of custody administered by or on behalf of the Minister for Justice and Equality, other than a Garda Síochána station. For the purposes of that Act it includes a place provided under s.2 of the Act of 1970. One example of such a place was the "open" prison in Shanganagh Castle (now closed). It also includes a place provided under s.3 of the Prisons Act 1972, which enables the Minister to specify a place to be used as a prison. This power was, for example, exercised in 2001 to specify that Wheatfield Place of Detention should be used as a prison. The Prisons Acts, and any other enactments relating to prisons, apply to persons detained in a place provided under s.2, and such persons are deemed to serving sentences of imprisonment in such places (s.4 of the Prisons Act 1970).

9. Temporary release under s.2 as amended may be granted for the purpose of assessing or preparing the person for release; or to enable him or her assist in a Garda investigation; or on health or other humanitarian grounds; or for prison governance reasons; or if the Minister is of the opinion that the person has been rehabilitated and would be capable of reintegrating into society. In making a decision whether or not to grant temporary release the Minister must have regard to a number of considerations set out in the section including the nature and gravity of the offence, the conduct of the person concerned and any report or recommendation from the governor of the prison concerned.

10. If the Minister grants temporary release, a direction to that effect is to be given to the governor of the prison concerned, and the governor shall comply with that direction.

11. Separately, s.39 of the Prisons Act 2007 provides that the Minister may, on compassionate grounds, or for the purpose of assessing suitability for early release, or to enable assistance in the investigation of an offence, order that a prisoner be taken to a specified place, for a specified purpose, for a specified period of time. This appears to enable shorter, escorted absences from prison.

Temporary release from the CMH

12. Section 1 of the Criminal Justice Act 1960 defines the Central Mental Hospital as the Central Criminal Lunatic Asylum established under the Central Criminal Lunatic Asylum (Ireland) Act 1845.

13. Section 3 of the 1960 Act, as amended, empowers the person in charge of the Central Mental Hospital (now referred to as the clinical director) to temporarily release a "*criminal lunatic*" detained there, with the consent of the Minister, if satisfied that the person is not dangerous to himself or others. The release may be subject to conditions. A "criminal lunatic" is, for the purposes of the section insofar as they are relevant here, a person detained in the CMH "*by warrant, order or direction of the Government*" and, if he or she is serving a sentence of imprisonment, whose sentence has not expired.

14. It should be borne in mind, when considering this provision, that various important pieces of 19th century legislation, conferring powers in respect of criminal lunatics on the Lord Lieutenant, were still in force when the Act of 1960 was enacted. The functions of the Lord Lieutenant in this regard were deemed, pursuant to the Adaptation of Enactments Act 1922, to be exercisable by the Government or Minister (see *Application of Gallagher* [1991] 1 I.R. 31).

15. Under s.12 of the Central Criminal Lunatic Asylum (Ireland) Act 1845 the Lord Lieutenant could by warrant direct that any person serving a sentence of imprisonment who was certified to be insane should be removed to the CMH. Such persons were to remain there until their sentences expired unless prior to that date it was certified to the Minister that they had become of sound mind, in which case they were to be returned to prison.

16. Section 13 of the Lunatic Asylums (Ireland) Act 1875 provided that the Lord Lieutenant could direct by warrant that any person who had been remanded by justices of the peace, but who was certified to be of unsound mind, should be removed to the district lunatic asylum until it was certified that he or she had become of sound mind. Section 8 of the Act of 1960 (now repealed) permitted the Minister to order the transfer of such a person to the CMH.

17. Under the Trial of Lunatics Act 1883, where an accused person was found guilty but insane, the proper course to be followed by the court was not to pass sentence (since it was a verdict of acquittal), or to inquire into the current mental state of the accused, but to order his or her detention as a criminal lunatic until the pleasure of the Government was known. The release of a person in this position was, therefore, primarily a matter for the Minister.

18. Section 3 of the Act of 1960 enabled the clinical director of the CMH, in each of these cases, to grant temporary release with the consent of the Minister. However, each of the provisions referred to here has been repealed, and replaced with procedures set out in the Criminal Law (Insanity) Act 2006. Although s.3 was amended in 2001 and again as recently as 2015, the reference to a "*warrant, order or direction of the Government*" does not appear to have been amended or adapted to the new regime

created by the Criminal Law (Insanity) Act 2006. To be clear, there do not appear to be any circumstances now in which the Minister (or the Government) may direct that a person be detained in the CMH.

19. Temporary release from the CMH is also provided for in s.14 of the Criminal Law (Insanity) Act 2006. Section 14 provides that the clinical director may, with the consent of the Minister, direct the temporary release of a "*patient*" on such conditions as he deems appropriate. He or she could also direct the transfer of a patient to another designated centre, if any such facilities were in being. Section 14(9) provides that the Minister may "in the interests of justice" direct the removal of a patient from a designated centre to a specified place "and during such authorised absence the patient shall be deemed to remain in the lawful custody of the designated centre".

20. To understand what is meant by the word "patient" in this provision it is necessary to have regard to its role in the context of the Act as a whole.

The Criminal Law (Insanity) Act 2006

21. This Act, as is clear from the title, is concerned only with the interaction between mental illness and the criminal justice and penal system. It has no application to those persons dealt with under the Mental Health Act 2001 as amended. Among other provisions, it established a Mental Health (Criminal Law) Review Board with the role of reviewing individual cases of detention under the Act. The Review Board is to be independent in the exercise of its functions, and "shall have regard to the welfare and safety of the person whose detention it reviews" as well as to the public interest.

22. Section 3 of the Act, as amended, designates the CMH as a centre for the reception, detention and care or treatment of persons committed or transferred there under the other provisions of the Act. The Minister for Health and Children is empowered to designate by order other psychiatric centres (hospitals or in-patient facilities in which care or treatment is provided for persons suffering from a mental disorder) for this purpose. As of the date of hearing of this appeal, no such order had been made. However, very recently the Minister has designated a facility in Portrane, Co. Dublin (see S.I. 142/2020), within the National Forensic Mental Health Service premises

located there. This will bring into play the capacity of the clinical director a designated centre to transfer a patient to another such centre under s.14(2).

23. It is worth noting here that the Act originally envisaged, in s.13(1), the possibility that a prison might be a designated centre. However, that subsection was deleted almost immediately by the Criminal Justice Act 2006.

24. Section 1 of the Act defines a "patient", but only for the purposes of ss.12, 13 and 14. Where used in those provisions it means "a person detained in a designated centre pursuant to the provisions of this Act".

25. Section 12 of the Act makes provision for the powers and procedures of the Review Board when reviewing the detention of a patient.

26. Section 13 deals with persons found by a court to be either unfit to stand trial (under s.4 of the Act), or not guilty by reason of insanity (under s.5), who are, again, referred to as "patients". The section obliges the Review Board to review the detention of a patient at intervals not more than six months apart. In the case of a person found either unfit for trial or not guilty by reason of insanity, the review may lead to a determination that further in-patient treatment is required or that the patient may be discharged from the centre either conditionally or unconditionally.

27. The appellant in this case was fit for trial and pleaded guilty. He was not committed to the CMH by order of a court but was transferred there, from prison, under the terms of s.15 of the Act. A transfer from prison to the CMH is effected, with or without the consent of the prisoner, on foot of a direction by the prison governor. The direction can be given only if one or more doctors certify that the prisoner is suffering from a mental disorder for which he or she cannot be afforded appropriate care or treatment within the prison. Under s.15(8), the prisoner is to be deemed to be in lawful custody while being transferred to the centre, while at the centre and while being transferred back to prison. He or she may be escorted to court by any members of staff of the prison or of the centre.

28. Section 16(1) provides that where a prisoner is detained in a designated centre pursuant to s.15, the governor of the prison from which the prisoner was transferred must give notice in writing to the clinical director of the centre of (a) the date, if known, on which the prisoner will cease to be a prisoner, and (b) any change to such date. This obligation has its most obvious function in relation to prisoners serving determinate sentences, whose release dates may change as a result of, for example, the imposition of a new sentence on appeal or in respect of a new conviction.

29. Section 16(2) makes it clear that, after a prisoner detained in a centre ceases to be a prisoner, he or she may be admitted to or detained in any place pursuant to the provisions of the Mental Health Act 2001.

30. Under s.17 of the Act, the Minister may direct the Review Board to review the detention of a prisoner transferred to the CMH under s.15. The prisoner may also apply directly for a review. In any event the Review Board must review the detention of such a prisoner at intervals of not more than six months. There are two possible outcomes. The review may lead to an order (after consultation with the Minister) directing that the prisoner be transferred back to prison. However, if the Review Board is satisfied that the prisoner is suffering from or continues to suffer from a mental disorder for which he or she cannot be afforded appropriate care or treatment within the prison, it must refuse to make such an order and the prisoner will continue to be detained in the CMH.

31. Separately, the clinical director of the hospital may form an opinion that a prisoner detained in the centre is no longer in need of in-patient care or treatment. If so, the director may, under s.18, after consultation with the Minister, direct the transfer of the prisoner back to prison.

32. It should be noted that a prisoner transferred to the CMH under s.15, and dealt with according to the provisions of that and the following sections, is at no point referred to as a "patient", but is consistently referred to as a "prisoner". A "prisoner" is defined in s.1 as "a person who is in prison on foot of a sentence of imprisonment, on committal awaiting trial, on remand or otherwise". A prison is defined simply as "a place of custody administered by the Minister".

Parole

33. Although parole is, at present, a non-statutory concept and is essentially an exercise of the Minister's power to grant temporary release under s.2 of the Act of 1960, it is understood to differ from what might be called classic temporary release. The latter will often involve a period of release understood by all concerned to be short, such as where a prisoner is released for Christmas, or to attend a family event, and is subject to an obligation to return to prison at the conclusion of the period as well as any other conditions. It is of course the case that temporary release may be granted on an incremental basis as part of a plan for the eventual release of the prisoner, and in the past might lead to what was known as "full temporary release" where the periods of release were automatically renewed in the absence of any breach. It is also true that temporary release may be given for reasons that have little to do with the personal circumstances of the prisoner, such as prison governance. However, the relevant point here is that a person given parole can expect to remain at liberty so long as he or she complies with any attached conditions.

34. The provisions of the Parole Act 2019, when commenced, will establish an independent Parole Board with the power to order the conditional release of an eligible applicant according to statutory criteria. The persons eligible for parole under s.24 of the Act will be those serving a life sentence who have served at least twelve years, and those who have served a term equivalent to a term to be prescribed in regulations made by the Minister. However, significantly, s.24(7) provides that a person who has been transferred to a designated centre pursuant to s.15 of the Criminal Law (Insanity) Act 2006 shall not be eligible for parole while detained in that centre.

35. As the Act has not been commenced, the power of release currently remains with the Minister. In any event, the Act clearly does not govern the dispute between the parties in this case.

36. The Parole Board in its current incarnation is a non-statutory body tasked with advising the Minister on the progress of an applicant and the management and

administration of his or her sentence. According to a booklet issued in 2016 for the guidance of prisoners, its advice is usually accepted by the Minister.

37. Prisoners do not apply for parole. The procedure is that the Minister receives information from the prison service as to which prisoners will become eligible for parole each year, and refers this list to the Parole Board. Eligible prisoners are, currently, those serving life sentences and fixed sentences of eight years or more. The Parole Board then invites the eligible prisoners to participate in the review process.

38. Among the matters to be taken into account by the Parole Board are the conduct of the applicant while in prison, and his or her engagement with services available to offenders such as the probation, psychological, psychiatric, education, training and addiction services. It will also consider any "offence-focussed" efforts by the prisoner to engage in rehabilitative programmes. The Board must take into account any risk assessment by the probation or psychology services and any written submission by victims or members of a victim's family.

39. The Board does not deal with requests for temporary release, although it may recommend a programme of release in an individual case as part of its advice to the Minister.

Remission

40. The power to commute or remit, in whole or in part, any punishment imposed by a court exercising criminal jurisdiction derives ultimately from Article 13.6 of the Constitution, which vests it in the President but permits its conferral by law on other authorities. The power is conferred on the Government by s.23 of the Criminal Justice Act 1951. Section 23A permits delegation of the power to the Minister for Justice and Equality. Such delegation was carried out by S.I. 416/1998. The rules governing remission of sentences of imprisonment are set out in Rule 59 of the Prison Rules 2007 (S.I. 252/2007). They do not apply to prisoners sentenced to life imprisonment

41. For the sake of completeness, it may be noted that s.33 of the Offences Against the State Act 1939 empowers the Government to remit in whole or in part, or to modify, or to defer, any punishment imposed by a Special Criminal Court.

Prisoners and medical treatment

42. Section 17(6) of the Criminal Justice Administration Act 1914 provides for the medical treatment of prisoners outside prison in the following terms:

> *"The Secretary of State, on being satisfied that a prisoner is suffering from disease and cannot be properly treated in the prison, or that he should undergo and desires to undergo a surgical operation which cannot properly be performed in the prison, may order that the prisoner be taken to a hospital or other suitable place for the purpose of treatment or the operation, and while absent from the prison in pursuance of such an order the prisoner shall be deemed to be in legal custody."*

43. This section was left expressly unaffected by the Mental Treatment Act 1945, and is not referred to in the Criminal Law (Insanity) Act 2006.

The High Court proceedings and judgment

44. In February 2017 the appellant wrote to the Parole Board asking whether and when he would be considered for parole. The Board responded that it could not engage in a review because he was a patient in the CMH.

45. On the 26th June 2017 the Review Board issued its decision on its latest review of the appellant's case. It recorded *inter alia* that he continued to display active psychotic symptoms, including delusions and hallucinations. Having regard to what had transpired previously when he was transferred back to prison, he was deemed to be both at high risk of non-compliance with his prescribed medication and likely to avail of illicit drugs outside a therapeutic environment. His clinical and risk factors indicated a significant risk of violence, linked to mental illness, outside a high security setting. The Review Board concluded that he continued to suffer from a serious and chronic mental disorder which required in-patient treatment and care in

the CMH which would not be available to him in prison. Accordingly, it refused to return him to prison.

46. In July 2017 the appellant's solicitor wrote to the Minister seeking a referral to the Parole Board. The response, from the Minister, referred to the respective roles of the Parole Board and the Review Board, and the possibility that the appellant could be transferred back to prison by the clinical director under s.18 of the Act of 2006. The letter concluded with the following two paragraphs:

> *"The Parole Board has no role in reviewing the detention of patients transferred from a prison to a designated centre such as the Central Mental Hospital (CMH). Those powers are set out in statute and do not provide a role for the Parole Board. Where a prisoner is in the long term care of the CMH, the Parole Board is plainly not in a position to advise the Minister, as it would in the case of a person in the custody of the prison system. It could not, for example advise the Minister of the person's progress to date, the degree to which there has been engagement with the various therapeutic services such as the Probation & Psychology Services, how that person has addressed their offending behaviour and how best to proceed with the future management and administration of that sentence.*
>
> *Put simply, the Parole Board could not advise the Minister on the sentence management of a person under treatment in the CMH. In such circumstances, it would not be in the public interest for the Minister to make a decision until such time as the prisoner has stabilised, returns to prison from the CMH and engages with the relevant services in Prison to address his offending behaviour. The Minister cannot refer your client's case to the Parole Board for review at this time. Should Mr.*[M] *no longer require treatment in the CMH, be returned to prison and engage with the therapeutic Services available to him in prison, the matter will then be reconsidered."*

47. On the 31st July 2017 the appellant was granted leave to seek an order of *certiorari* quashing the refusal of the Parole Board to consider him for parole, orders of *mandamus* directing the Parole Board to consider recommending him for parole,

remission or temporary release, and directing the Minister to consider him for temporary release under the Act of 1960 and/or remission under the Criminal Justice Act 1951, and a declaration that the respondents should consider his application for temporary release or remission of punishment in the same manner as a prisoner detained in a prison.

48. It is pleaded in the statement of grounds that there is no legislative bar to the exercise of the powers set out in s.2 of the Criminal Justice Act 1960 or ss.23 and 23A of the Criminal Justice Act 1951 arising from the fact that the appellant is unwell and is residing in the CMH. It is asserted that he is entitled, pursuant to Article 40.1 of the Constitution, to be treated in the same way as other prisoners who, having served an equivalent period in custody, would be considered for parole. The Minister and the Parole Board are said to have unlawfully fettered their discretion. The appellant claims that as a result he faces detention for the rest of his life due to the circumstances of his mental illness.

49. The appellant's claim was rejected in the High Court (see *M. v. The Parole Board* [2018] IEHC 531). Barrett J. considered that the case made was fundamentally flawed, in that the Minister's power to grant parole was governed by s.2 of the Criminal Justice Act 1960 as amended. That provision referred to release "from prison", and the appellant was not in either a prison, a place provided by the Minister under s.2 of the Prisons Act 1970, or a place specified by the Minister under s.3 of the Prisons Act 1972. He could not be given parole unless returned to prison under the provisions of the Criminal Law (Insanity) Act 2006.

50. Barrett J. did not see this situation as presenting any form of lacuna. The appellant was transferred to the CMH so that he could be properly cared for. Once the Review Board determined that he was well enough to be returned to prison he could seek to be released on parole. The appellant was not being subjected to a full life term without possibility of remission or parole. The Minister had not fettered his discretion but was conforming with the statutory parameters of that discretion.

51. Barrett J. also expressed the view that in any event the grant of parole was an exercise of the power of clemency allocated to the executive by Article 13.6 of the

Constitution. A prisoner had no right to parole, and in *Murray and Murray v. Ireland* [1991] I.L.R.M. 465 it had been held that the courts would intervene only if the Minister exercised his powers in a capricious, arbitrary or unjust way. Having regard to the decision of this Court in *Doherty v. Governor of Portlaoise Prison* [2002] 2 I.R. 252, the court's review powers were equally constrained when it came to the anterior issue of whether or not the Minister might be obliged to give consideration to granting parole. Barrett J. felt that the case would have to fail on this ground alone.

Submissions in the appeal

52. The appellant submits that, having regard to the provisions of the Criminal Law (Insanity) Act 2006, he is a prisoner serving his sentence while detained in the CMH. His primary submission is that, in the circumstances, the Minister has the *vires* to grant him release under s.2 of the Act of 1960. It is accepted that the Minister has a discretion as to how to dispose of any case considered by him, but the question here is whether he *can* consider the appellant's case.

53. It is argued that the definition of "prison" in s.2 is broad enough to encompass any place where a convicted person may be lawfully detained to serve his sentence, and that it should not be read as excluding the CMH. To do so would, it is submitted, lead to an absurdity and would not reflect the intention of the Oireachtas.

54. It is further submitted that a restrictive reading of the section would lead to a breach of the equality guarantee. The hypothetical comparator here is a prisoner receiving medical treatment, either in a prison or in a hospital other than the CMH, who would not be excluded in the same manner. This argument is made with reference to s.17(6) of the Criminal Justice Administration Act 1914, on the basis that it has never been said that a stay in hospital, even if long-term, could preclude consideration of a prisoner's case for release. It is suggested that if the Minister were to utilise the power under the Act of 1914 to send a prisoner to a psychiatric hospital the result would be the same.

55. The appellant argues that he has been transferred to the CMH under the Act of 2006 only because of the inadequacy of the Prison Service mental health facilities. As a

result of that transfer he has been deemed to have lost the benefit of an entitlement to seek release, simply because of his illness. This, he says, is a punitive consequence, at odds with the paternalistic intent of the Act.

56. It is submitted that even if the CMH is to be seen as excluded from the definition of a prison, for the purposes of s.2 of the Criminal Justice Act 1960, it is still open to the Minister to assess his case and direct his release from prison. If that were to be done, the governor of the prison would simply notify the clinical director, under s.16 of the Act of 2006, that the person concerned had ceased to be a prisoner. The powers of detention under the Mental Health Act 2001 would then become operable if required. Alternatively, the Minister could make any grant of temporary release conditional upon attendance at, or admission to, a psychiatric hospital.

57. The appellant says that, contrary to the suggestion put forward by the respondents, he cannot be given temporary release by the clinical director of the CMH under s.14 of the Act of 2006, since he is not a "patient" within the meaning of that section. If the Minister continues to refuse to even consider him for release under s.2 of the Act of 1960, his sole recourse is to the Review Board process, which can only result in either his return to prison or his continued detention. Given his history, he fears that they will never return him to prison because of the possibility that he will not abide by his treatment regime. In those circumstances he will serve a full life term, without the possibility of remission or parole. Such a situation would, he says, constitute a violation of his rights under Article 3 of the European Convention on Human Rights, as established in *Vinter v. United Kingdom* [2013] ECHR 786.

58. Finally, with reference to the role and procedures of the Parole Board, the appellant submits that the fact that a prisoner has a mental illness does not prevent the process from being undertaken. The Board could assess him in the CMH and seek reports from the staff there. The necessity for psychiatric treatment cannot be seen as justifying continued punitive detention.

59. The primary submission made by the respondents is that parole and remission are privileges granted by the executive, to whom the power to grant clemency has been allocated by the Constitution. They can therefore be the subject of judicial review

only in narrow circumstances. The Minister has a wide discretion, and he is amenable to judicial review only if he exercises that discretion in a manner that is capricious, arbitrary or unjust. In this regard the respondents rely upon *Murray v. Ireland* [1991] I.L.R.M. 465 and *Doherty v. Governor of Portlaoise Prison* [2002] 2 I.R. 252.

60. Secondly, it is submitted that the powers of the Minister must be exercised in accordance with s.2 of the Criminal Justice Act 1960. That provision limits him to cases where the person concerned is in prison, and the CMH is not a prison. Neither is it a place provided under s.2 of the Prisons Act 1970. Further, it is suggested that references in s.2 of the 1960 Act to the role of the prison governor in, for example, providing reports or recommendations to the Minister, cannot apply to a person in the appellant's situation, who has not been in a prison for several years and has had no interaction with prison staff during that time. The obligation of a governor to comply with a direction by the Minister to release a prisoner is, similarly, inapplicable.

61. The respondents' position is therefore, that the Minister cannot grant temporary release to the appellant and so cannot be compelled to consider an application for release. This situation would change should the appellant become well enough to return to prison.

62. It is denied that any breach of the equality guarantee has occurred. The respondents rely upon the general proposition that the Constitution does not require the State or its organs to treat persons or situations as alike when they are not, with reference to the decisions of this Court in *The State (Nicolaou) v. An Bórd Uchtála* [1966] I.R. 567 and *M.D. (A Minor) v. Ireland* [2012] 1 I.R. 697. A prisoner suffering from a mental illness requiring treatment in the CMH is not in the same situation as a prisoner brought to an ordinary hospital for physical treatment.

63. The respondents assert that for the purposes of the Act of 2006 the appellant is a patient as well as a prisoner, and that he can therefore be given temporary release under s.14. The clinical director could, for example, permit him to go to a funeral. However, if it was clinically appropriate to release him for longer periods it would follow that he would probably be well enough to return to prison, having regard to the provisions of s.18 of the Act.

64. It is submitted that the ECHR jurisprudence is irrelevant to this case. There are no irreducible life sentences in this State. The appellant can be considered for release if he is returned to prison.

65. Finally, it is submitted that the task and processes of the Parole Board do not lend themselves to the assessment of a person in the appellant's position. It is not possible for the Board to advise how the person's sentence may be managed in order to assist him to address his offending behaviour and rehabilitate himself, or assess the extent to which he has accessed services available within the prison setting.

Discussion

66. The judgment of Finlay C.J. in *Murray and Murray v. Ireland* [1991] I.L.R.M. 465 includes the following statement of principle:

> *"The length of time which a person sentenced to imprisonment for life spends in custody and as a necessary consequence the extent to which, if any, prior to final discharge, such a person obtains temporary release is a matter which under the constitutional doctrine of the separation of powers rests entirely with the executive..."*

67. Finlay C.J. went on to say that:

> *"...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 exercised them in a capricious, arbitrary or unjust way."*

68. In *Kinahan v. The Minister for Justice and Law Reform* [2001] 4 I.R. 454, Hardiman J. expressed a view that temporary release was a statutory creation administered under the relevant statutory rules, rather than a specific exercise of a general power of commutation or remission under the Constitution. He considered that the obligation to return to prison at the conclusion of a period of release was inconsistent with remission.

69. The dispute in *Doherty v. Governor of Portlaoise Prison* [2002] 2 I.R. 252 concerned the operation of the Criminal Justice (Release of Prisoners) Act 1998, which was enacted to provide for certain processes designed to assist in the implementation of those parts of the "Good Friday Agreement" relating to the early release of prisoners. The appellant argued that he was a "qualifying prisoner" under the Act. The respondents contended *inter alia* that on the facts of the case he was not.

70. Murray J. pointed out that the Act in question did not itself provide for a power of release, and that any related release would therefore take place under the provisions of an existing enactment such as the Criminal Justice Act 1960. He described the exercise of the power of release under the 1960 Act as the exercise of "an executive function of a discretionary nature within the ambit of the enactment conferring those powers". He did not consider that Finlay C.J had intended in *Murray* to exclude review by the courts if the Minister exercised his discretion in a manner which conflicted with any statutory provisions governing its exercise.

71. However, once the power was exercised within the ambit of the discretion, it was a purely executive discretion and not reviewable except on the grounds described by Finlay C.J. Release of prisoners was an exercise in clemency, which had always been seen as a privilege rather than a right. It followed that the Minister had a very wide discretion. The Act of 1998 did not impose any positive obligation to release, or to consider the release, of the appellant. The Minister was therefore not obliged to consider or exercise any power of release, let alone a power of release by reference to this particular Act.

72. It was in this context that Murray J. said:

> *"These are matters which fall entirely within the [Minister's] discretion. Whether he should consider or actually exercise a power of release in relation to any prisoner, by reference to any particular criteria, is a discretionary matter for the [Minister]."*

73. It seems to me to be clear, therefore, that Murray J. was not suggesting that the Minister has, in general, a discretion to refuse to consider an application from a

prisoner for temporary release. What matters is the relevant statutory framework, since the Minister cannot release any person in the absence of a statutory power. Where such power exists, the court must determine, in the first instance, whether or not the Minister has acted within the ambit of the discretion conferred upon him. If he believes that he does not have any discretion to consider release in particular circumstances, and the Court concludes that he is wrong in so believing, he will obviously not have acted within the discretion and can claim no immunity against judicial review.

74. The principal dispute between the parties in this appeal relates to s.2 of the Criminal Justice Act 1960 as amended. The appellant says that he can be considered for release under its terms. The Minister says that he cannot, because he is not in prison and therefore cannot be released from prison. Further, the Minister says that the Parole Board could not assess the case of a person in the appellant's position.

75. I consider that the section cannot be applied to the appellant. However, I would not be inclined to rest this finding on the words "from prison" as used in s.2 of the 1960 Act as amended. It is true that the appellant is not physically in a prison. However, the Criminal Law (Insanity) Act 2006 itself defines a prisoner as a person "in prison", but the whole point of the procedures set out in ss.16, 17 and 18 is that the prisoner (who continues to be referred to as such) is in fact detained in the designated centre.

76. I am also unimpressed by the argument that it is impracticable for the Parole Board, given the way in which its task has been defined, to assess the case of a person such as the appellant. The Parole Board has functioned to date as a non-statutory body whose processes have been designed by the Minister. If the Minister is obliged to consider a case such as this, it is no answer to say that the body he has created to advise him is not capable of giving advice in these circumstances.

77. In my view, the more fundamental point is that s.2 of the 1960 Act was never, whether before or after the amendment in 2003, intended to apply to prisoners transferred to the CMH. The CMH is not a prison, nor a place provided under s.2 of the Prisons Act 1970, nor a place specified under s.3 of the Prisons Act 1972. The section that was expressly intended to apply to the CMH is s.3. It appears to be the

case that s.3 is now operable only in the case of any person who was transferred from prison to the CMH on foot of a Ministerial order made before the 2006 Act came into force, and who has remained in detention there since. However, that limitation on s.3 would not be a proper basis for now reading into s.2 a power that clearly was not intended by the legislature in 1960.

78. There is also a dispute between the parties as to whether s.14 of the Criminal Law (Insanity) Act 2006 has any application to the appellant. The argument has been made on his behalf that he cannot be a "patient" within the meaning of this section, because, if he was, he would also be a "patient" within the meaning of s.13 and it is clear that he is not, since the Review Board has no power to order his release under the latter section.

79. In my view this analysis is mistaken. The starting position is that s.1 provides that the word "patient" as used in ss.12, 13 and 14 means a person detained in a designated centre pursuant to the Act. It does not necessarily follow that each of these three sections must relate to all persons described as patients.

80. The appellant is clearly a person detained in a designated centre, the CMH, pursuant to the Act. Section 12 is a general provision relating to the powers and functions of the Review Board when reviewing the case of any patient, and does not conflict in any way with the specific provision made in s.17 for the outcome of a review concerning a transferred prisoner. Section 13, by its terms, is concerned only with those patients who come to the CMH having been found by a court to be unfit to plead or, after trial, not guilty by reason of insanity. It has no application to persons transferred from prison while serving a sentence. Section 14 however is, again, a general provision that appears to cover all patients without distinction. It seems to me that the reasons why the clinical director might consider temporary release to be desirable in a particular case are as likely to arise in the case of a transferred prisoner as in the case of a patient committed through the courts. It may quite simply be a compassionate response to particular circumstances. Alternatively, planned temporary release may be seen as a helpful stage in the process of assisting with the recovery of a patient. It may also aid in the assessment of the progress of any recovery. These are

matters that are left to the judgment of the clinical director, subject to the consent of the Minister.

81. However, it does seem to be the case that in the case of a transferred prisoner, the statutory procedures and powers could not go beyond limited periods of release before the question of a return to prison would arise in the course of one of the Review Board's regular reviews. In other words, it is not envisaged in the statutory framework that a person in the appellant's position might remain on a long-term basis in the CMH, while building up a record of stable conduct and incremental periods of release with a view to being granted longer-term parole. If the person is well enough not to require in-patient treatment in the CMH, the review will conclude that he should be returned to prison.

82. This interpretation of the legislation does not lead to the conclusion that the appellant's rights under Article 3 of the ECHR have been violated. That Article prohibits grossly disproportionate sentences. The imposition of a life sentence for a serious crime such as murder is not *per se* grossly disproportionate. What the ECtHR has said (in *Vinter* and its subsequent jurisprudence) is that the Article requires reducibility of sentence:

> *"...in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds."*

83. A "whole life" sentence, meaning a sentence that expressly sets the prisoner's life as the term to be served, will not comply with Article 3 unless there is a possibility of such a review. However, Irish law does not provide for such a sentence. No minimum period is set by the sentencing judge, and as a matter of law a prisoner serving a life sentence may be released by the executive. As a matter of practice (pending the bringing into force of the Parole Act 2019) such a prisoner will be referred to the Parole Board for assessment after serving twelve years.

84. In the circumstances I would dismiss the appeal. However, I wish to add some remarks concerning the broader context.

85. The problem in this case is not that the law relating to life sentences precludes the possibility of release of the appellant. The real difficulty, in my view, is that his state of mental health precludes his return to prison for the purpose of an assessment for parole, and to date there has been no possibility under the relevant legislation that he could be released for the purpose of transfer to another psychiatric facility for ongoing treatment. The Court is not in a position to say whether his situation will be affected by the recent designation of the centre in Portrane.

86. As matters stand, it may be that a life prisoner who develops a serious and chronic mental illness that requires in-patient treatment could, as a result, end up indefinitely in the high-security setting of the CMH. That may, unfortunately, be necessary in some cases. I note here that the Review Board considers that the appellant presents a significant risk of violence outside such a setting.

87. The Court is aware from the relatively recent case of *AM. v. HSE* [2019] IESC 3 that the difficulties arising in this case are not unique to prisoners serving life sentences. In that case, a prisoner serving a determinate sentence was transferred to the CMH upon diagnosis with mental illness. Shortly before he was due for release on the expiry of his sentence he was made a ward of court for the sole purpose of seeking an order for his continued detention in the CMH, because *inter alia* there was no other psychiatric treatment facility available that could provide a sufficient level of security.

88. However, it may be possible to envisage an argument, in an appropriate case, that the current framework is unlawful in that it offers no prospect of release for a transferred prisoner who requires in-patient treatment and is not well enough to return to prison, but who is not considered to be so dangerous that he could not be accommodated in an appropriate hospital in the community. This observation is *obiter*, in that this case has been argued as a question of pure statutory interpretation. While Article 40.1 of the Constitution and Article 3 of the ECHR have been relied upon, there has been no challenge to the validity of any legislative provision on the basis of either of these provisions.

Iseult O'Malley
Approved 16th July 2021