THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 299 JR]

BETWEEN

SHANE MCLOUGHLIN

APPLICANT

AND

GOVERNOR OF WHEATFIELD PRISON, THE IRISH PRISON SERVICE AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 19th day of June, 2017.

1. The applicant is serving a sentence of eleven years imprisonment imposed on 31st July, 2009, backdated to include time spent on remand in custody. He was convicted of an offence contrary to s. 15 of the Misuse of Drugs Act 1977-1984 ("the Act"), in a trial by jury and the approximate market value of the drugs was between €440,000 and €500,000. Drugs paraphernalia and a mixing agent were also found. The applicant did not appeal either conviction or sentence. He had a previous conviction under s. 15A of the Act when he was sentenced to six years and six months imprisonment. The applicant tested positive for drugs while he was in prison, on 20th July, 2015, and 21st March, 2016.

2. His prospective release date with one quarter remission is 28th October, 2017. The applicant applied for an enhanced remission and this application for judicial review arises following the decision by the Minister for Justice and Equality to refuse him enhanced remission. Had the application for enhanced remission been successful, the applicant's release date would have been 28th November, 2016.

3. Leave to apply by way of an application for judicial review for orders of *mandamus, certiorari* and declarations was granted by Noonan J. on 3rd April, 2017. The applicant seeks an order of *certiorari* on the grounds that the Minister failed to give any or any adequate reasons for her decision, and that the decision was made in the absence of fairness of process and natural justice.

4. The application was heard by me on 31st May and 1st June, 2017 and judgment was reserved.

5. By order made on 24th April, 2017, the applicant was given leave to amend the statement of grounds to seek an order extending time to bring the application for an order of *certiorari,* but not with regard to the other reliefs sought in the form of *mandamus* and declaratory relief.

Is the applicant out of time?

6. The respondents argue that the applicant knew the reasons why he had been refused enhanced remission from, at the latest, 26th November, 2016 and the three month statutory time limit had passed when the leave application was made *ex parte* on 3rd April, 2017.

7. The applicant argues that because of his ongoing engagement through his solicitor with the Minister, time did not begin to run until at the earliest, 10th February, 2017 or 16th March, 2017, when correspondence ceased.

8. In those circumstances, I turn now to consider the chain of correspondence.

9. The applicant lodged an application in person seeking enhanced remission on 16th June, 2016. A reply was sent on 26th August, 2016, said to have been "reissued" on 11th November, 2016. The letter of reply was sent to the Governor of Wheatfield Prison and the applicant's solicitor in her first letter of 17th January, 2017, suggests that the reply from the Minister was not received by the applicant until an unidentified date in November. I propose in those circumstances taking as a starting point that the letter of refusal was received on 26th November, 2016.

10. The solicitors for the applicant in their letter of 17th January, 2017, noted the basis of the Minister's decision and expressed surprise that the applicant's application had been dismissed, and sought further information regarding the basis for the refusal. The solicitors for the applicant raised the question of whether the decision of the Minister had been made on the basis of matters other than his behaviour in custody. In particular, it was noted that the letter communicating the decision to refuse enhanced remission included a reference to the "Garda view" and asked for all copies of reports and minutes supplied to the Minister by any agency which were relevant to her considerations. It was noted that in an application to the Parole Board, a prisoner is supplied with a dossier in relation to all reports submitted to that Board, and that the writer saw no reason why a similar approach was not appropriate in the case of a refusal of an application for enhanced remission.

11. A letter was sent in reply on 20th January, 2017, from the Irish Prison Service in which it was said that the decision made by the Minister was "based on the information and evidence provided by Mr. McLoughlin". It was acknowledged that Mr. McLoughlin had engaged in authorised structured activity and it was also acknowledged that "prior to making the decision, the Minister also sought views regarding his conduct while in custody and the views of An Garda Síochána". Because the conviction of Mr. McLoughlin related to the supply of drugs under the Misuse of Drugs Act, the letter noted the significance of the fact that Mr. McLoughlin had not accepted or acknowledged that he had any addiction issue "despite drugs playing a significant part in his offence". It was noted that the applicant had been disciplined under the Prison Rules on two occasions after testing positive for drugs.

12. The letter refused to furnish copies of the reports the Minister considered in relation to the application on the basis that they were "compiled and submitted on a confidential basis" and that to disclose information "may negatively impact the free flow of information between parties relating to prisoners which is central to the Prison Services ability to make safe decisions in relation to the management of a prisoner's sentence". It was noted that this particular approach was consistent with the authorities, in particular the judgment of Noonan J. in *Doody v. Governor of Wheatfield Prison & Ors.* [2015] IEHC 137 and the earlier judgment of O'Neill J. in *Byrne v. Governor of Castlerea Prison* [2005] IEHC 64.

13. The applicant was invited to submit another application should he wish.

14. The solicitors for the applicant responded by seeking a copy of his prison file pursuant to the Freedom of Information Act and furnished further information, including that the applicant had attended a psychologist for twelve months between 2013 and 2014, and that one of the disciplinary findings had been and continues to be disputed by him. It was noted that in those circumstances, the applicant would seek to appeal the finding on that disciplinary breach, but this reference to a possible appeal was wrong as the Prison Rules provide for a petition, and not an appeal, to the Minister from a decision that a prisoner had been in breach of prison discipline, and this was noted in a replying letter of 10th February, 2017.

15. The final letter before an application for leave was made was from the solicitors for the applicant on 16th March, 2017, which noted that the Freedom of Information Act application had not yet been dealt with, and which expressed concern that there was a vacuum of information as to the basis of the Minister's decision and which repeated the request for reports.

16. The respondents, in the statement of opposition, plead that the views of An Garda Síochána were not a factor in the decision-making process, and this is confirmed in the verifying affidavit of Paul Mannering. No contrary evidence is available or asserted.

Decision
17. I consider that the applicant is out of time to bring an application for judicial review by way of *certiorari* in regard to the decision communicated to him on 26th November, 2016. Having regard to the authorities an application to extend time must be supported by evidence that circumstances exist which were either outside the control of the applicant or which could not reasonably have been anticipated: *Coton v. DPP* per Kearns P. [2015] IEHC 302. The jurisprudence with regard to extension of time is well established and is not required to be repeated by me here.

18. The applicant advanced no reason that he did not seek judicial review within three months of the communication of the decision to him and indeed, his solicitor in her letter of 17th January, 2017, threatened to commence an application for judicial review if a reply was not received within seven days. She was not satisfied with that reply as indicated in her letter of 26th January, 2017. At that point, a query had arisen with regard to the reports or other documents on which the Minister had relied in coming to her decision. In a letter of 16th March, 2007, the applicant's solicitors noted the time limits in relation to bringing application for judicial review and indicated that application would be made without further reference. The three month period had elapsed at that stage.

19. The applicant seeks to argue that time commenced to run only when it became clear that the respondents were not prepared to furnish the information and documents on which the Minister made the decision. It is argued that the circumstances giving rise to the application crystallised then and not before. The argument seeks to rely on a recent judgment of Ní Raifeartaigh J. in *Bradley v. Minister for Justice and Equality* (Unreported, High Court, Ní Raifeartaigh J., 26th May, 2017).

20. The difficulty the applicant faces in making this argument is that his solicitor was well aware by 17th January, 2017, of the factual basis on which judicial review might be sought and these facts included the refusal on the part of the respondents to disclose the information and reports sought. The applicant has not identified any facts or factors outside his control or knowledge which would justify an extension of time. No additional affidavit evidence has been furnished in support of the amended statement of grounds by which an extension of time was added.

21. The applicant's solicitor engaged in correspondence regarding the absence of information and documents, but time did not start to run afresh at each reply. The process engaged was one that might have led to a resolution of the issue regarding the legality of the decision of the Minister, but the request for clarification were made regarding the decision and did not change the effective date of the decision. The applicant knew within time that the documents had been refused. The correspondence may have added some factual detail to the application but the application for judicial review does not arise out of that correspondence, but out of the decision to refuse enhanced remission.

22. Further, this application for *certiorari* is not sufficiently focused on a possible contest between the request of the applicant for disclosure and the respondents' assertion that the documents are privileged or confidential, if such assertion is in fact made. There may be some lack of clarity regarding the precise approach of the respondents, as if the Garda reports did not form part of the material which influenced the decision, the question of privilege or confidentiality cannot arise.

23. The application to extend time is made with regard to the relief in *certiorari* only and insofar as the question of confidentiality or privilege might arise it is a matter more properly one to which the relief of *mandamus* or a declaration is more appropriate. The applicant does not have leave to seek an extension of time with regard to these reliefs.

24. Therefore the application fails by reason of being out of time.

The legal framework
25. I should add, in case I am wrong in this view, that applicant has not persuaded me that the circumstances can be distinguished from recent cases law which is authoritative and binding on me. The law regarding the role of the courts in reviewing a decision by the Minister to grant a prisoner enhanced remission has been clarified in a number of recent decisions

26. The Minister is not obliged to explain his or her reasons in great detail, (*O'Brien v. Minister for Justice and Equality & Anor*. [2017] IEHC 199), nor is a court likely to interfere in the exercise of ministerial discretion unless the decision is arbitrary or unjust. The threshold for judicial review is high and the Minister has given as the reason for her decision the fact that she is not satisfied that the applicant has fully addressed his offending behaviour and while it was acknowledged that the applicant had engaged in some authorised structured activity, the Minister had regard to the nature and gravity of the offence and the "lack of offence focused work". The applicant cannot argue that the decision was made without some reasonable basis nor that it was arbitrary, capricious or unjust. The applicant may not rely on any principle of legitimate expectation to ground an application for judicial review: *Ryan v. Governor of Midlands Prison* [2014] IEHC 338.

27. The courts have displayed a reluctance to interfere in the discretion of the Minister to refuse enhanced remission: *McKevitt v. Minister for Justice & Ors.* [2014] IEHC 551, approved by the Court of Appeal [2015] IECA 122. A court will interfere with the exercise of this discretionary power when a decision is arbitrary or unjust, or where a decision maker has not given discernable reasons for his or her determination. As O'Malley J. said in *Ryan v. Governor of Midlands Prison*, the Minister in coming to a decision is entitled to have regard to "relevant information" and that the fact that a prisoner had engaged in authorised structural activity was not, of itself, sufficient to guarantee that enhanced remission would be successful.

28. Two recent decisions are of note. In *Doody v. Governor of Wheatfield Prison & Ors.,* Noonan J. refused to grant judicial review by

way of *certiorari* quashing a decision of the respondent to refuse the applicant enhanced remission. The applicant had engaged in a number of structured training courses within the prison environment. Noonan J. held that that decision was neither "capricious, arbitrary or unjust".

29. Barrett J. in a recent decision on point, *O'Brien v. Minister for Justice and Equality* & *Anor*., dealt with a question on the narrow ground that the Minister had failed to give adequate reasons or had applied an "unduly restrictive policy, or a blanket-refusal policy" in respect of offenders of the relevant class. Barrett J. considered that sufficient reasons were given and that the Minister had no obligation to provide what he called a "comprehensive compendium of answers to each aspect of every point raised" as he put it:

> "The Minister is required to provide a suitably rationalised response by reference to the facts of the application before her, and this she has done." (para. 9)

30. The applicant seeks to distinguish the decision of Noonan J. in *Doody* and the later decision of Barrett J. in *O'Brien v. Governor of Mountjoy Prison* & *Anor*. on the grounds that the applicant is refused disclosure of his full prison file and that therefore, the principles identified by Ní Raifeartaigh J. in *Bradley v. Minister for Justice and Equality* are engaged.

31. The facts of this case are sufficiently close to the facts on which Noonan J. came to his decision in *Doody v. Governor of Wheatfield Prison* & *Ors*. and on which Barrett J. came to a similar conclusion in *O'Brien v. Governor of Mountjoy Prison* & *Anor*.. Both these cases are recent and authoritative and binding on me. In particular, I adopt the statement of Barrett J. at para. 10 and 11:

> "10. …. There are only so many reasons why one-third remission would be granted or refused. It is likely that similar reasons may ultimately be offered in many, perhaps even most cases, notwithstanding that each is individually considered. It demands the impossible of decision-makers tasked with the everyday operation of government that they should be required constantly to conceive innovative and different ways to convey what seems likely ultimately to be a broadly similar message (save as to conclusion) regardless of which way the Minister's discretion is exercised. Consistency in messaging can be compatible with individualised decision-making.
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> 11. …. while the applicant might wish to focus on all the good work that he did in prison (and he did good work in prison) the Minister viewed (and was entitled to view) that as but one factor among several of relevance in the exercise of her discretion, and ultimately to decide, lawfully and properly (as she did), that viewed in the round the applicant's application ought to be refused."

32. Furthermore, I consider that the judgment of Ní Raifeartaigh J. in *Bradley v. Minister for Justice and Equality* may be distinguished as it involved a consideration of a claim of privilege or confidentiality and whether as Ni Raifeartaigh J. said at para. 48:

> "there is a zone of non-adjudication in respect of communications between the gardaí and the Prison Authority/Minister which arises from or is somehow connected with the limited standard applicable to decisions in enhanced remission cases, and covers all garda reports given to the Prison Service in this context".

33. The decision of Ní Raifeartaigh J. arose in a context where there was a dispute of fact in respect of which she considered it was not "entirely clear where the applicant's engagement with the courses and activities on offer was considered to be less than satisfactory. She expressed herself unwilling to take a view that the decision was arbitrary, capricious or unjust when there was information before the decision maker on which the decision could be made. The distinguishing feature of that case was that the Minister's refusal, *inter alia*, was made on the basis of the "potential threat to the safety and public, and the views of An Garda Síochána". It was in regard to the latter that a conflict of evidence arose and, in particular that there was a Garda report that was negative and did play a role in the decision to refuse enhanced remission. As she said at para. 31, there seemed to be a conflict between the Garda view in 2016 and the Garda view as expressed at the sentence hearing in 2012.

34. The circumstances of the present case are different. While the letter of refusal did make reference to the views of the Gardaí, and while the letter may be criticised for being over formulaic, the respondents have said unequivocally that the Garda view played no part in the reasoning of the Minister. This assertion by the respondents was made at para. 26 of the statement of opposition and verified by Paul Mannering in his affidavit sworn on 15th May, 2017. No effort was made to cross-examine on this issue, notwithstanding the difference between the correspondence and affidavit evidence. Confusion as to the precise role the Garda evidence played arises from the correspondence, and the factual position was not clarified until the service of opposition papers.

35. The applicant is free to apply afresh for enhanced remission, and may tailor his application differently.

36. I refuse to grant the relief sought.