The following is an outline of a paper delivered by Roger Sweetman SC at the second in the Prison Law series of practice seminars for barristers and solicitors, 'Prison Law Seminar - The Parole Process', which took place on Thursday March 26th, 2009. The lecture series is co-hosted by the Irish Penal Reform Trust, the Irish Criminal Bar Association and the Dublin Solicitors Bar Association.

RECENT CASE LAW IN RELATION TO THE PAROLE PROCESS

In the normal way, a sentence of imprisonment imposed by a Court must be served in full. The Power to Pardon, Commute or Remit punishment is conferred by Article 13.6 Bunreacht na hEireann, which states:

> "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities."

S.23 Criminal Justice Act 1957 conferred the powers of commutation and remission on the Government which by S. 17 of the Criminal Justice (Miscellaneous Provisions) Act 1977 delegated this power to the Minister for Justice. The Minister is further empowered to grant temporary release to prisoners by S. 2, Criminal Justice Act 1960 as amended by S. 1, Criminal Justice (Temporary Release of Prisoners) Act 2003, subject to a number of statutory conditions.

As is now customary, the Minister has set up a specialist body to advise him in the exercise of the powers set out above. Originally called the Sentence Review Group, this body is now called the Parole Board.

The legislative and administrative arrangements outlined above have given rise to a small body of domestic litigation, though as yet no case has come before the European Court of Human Rights.

The Domestic cases are mostly concerned with the exercise by the Minister of the powers delegated to him and so far as I am aware, the only cases which refer to the operation of the Parole Board are People (DPP) - v - R. McC, [2008] 2 IR 92 and Lynch - v - Minister for Justice and Others, [2008] 2 IR 92. I will return to these two cases later in this paper.

The cases I referred to earlier include:

1. Brennan - v - Minister for Justice, [1995] 1 IR 612, which involved a District Judge challenging the Minister for Justice's exercise of the power to remit penalties imposed by him on Defendants appearing in his Court. Geoghegan J. found the power exercised by the Minister to be both constitutional and executive in nature, but improperly exercised.

2. Kinahan - v - Minister for Justice, [2001] 4 IR 454 concerns the exercise by the Minister of the temporary release powers given him by S.2 Criminal Justice Act 1960 as amended, the amendments being introduced in 2003 to counteract decisions of the Superior Courts striking down decisions of the Minister as being ultra vires the 1960 Act, cf. Corish - v - the Minister [2000] 2 I.R. 548 and State (Murphy) - v - Kielt [1984] I.R. 458.

By and large, the Courts have set the bar very high for any interference in the exercise of Ministerial discretion regarding remission of sentence or temporary release. They will only interfere where a ministerial decision is capricious, arbitrary or unjust. Indeed, in cases such as Breathnach [2004] 3 IR 336, where the Minister had given no reasons for the imposition of conditions on a grant of temporary release, which the applicant complained of as unreasonable, the Court declined to interfere on the basis of the wide discretion given to the Minister.

As will be seen from the above cases, the Courts have taken a strict classical separation of powers attitude to questions of remission of sentence or temporary release and have only been prepared to intervene where there is clear evidence of injustice or ultra vires activity. The furthest they have been prepared to go in suggesting reform is the rather timid

suggestion by Keane C.J. in DPP - v - Finn [2001] 2 I.R. 25 that the Government might consider setting up a statutory parole board. The Government have gone some way towards this, in that we now have a non-statutory Parole Board, the distinguished Chairman of which is with us this evening, to act as adviser to the Minister in the exercise of his powers as above outlined. It is apparent from the statistics provided by the Board that the Ministers over the years, while accepting the vast majority of the recommendations of the Board, have not been slow in stating what they consider to be the appropriate length of time to be served by life sentence prisoners, the category most in need of the intervention of a Parole Board, cf. speech of Michael McDowell, T.D. on 24th March 2006, quoted in Lynch - v - Minister for Justice and Ors. [2008] 2 IR at pp 170-171 and speeches of Dermot Ahern, T.D. on 29th January 2009 and in the Oireachtas, in which he stated the minimum period served by life sentence prisoners on his watch would be 15 years and rising. I mean absolutely no disrespect to Mr. Holmes and his board when I say that as intelligent people with busy lives, they are highly unlikely to waste their time making recommendations to the Minister, which he has stated in terms he will not accept. Thus, I suggest, in a very real way the Minister determines the sentence length for life sentence prisoners.

The question of the compatability of the present arrangements for sentence review with the European Convention of Human Rights was challenged in Lynch - v - Minister for Justice. Irvine J., who tried the case, rejected that challenge and declined to hold that the Ministerial statements referred to above could be equated with the equivalent U.K. Minister's tariff fixing role, and found the decisions of the European Court of Human Rights in Stafford - v - UK (2002) 35 EHRR 1121 and the House of Lords in R (Anderson) - v - Home Secretary, [2003] 1 AC 837 unpersuasive, given the different sentencing regime in the UK. It is interesting, though, to note the expressions of concern by Kearns J., speaking for the Supreme Court, in DPP - v - R. McC. summarised in the headnote as: "There were problems with sentences of life imprisonment, as any decision as to the time actually served rested with the executive rather than the judiciary. In the absence of a statutory parole board acting under defined terms of reference and applying settled criteria whose decisions would be accepted, except for stated reasons, by the government, any sentence of life imprisonment remained one of uncertain duration …….

and it was unsatisfactory that a court exercising independent judicial powers was left in a situation of not actually knowing the period which would be served……".

Given the remarks of the European Court of Human Rights in Van Droogenbroeck - v - Belgium (1982) 4 EHRR 443 about looking at substance rather than form, it will be interesting to see how the European Court deals with the Irish Sentence review system when a case comes before it.

It is also of note that Professor Tom O'Malley is of the view that the present system may need to change to a statutory parole board with fixed terms of reference and the Court setting a tariff period similar to the U.K. (cf. O'Malley Sentencing, 2nd Edition, pp. 451-452). It would appear that in the whole area of sentencing, parole etc., we are approaching interesting times.

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25th March 2009