THE HIGH COURT

[2016 No. 921JR]

BETWEEN:

OWEN O'BRIEN

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

AND

THE IRISH PRISON SERVICE

RESPONDENTS

Judgment of Mr Justice Max Barrett delivered on 31st March, 2017.

I. Background

1. The applicant was convicted of a series of sexual assaults on a child. He received a five-year sentence of imprisonment. Sentence was imposed on 17th May, 2013. A prisoner typically receives a one-quarter remission of sentence in return for good behaviour in prison (there is no right to this one-quarter remission but, in practice, such remission is, to borrow a phrase employed at hearing by the applicant's counsel largely 'the prisoner's to lose'). With this one-quarter remission, the applicant had an anticipated release date of 13th February, 2017. However, pursuant to rule 59 of the Prison Rules 2007 (S.I. No. 252 of 2007), as amended, the applicant had applied for enhanced remission which would have seen one-third of his sentence remitted and an earlier release date settled upon, if that application were successful. During his time in prison, the applicant had taken various steps to reduce his prospects of re-offending on release, which included his attending a sex offender programme that saw him secure a 'low to medium' risk-rating of re-offending, the usual such rating being apparently a 'medium to high' risk. Even so, the applicant's application for remission was rejected by the Minister, in a letter of 15th September, 2016, with the critical element of the letter of rejection being as follows:

> *"The Minister, having considered your application for enhanced remission, including material supplied in support of the application and the matters outlined above has decided to refuse your application. Whilst it is acknowledged that you have engaged in some authorised structured activity, the Minister having had regard to the extent to which you have taken steps to address your offending behaviour, the nature and gravity of your offence to which the sentence of imprisonment relates and the potential threat to the safety and security of members of the public, is not satisfied that you are less likely to re-offend and are better able to re-integrate into the community."*

2. Following on the refusal of enhanced remission, the applicant commenced the within judicial review proceedings in which he sought, *inter alia*, an order of certiorari quashing the refusal, an order of *mandamus* directing that adequate reasons be given for the refusal, a declaration that the refusal was based on unlawful policy considerations, damages, an order admitting the applicant to bail, and various ancillary reliefs.

3. The within judicial review application was heard on 9th February, 2017. Notwithstanding the imminence of the release date and the logistical constraints this brought to bear as regards any decision the court might make in the judicial review application, it was considered sensible to proceed to hearing because, *inter alia*, certain claims as to a systemic deficiency in the remission process might otherwise go un-aired and unaddressed. In fact, as will be seen, the court has found none of the claimed deficiencies to present.

II. A 'Blanket-Refusal' Policy?

4. The applicant maintains that the Minister fettered her discretion "*by applying an unduly restrictive policy, or a blanket-refusal policy*" in respect of sex offenders, as evidenced, he maintains, by the fact that no sex offenders have thus far been successful in obtaining a one-third remission. The Minister maintains (and the court accepts on the evidence before it) that no unduly restrictive policy applies, that there is no blanket-refusal policy, and that the applicant's application for one-third remission was considered on its merits and refused. Where the applicant sees the application of a blanket refusal policy, the court sees but a string of independent, consistent decisions in which the Minister has separately reached the conclusion not to exercise her discretion to grant the remission sought by certain other sex offenders, having regard, *inter alia*, to the nature and gravity of the respective offences in issue. On the evidence before it, the court sees: no capriciousness, arbitrariness or unjustness presenting in the Minister's decision concerning the applicant, as alleged; no error in the assessment of level of engagement in authorised structured activity; and no failure to acknowledge that there exists a discretion that might be exercised. All that has occurred as regards the applicant is that he properly applied for enhanced remission and, just as properly, was refused enhanced remission, with proper and good reasons offered for that refusal.

III. Pre-Determination

5. There was some suggestion that the individual decision-maker within the Department of Justice had indicated in an in-prison conversation with the applicant, before the application was considered, that it was unlikely to be successful. In fact, the court finds on the evidence before it that what occurred was an entirely unobjectionable conversation in which the decision-maker indicated, following inquiry being made of him directly by the applicant, that he was not commenting on the applicant's application but that he was not aware of a sex offender having previously made a successful application. There is no basis in this conversation for the applicant's later averment in evidence that he found the conversation "*disconcerting*", save to the extent that he may have found it disconcerting that he might be released later than sooner, but an appreciation of that objective truth offers no basis for relief by way of judicial review. Nor does the court see any basis for concluding, on the basis of the facts just described, that the outcome of the applicant's application for enhanced remission was in any sense pre-determined.

IV. Rationalised Consideration

6. It is claimed that the Minister failed to give proper justification for her refusal of the one-third remission. It will be recalled that the Minister referred, *inter alia*, to the nature and gravity of the applicant's offence, and there is a sense in the pleadings that the nature and gravity of the applicant's offence is under-stated. Thus, for example, the amended statement required to ground the application for judicial review mentions, *inter alia*, that "*His [the applicant's] offending, while serious, was confined to one victim within a domestic context*". That "one victim" was a child who was subjected to sustained sexual abuse. It may be, of course, that the

applicant did not have direct oversight of the particular statement from which the just-quoted text is extracted. Be that as it may, the applicant's offending clearly involved profoundly grave wrong-doing, a factor to which the Minister was entitled to have no little regard.

7. What of the suggestion that the above-quoted text from the letter refusing the one-third remission is too terse and that the Minister ought to have expanded more fully on the application and the weighting accorded by her to the various aspects of the applicant's application? In this regard, considerable weight was placed by the applicant' counsel on the decisions of the Supreme Court in *Mallak v. Minister for Justice* [2012] 3 I.R. 297, *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47, and *McEnery v. Commissioner of An Garda Síochána* [2016] IESC 66. As the last-mentioned of these cases was decided last November, involves a consideration of the previous case-law just mentioned, and represents to some extent an unfolding re-/iteration by the Supreme Court of the principles applicable in this area of the law, it seems to the court that it suffices for it to have regard to *McEnery* in order to show that the nature and degree of reasoning required of the Minister in refusing the one-third remission is not, with respect, as burdensomely rigorous as that for which counsel contended.

8. *McEnery* saw the Supreme Court quash, on grounds of inadequate reasons, the decision of the Garda Commissioner, as set out in a letter of 25th March, 2013, confirming a proposed decision to dismiss a Sergeant McEnery from An Garda Síochána. The particular difficulty arising in *McEnery* in this regard, as can be seen from para. 64 of the judgment of Laffoy J., is that the Garda Commissioner, following receipt of final submissions from Sergeant McEnery against the proposed dismissal, did not seek in the wake of those submissions to rationalise his conclusion to dismiss, but merely reiterated his conclusion that Sergeant McEnery's conduct merited dismissal in accordance with the relevant rule of conduct.

9. The actions of the decision-maker that are 'at issue' in the within proceedings are far removed from those which the Supreme Court considered in *McEnery*. Here, an application was made, the application was given individual consideration by a civil servant by reference to the criteria in the Prison Rules, and the Minister thereafter decided that while the applicant had "engaged in some authorised structured activity", having given regard to "*the extent to which [the applicant had]…taken steps to address [his]… offending behaviour, the nature and gravity of [his]…offence to which the sentence of imprisonment relates and the potential threat to the safety and security of members of the public*" was not satisfied that the applicant was both less likely to re-offend and better able to re-integrate into the community. That is an entirely rationalised consideration by the Minister of the applicant's application in precisely the manner contemplated by *McEnery*. Neither *McEnery* nor the preceding case-law referred to above requires that the Minister should engage with every aspect of an applicant's application for enhanced remission in exhaustive detail, providing a comprehensive compendium of answers to each aspect of every point raised. 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.

10. If it is claimed, and there is a hint of this in the pleadings, that the Minister's response came in a somewhat standardised form (notwithstanding that it involved a rationalised engagement with the individual application) that, with respect, is to be expected. 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.

11. To the applicant's complaint that he does not see what more he could have done in prison to improve himself and that it is difficult to conceive of anything more capricious, arbitrary and unjust than to encourage a category of inmates to strive for enhanced remission and then to refuse it to them all, the court considers that that is to bring a distorted prism to bear both on how his application was treated and how the end-decision was reached by the Minister. First, as to how the application was treated: it was given individual consideration by reference to the criteria identified in the Prison Rules; the applicant may elect to view his application in the context of such other applications as have been made by sex offenders but the Minister did not. Second, as to how the end-decision was reached, 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.

V. Conclusion

12. For all of the reasons stated above, the court has declined to grant the various reliefs sought by the applicant in the within application.