THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 686 J.R.]

BETWEEN

SHAUN KELLY

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of November, 2017

1. In this case, the applicant seeks, *inter alia, certiorari* by way of judicial review, of two decisions of the respondent refusing him temporary release and enhanced remission respectively.

2. The relevant background is as follows.

3. The applicant was sentenced by Donegal Circuit Criminal Court on 18th December, 2014 to a sentence of four years imprisonment with the final two years suspended in respect of a charge of dangerous driving causing death. The offence was committed in July, 2010 when the applicant was 21 years of age. It involved the death of eight people, including seven friends of the applicant who were passengers in the car driven by him.

4. The Director of Public Prosecutions appealed against the leniency of the sentence. In a judgment delivered on 16th November, 2015, the Court of Appeal found that the sentence imposed by the Circuit Court was the result of an error of principle by the learned sentencing judge and it set aside the said sentence as being unduly lenient.

5. In a further judgment delivered on 7th December, 2015, the Court of Appeal substituted a sentence of eight years imprisonment with final four years suspended to date from the date that the applicant went into custody.

6. The applicant's release date, based on the calculation of a remission rate of one quarter, in accordance with Rule 59(1) of the Prison Rules 2007 to 2014 (S.I. No. 252 of 2007 and S.I. No. 385 of 2014) ("the Prison Rules") is the 16th December, 2017. The applicant's release date, based on the calculation of a remission of one third, in accordance with Rule 59(2) of the Prison Rules was between 16th and 18th August, 2017.

7. For the most part, the applicant has served his sentence in Castlerea Prison and latterly, since 10th August, 2016, in Loughan House Open Centre Prison.

8. On 9th February, 2017, in light of positive reports on the applicant's sentence progression, and given that he is due to be released on 16th December, 2017, he was approved by for temporary release on a trial basis commencing February, 2017. If it went well, it was suggested that the applicant could avail of one temporary release period per month, with curfew, for March and April 2017, and, thereafter, temporary release to be reviewed after the April 2017 review meeting.

9. On foot of this, the applicant was granted overnight temporary release on the 17th February, 2017 until 19th February, 2017, whereby he was permitted to return home to his family in Donegal. While on temporary release he was photographed on his family farm and subsequently, on 20th February, 2017, when the applicant had returned to Loughan House Open Centre Prison, a series of very prominent newspaper articles appeared in the national press expressing highly critical views on the fact that he had been permitted temporary release.

10. On 20th February, 2017, an internal Irish Prison Service (IPS) email referred to this press coverage. Attached to the email was a "Media Book" which comprised extracts from the highly critical media coverage which the applicant's temporary release had generated.

11. On 22nd February, 2017, the Governor of Loughan House Open Centre Prison was advised that the Director of Operations of the IPS had instructed that the applicant's programme for future temporary release be cancelled and that he remain within the confines of Loughan House property/grounds for his own safety and protection. On 3rd March, 2017, the IPS sought a list of any prisoners in Loughan House Open Centre who were serving sentences for dangerous driving causing death.

12. By early March, 2017, the applicant was aware that he would not be availing of any further temporary release. An internal IPS email of 9th March, 2017, gives an account of a meeting between prison personnel and the applicant's parents who conveyed their annoyance that the applicant's temporary release programme had been revoked. They are recorded as asking whether the IPS was being dictated to by the media. The email states that it was explained to the applicant's parents that while there had been unprecedented media attention, temporary release was not a right and the granting of it was based on a number of factors including the nature and gravity of the offence. They were also advised that temporary release once approved could also be revoked.

13. Notwithstanding the decision taken on 22nd February, 2017, it would appear however that in April, 2017, further to the applicant's request, the IPS explored whether temporary release might be exercised at locations other than the applicant's family home in Donegal but it was explained to the applicant that this consideration "was not an indication of approval of TR".

14. On 5th April, 2017, the applicant applied for consideration for enhanced remission pursuant to Rule 59(2) of the Prison Rules.

15. On 3rd July, 2017, the applicant's mother wrote to Ms. Rita McGahern, Principal Officer in the Operations Directorate of the IPS, with regard to the cancellation of the temporary release programme which had been envisaged in February, 2017 for the applicant. She requested that the "home visits" would be reinstated.

16. That letter was replied to by McGahern on 6th July, 2017 in the following terms:

> "I wish to acknowledge receipt of your correspondence of 03 July, 2017. Please be assured that consideration has been given to the management of the custodial sentence imposed by the courts in respect of your son … He was deemed suitable for transfer from a closed prison to an open centre having served 17 months of a four year sentence, leading to his transfer from Castlerea Prison to Loughan House Open Centre regime on 10th August, 2016. In early 2017, he was approved a trial of two over nights temporary release (TR) from 17th to 19th February, 2017, as part of his reintegration into the community. However this led to unprecedented media attention all of which was negative and focussed on the loss of life. In light of these events the Director of Operations instructed that the programme for future TR be cancelled and that Mr. Kelly remain within the confines of the Loughan House property for his own safety and protection. The Irish Prison Service are obliged to ensure the safe and secure custody of all prisoners for the duration of their sentence, and it is with this in mind that the Directors (sic) decision remains unchanged."

17. It is the applicant's contention, in the within proceedings, that this letter constituted a separate and distinct decision refusing temporary release to the applicant, to that which was made on 22nd February, 2017. The respondent contends that the letter of 6th July, 2017 merely confirmed the decision made on 22nd February, 2017.

18. On 17th August, 2017, the applicant was advised that his application for enhanced remission was refused. The contents of this decision letter are set out more particularly later in the judgment.

19. By Order of this Court of 25th August, 2017, (Faherty J.) the applicant was granted leave to seek, inter alia:

> (i) an order of *certiorari*, by way of an application for judicial review, quashing the decision of the respondent to refuse the applicant enhanced remission;
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> (ii) an order of *certiorari*, by way of an application for judicial review, quashing the decision of the respondent to revoke the applicant's temporary release which decision was made in or around February, 2017 and subsequently affirmed and explained by letter dated 6th July, 2017; and
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> (iii) an order of *certiorari*, by way of an application for judicial review, quashing the ongoing decision of the respondent, as evidenced in the letter of 6th July, 2017, to refuse the applicant temporary release indefinitely, for the duration of his sentence.

The challenge to the temporary release decision

20. In summary, the decision not to grant the applicant temporary release is challenged on the following grounds:

> (i) There is nothing in the relevant legislation relating to temporary release to permit the respondent to take into consideration media reports relating to a person who has been granted temporary release;
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> (ii) There is nothing in the relevant legislation which permits the respondent to take into consideration the safety and protection of a person in the position of the applicant who was granted temporary release;
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> (iii) None of the media articles upon which the IPS relied indicated any danger to the safety or protection of the applicant by reason of his being granted temporary release;
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> (iv) The respondent erred in law in failing to take into account relevant considerations and in taking into account irrelevant considerations;
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> (v) The impugned decision was made in breach of fair procedures, natural and constitutional justice. In particular, it was unfair that the decision to cancel the applicant's temporary release and/or the decision to refuse him temporary release indefinitely would be based on adverse media reports that happened to be critical of any decision to grant a prisoner early or temporary release. Such media reports were matters outside the applicant's control. There was no wrongdoing on his part and no breach of the temporary release conditions or bond. Furthermore, no opportunity was provided to the applicant to challenge or test the basis for the impugned decision;
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> (vi) The impugned decision is bad for being *ultra vires* the applicable statutory scheme; and
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> (vii) The respondent's decision was in all the circumstances arbitrary and/or capricious and/or unjust.

21. In her affidavit grounding the within application, and for the purposes of seeking an extension of time, the applicant's solicitor accounts for the failure to challenge the cancellation of the temporary release programme within three months fn 22nd February, 2017 on the basis that while the applicant formed the intention to take issue with the decision within the requisite three month period, and while his mother also made efforts to do so, the applicant only became aware that he could challenge the decision by way of judicial review when he instructed his legal representatives in July, 2017.

22. In the statement of opposition, the respondent asserts that the applicant is out of time to challenge the decision of 22nd February, 2017. It is asserted that the applicant's reason for not challenging the decision within the requisite three months is not valid. The respondent contends that by virtue of his circumstances as a serving prisoner who was legally represented during his trial and subsequent appeal before the Court of Criminal Appeal, the applicant had sufficient familiarity with the legal process to avail of legal advice. They also assert that while it is understandable that in the immediate aftermath of the decision concerning temporary release that the applicant (and his parents) would make direct approaches to the prison authorities in a bid to have the decision reversed, once it became clear that their requests would be unsuccessful they had sufficient understanding of the legal process to have considered the possibility of mounting a legal challenge to the decision. In this regard, the respondent relies on the email communication dated 9th March, 2017 which documents the applicant's parents understanding as of that time that the temporary release programme had been terminated. The respondent also points to the applicant's Freedom of Information request of 16th March, 2017, in respect of the period of surrounding the decision cancelling the temporary release. It is asserted that this is sufficient to demonstrate an ability to challenge the impugned decision in time.

23. In all the circumstances of this case, the Court is satisfied to grant an extension of time for the purposes of the within challenge.

While the respondent relies on the fact that the applicant had legal representation for his trial and appeal, and thus was no stranger to the process of obtaining legal representation, in granting the extension, the Court takes into its consideration the fact that the applicant's trial and appeal were well in the past by the Spring of 2017, and that the fact of his incarceration may have impacted upon his failure to appreciate that he could challenge the decision through legal channels. While the Court notes that applicant did take issue with the respondent's decision in its immediate aftermath, the fact that this did not translate into a legal challenge on his part within three months of the 22nd February, 2017 should not, in the Court's view, bar the applicant from seeking relief given that as late as April, 2017, the IPS were still exploring ways of accommodating temporary release.

24. The applicant asserts that the response provided by the respondent on 6th July, 2017 to the applicant's mother's request that the temporary release programme be reinstated constitutes a discrete decision made on the issue of temporary release, over and above the prior decision of 22nd February, 2017. The respondent disputes that any decision was made on 6th July, 2017. On balance, it seems to the Court that the response provided by the respondent on 6th July, 2017, was for all and intense purposes a response to the queries which had been raised both by the applicant personally and on his behalf consequent on the 22nd February, 2017 decision. I am not satisfied that it can be said to constitute a discrete decision. The issue is, in any event, moot given that the Court is satisfied to extend the time within which to challenge the decision of 22nd February, 2017.

25. The response to the challenge to the decision cancelling the temporary release programme which had been envisaged for the applicant is contained in the affidavit of Martin Smyth, Director of Operations with the IPS, who was the person who made the decision that the applicant would receive no further periods of temporary release save as those that may arise for humanitarian reasons. He avers, *inter alia* as follows:

> "7. While my decision was made after …media coverage I wish to strongly and clearly state that my decision was not based on any reaction to the fact or content of the newspaper articles. I did not make the decision upon receipt of the media booklet, but did so later.
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> 8. I made my decision following a briefing by our Victim Liaison Officer, Mr. Walter Burke, about the tone and content of a telephone call he received from a victim. Mr. Burke came to my office to verbally inform me of this communication. I say that in itself was very unusual. From what he informed me I have informed the view there was a genuine and real concern that the Applicant could be put in danger or that his safety would be under threat if he was allowed further periods of temporary release. That concern was the sole reason for my decision. I took the genuine view that the Applicant could potentially be the subject of an incident if on a further period of temporary release.
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> …
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> 11. I say that while I receive regular and routine updates on media coverage of prison issues, I acknowledge that it is unusual to receive a dedicated booklet. This reflected the nature of the case. I say that while, I and my colleagues, in the Irish Prison Service Operations Directorate are well experienced in dealing with media comment surrounding the temporary release of serving prisoners, in the 14 years that I have worked in the Irish Prison Service I have not previously experienced such negative media reporting in respect of a temporary release.
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> 12. Insofar as the Applicant [is] in custody IPS owes a duty of care in decision making. When a prisoner is on temporary release and therefore has left the cofines of the prison, the prisoner operates for that period of temporary release in the same capacity as any other member of the public. The Applicant would be unaccompanied by prison staff while on overnight temporary release and therefore I say and believe that I have a statutory obligation in accordance with Section 2(d) of the Criminal Justice Act 1960 as amended… whereby the Minister is required to have regard to:
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> > *'The potential threat to the safety and security of members of the public 9including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison.' "*

26. Mr. Smyth goes on to aver:

> "16. Although the Applicant was not to have further temporary release it is the case that he would be entitled to apply for temporary release in exceptional and humanitarian circumstances and that same will be considered.
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> …
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> 17. I say that the Applicant did not do anything wrong or engage in any misconduct while he was on temporary release. However, the notoriety of his offence and the fact that 8 people had died in the car crash, coupled with his temporary release that caused me to form a view that his safety could be under threat if he had further periods of temporary release."

The applicable statutory provisions

27. The executive power to direct the temporary release of a serving prisoner is contained within s. 2(1) of the Criminal Justice Act, 1960 (as fully substituted by the Criminal Justice (Temporary Release of Prisoners) Act 2003 which provides:

> "1.—The Criminal Justice Act 1960 is hereby amended by the substitution of the following section for section 2:
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> "2.—(1) The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—
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> (a) for the purpose of—
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> (i) assessing the person's ability to reintegrate into society upon such release,
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> (ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or

(iii) assisting the Garda Síochána in the prevention, detection or investigation of offences, or the apprehension of a person guilty of an offence or suspected of having committed an offence,

(b) where there exist circumstances that, in the opinion of the Minister, justify his temporary release on—

(i) grounds of health, or

(ii) other humanitarian grounds,

(c) where, in the opinion of the Minister, it is necessary or expedient in order to—

(i) ensure the good government of the prison concerned, or

(ii) maintain good order in, and humane and just management of, the prison concerned, or

(d) where the Minister is of the opinion that the person has been rehabilitated and would, upon being released, be capable of reintegrating into society.

(2) The Minister shall, before giving a direction under this section, have regard to—

(a) the nature and gravity of the offence to which the sentence of imprisonment being served by the person relates.

(b) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto,

(c) the period of the sentence of imprisonment served by the person,

(d) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the person relates) should the person be released from prison,

(e) any offence of which the person was convicted before being convicted of the offence to which the sentence of imprisonment being served by him relates,

(f) the risk of the person failing to return to prison upon the expiration of any period of temporary release,

(g) the conduct of the person while in custody, while previously the subject of a direction under this section, or during a period of temporary release to which rules under this section, made before the coming into operation of the Criminal Justice (Temporary Release of Prisoners) Act 2003, applied,

(h) any report of, or recommendation made by—

(i) the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned,

(ii) the Garda Síochána,

(iii) a probation and welfare officer, or

(iv) any other person whom the Minister considers would be of assistance in enabling him to make a decision as to whether to give a direction under subsection (1) that relates to the person concerned.

(i) the risk of the person committing an offence during any period of temporary release,

(j) the risk of the person failing to comply with any conditions attaching to his temporary release, and

(k) the likelihood that any period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment.

(3) The Minister shall not give a direction under this section in respect of a person—

(a) if he is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to so do,

(b) where the release of that person from prison is prohibited by or under any enactment, whether passed before or after the passing of this Act, or

(c) where the person has been charged with, or convicted of, an offence and is in custody pursuant to an order of a court remanding him to appear at a future sitting of a court.

(4) A direction under this section shall be given to the governor of, or person for the time being performing the functions of governor in relation to, the prison concerned.

(5) The governor of, or person for the time being performing the functions of governor in relation to, the prison concerned to whom a direction under this section is given shall comply with that direction, and shall make and keep a record in writing of that direction.

(6) Without prejudice to subsection (1), the release of a person pursuant to a direction under this section shall not confer an entitlement on that person to further such release.

(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.

(8) Every rule under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if a resolution annulling the rule is passed by either such House within the next 21 days on which that House has sat after the rule is laid before it, the rule shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

(9) This section shall not affect the operation of the Criminal Justice (Release of Prisoners) Act 1998 .

(10) In this section, 'probation and welfare officer' means a person appointed by the Minister to be—

(a) a welfare officer,

(b) a probation officer, or

(c) a probation and welfare officer.

(11) In this section—

(a) references to a person who is serving a sentence of imprisonment shall be construed as including references to—

(i) a person being detained in a place provided under section 2 of the Prisons Act 1970 , and

(ii) a person serving a sentence of detention in St. Patrick's Institution,and sentence of imprisonment shall be construed accordingly,

and

(b) references to a prison shall be construed as including references to a place provided under the said section 2 and that Institution.".

The applicant's submissions

28. The applicant takes issue with the respondent's contention that the temporary release programme envisaged for the applicant ceased because of concerns for his safety or security. It is submitted that there are a number of indicators which would suggest that a perceived threat to the applicant is not the basis for the decision. These are:

(i) The applicant was not told at the time of the removal of the temporary release option that it was because of a threat to his safety or security;

(ii) The sequence of the matter is clear. Temporary was revoked after extensive negative media coverage and the provision of a media book to this effect being put together for the decision maker;

(iii) The rationale for the decision, as now posited by the respondent, is at odds with the internal IPS email communications of 20th February, 2017 and 24th April, 2017 wherein, respectively, reference is made only to media reports and where it is clear, as of April, 2017, that the respondent continued to explore venues at which the applicant could engage in temporary release;

(iv) The respondent has not given the applicant (or the Court) any information evidencing or elaborating upon the alleged threat to the applicant, as referred to in Mr. Smyth's affidavit. Instead, the respondent has claimed public interest privilege over the oral communication from Mr. Burke;

(v) If there was a serious threat to the applicant, one would think that that would preclude the respondent from granting the applicant humanitarian temporary release, but this option remains open to the applicant;

(vi) There is nothing in the papers before the Court which shows that there was any weighing of the alleged threat to the applicant, or that consideration was given as to how the alleged threat might be addressed such that a grant of temporary release to the applicant, which the IPS supported, could still be made;

(vii) There is nothing in Mr. Smyth's affidavit as to what was communicated to him by Mr. Burke that assists the applicant or the Court as to why the temporary release programme was cancelled, such that the applicant has been left in the dark on the issue. In particular, there is no minute or affidavit from Mr. Burke put before the Court.

(viii) While it is acknowledged that the respondent may not be anxious to disclose the individual source of the information to Mr. Burke, it remains the case that there is not even a reference to the nature of the threat in Mr. Smyth's affidavit.

29. It is further submitted that there is no merit to the respondent's contention that the applicant is a "member of the public" for the purposes of s. 2(2) (d) of the 1960 Act. The respondent's argument in this regard is misconceived. Pursuant to s. 2(2) of the 1960 Act, the consideration to be engaged upon by the respondent is a forward looking consideration which is to be engaged in at a time when the applicant for temporary release is a prisoner. The applicant is not therefore a "member of the public". The task of the respondent is to decide, *inter alia*, whether and to what the extent the release of the applicant could impact on the safety of persons other than the applicant who at the time of the respondent's consideration of temporary release are "members of the public". It is submitted that it would be reasonable to expect that the Legislature would have enumerated the safety and security of the prisoner as "a member of the public" as a factor to be taken into consideration, if indeed it intended such to be a factor in the respondent's decision.

30. It is submitted that the interpretation of s. 2(2) (d) of the 1960 Act advocated by the respondent is such as to import into Irish law the concept of protective custody, which, in the *People (Attorney General) v. O'Callaghan* [1966] I.R. 501, was rejected by the

Supreme Court. Accordingly it cannot be open to the respondent, by revoking and refusing further temporary release to the applicant, to thrust a form of protective custody upon him, where he is both unwilling and unknowing. Had it been the intention of the Legislature to create an entirely new jurisdiction to permit protective custody, clear and compelling language would have been used to achieve such a result.

31. It is further submitted that the contrived interpretation of s. 2(2) (d) of the 1960 Act was not carried through in the respondent's decision to refuse the applicant enhanced remission, in circumstances where the Prison Rules on enhanced remission include a provision similar to that provided for in s. 2(2) (d) of the 1960 Act, as a basis to refuse enhanced remission.

The respondent's submissions

32. It is the respondent's contention that the cessation of the proposed temporary release programme arose because of an issue concerning the safety and security of the applicant and not because of any adverse media coverage of his temporary release. The respondent submits that the media coverage was the context but not the reason for the decision taken on 22nd February, 2017. It is further submitted that there is no inconsistency in the respondent keeping open the option of humanitarian temporary release for the applicant.

33. The basis of the decision was the respondent's identification of a potential threat to the safety of the applicant as a member of the public while he on temporary release. This was based on information which had been communicated to Mr. Smyth as a result of which there was a perceived potential threat to the applicant's safety and security.

34. It is further submitted that it is incorrect to categorise the decision of 22nd February, 2017 as one revoking temporary release since the applicant had returned to prison by the time the decision was made.

35. Counsel emphasises that there is no right to temporary release. The applicant is in lawful custody. Thus, insofar as the applicant challenges the decision on the basis that various factors were not weighed by the decision-maker that is not the correct approach. In circumstances where there is no automatic entitlement to temporary release, the test the applicant must meet is whether the refusal is capricious, arbitrary or unjust.

36. It is submitted that it was in order for the respondent to categorise the applicant as a member of the public pursuant to s. 2(2) (d) of the 1960 Act. While it is acknowledged that s. 2(2) (d) is future oriented, it is the respondent's position that a prisoner is a member of the public when on individual, unescorted, release. In that respect, the applicant's safety was a matter for consideration under the criteria set out by the Oireachtas. The respondent lawfully considered that issue, which he was mandated to consider. There can be nothing capricious, arbitrary or unjust about a decision so based.

37. It is also submitted that, on the applicant's interpretation of the relevant subsection, the only person who, once temporary release was granted, would not be considered in the context of safety or security would be the applicant. This, it is submitted, cannot have been the intention of the Legislature. There is no halfway house; either the applicant is a prisoner in lawful custody or on temporary release. If on temporary release, the applicant must, by definition, be a member of the public.

38. There is no basis for the applicant's contention that simply because specific reference is made to the victim of the offence in the definition of "member of the public" that this, by definition, excludes the prisoner because he or she is not specifically referred to as a member of the public. The respondent also argues that it is not inconsistent with the prisoner being a member of the public, once released, that the Legislature would have designated a specific category of "member of the public" (i.e. the victim) as meriting particular emphasis in s. (2)(2)(d).

39. In the applicant's case, applying the criterion set out in s. 2(2)(d) of the 1960 Act, there was a perceived potential threat to his safety and security as a member of the public. Accordingly, further to s. 2(3) of the 1960 Act, based on the information before him, the decision-maker was of the opinion that it was not appropriate to grant the applicant temporary release. It is submitted that in all the circumstances of the present case, the respondent took the decision under s. 2(3) of the 1960 Act for a reason connected with s. 2(2) (d) of the said Act.

Considerations

40. It is the well established by case law that the Executive has exclusive jurisdiction over determining the management of the sentence progression of prisoners.

41. In *McDonnell v. Governor of Wheatfield Prison* [2015] IECA 216, Hogan J., giving the unanimous judgment of the Court of Appeal, stated:

> *"As part of the executive function of the State, the governor manages the prison and decides what is necessary for prisoner safety. The court cannot interfere in routine management and a fortiori cannot micromanage the prison by specifying a particular regime for a prisoner save in the most exceptional of circumstances."*

42. In Connolly v. Governor of Wheatfield Prison [2013] IEHC 334, Hogan J. again opined as to the extent to which the courts can interfere in the management of prisons:

> *"23. In view of the acute difficulties involved in prison management, the judicial branch can but rarely be prescriptive in terms of specific conditions of prison conditions, not least given that this is ultimately the responsibility of the executive branch. In these circumstances, it would be generally inappropriate to lay down any ex ante rules regarding solitary confinement. In this regard, the supervisory function which the Constitution ascribes to the courts must therefore often be confined in the first instance to prompting, guiding and warning the executive branch lest these precious values of human dignity (in the Preamble) and the protection of the person (in Article 40.3.2) might inadvertently be jeopardised in any given case. Even as in cases such as Richardson and Kinsella, where a specific finding of constitutional violation is called for, absent compelling circumstances, it will generally be appropriate as an initial step to give the executive branch (and, by extension, the prison service) an opportunity to remedy this breach in early course."*

43. The Court must approach the applicant's challenge to the removal of his temporary release programme from the standpoint that the applicant is in lawful custody and that there is no right to temporary release. As set out above, the Court cannot micromanage matters which are the exclusive preserve for the Executive, or those who run the prisons. Where however there are statutory schemes in existence which ordain the manner in which ministerial discretion is to be exercised in and around the affording facilities to prisoners, such as temporary release, the Court can intervene where the exercise of the discretion is found to be arbitrary, capricious or unjust. In the present case, the onus is on the applicant to establish that this threshold has been met with regard to the decision

not to afford him the balance of the temporary release programme which had been decided on in February, 2017.

44. Part of the applicant's challenge is that he was not afforded a right of reply before any decision terminating his temporary release programme was made. However, I do not find merit in this argument. The statutory regime for temporary release, and the executive discretion vested in the respondent, does not require that an opportunity be given to the applicant to be put on notice of the basis for the refusal prior to such a decision being made. While the applicant relies on the decision in *Chawke v. Mahon* [2014]1I.R. 788, his circumstances are entirely distinguishable from that case since no rights on the part of the applicant are involved and where the bar which the applicant must cross is whether the decision was taken arbitrarily, capriciously, or unjustly.

45. It is indisputably the case, consequent upon a decision taken by the respondent in early February, 2017, that up to at least April, 2017 (when a review was to be undertaken), the applicant was to be afforded one period of temporary release per month, commencing 17th February, 2017. Accordingly, while I note the provisions of s. 2(6) of the 1960 Act, which provide that a temporary release pursuant to a direction under the Act "shall not confer an entitlement on that person to further such release", the applicant was in a position whereby periods of temporary release were scheduled for at least March and April. I accept of course that that cannot be viewed as having been set in stone. The applicant availed of the February temporary release and duly returned to prison on 19th February, 2017, as scheduled.

46. It is common case that the cancellation of the further scheduled periods of temporary release did not arise by reason of the breach by the applicant of any conditions imposed on him, or a fear that he would not abide by any such conditions in the future, but rather, according to the respondent, out of a concern for the applicant's safety and security. The respondent says that this concern arose from a communication from "a victim" which, it is averred, was conveyed to Mr. Smyth, Director of Operations in the IPS, by Mr. Walter Burke, Victim Liaison Officer with the IPS. As a result of what he was told by Mr. Burke, Mr. Smyth formed the view there was "a genuine and real concern" that the applicant could be put in danger or his safety would be under threat if he was allowed further periods of temporary release. Mr Smyth avers that he took this information seriously. Accordingly, it was on this basis that the decision to cancel the temporary release programme was taken on 22nd February, 2017. The respondent asserts that the programme was terminated because of concerns for the applicant's safety and not because of adverse media coverage pertaining to his temporary release in February. It is contended that the media coverage was the context but not the reason for the programme being stopped and that there was a genuine and real concern that the applicant could be put in danger or that his safety would be under threat if allowed further periods of temporary release.

47. While I note Mr. Smyth's contention that his decision was made after the media coverage, (albeit he says it was not based on the fact of or content of the said newspaper articles), I also note that it is not specifically stated by Mr. Smyth that the communication from "a victim" was in reaction to or came about in the wake of the adverse press coverage which pertained to the applicant's period of temporary release. One of the applicant's complaints is that, save what is in Mr. Smyth's affidavit, neither he nor the Court have been informed of the nature and extent of the threat said by the respondent to have emanated from "a victim". This is a difficulty in this case, undoubtedly. The Court has not been given any details of the nature of the information said to give rise to the respondent's concern as to a potential threat to the applicant's safety and security. Mr. Smyth asserts public interest privilege over the oral communication received from Mr. Burke. While I accept the respondent's argument that it is understandable that the IPS would wish to preserve the confidentiality of communications from the victims of crime, and that it is essential and necessary that this would be the case, it is nevertheless of note that not a single detail of the potential threat has been alluded to in Mr. Smyth's affidavit.

48. Counsel for the applicant also points to the inconsistency in the position being adopted by the respondent on affidavit with the fact that as late as April, 2017, the respondent appeared to be exploring the option of accommodating temporary release for the applicant at a location other than Donegal. I am satisfied that this has to be regarded as inconsistent with the respondent's contention that there was a concern for the applicant's safety and security for the reasons averred to by Mr. Smyth.

49. The applicant also maintains that there is inconsistency in the respondent leaving open the option of humanitarian temporary release for the applicant, while simultaneously standing over the cancellation of the programme of temporary release envisaged in February, 2017. Irrespective of what other arguments the applicant makes in this regard, I do not find that there is any particular inconsistency in the idea that the respondent would not foreclose on humanitarian leave for the applicant, should the need arise.

50. In his written and oral submissions, counsel for the applicant takes issue with Mr. Smyth's reliance on s.2(2)(d) of the 1960 Act as the basis upon which the decision to cancel the applicant's temporary release programme was reached. This is the statutory factor upon which Mr. Smyth relied in deciding to withdraw the applicant's scheduled temporary release programme. The applicant's submissions as to the proper construction of s. 2(2)(d) have already been set out above, as have the submissions made on behalf of the respondent. Having perused the relevant subsection, I am of the view that counsel for the applicant is correct in contending that the phrase "members of the public", in the context of s. 2(2) (d) of the 1960 Act, is not broad enough to incorporate a reference to "the person" (the prisoner) being construed as a member of the public. In my view, on any logical or purposeful reading of the subsection, the intention of the Legislature was to mandate the respondent to have regard to whether the temporary release of a prisoner (referred to in the subsection as "the person") would result in a potential threat to members of the public. The emphasis in the subsection, in terms of a potential threat to safety and security, is most decidedly on a class of persons other than one incorporating the applicant, namely members of the public. Given that the Legislature saw fit to specify that the victim of the offence was to be included in "members of the public", this reinforces my view that the task of the respondent, pursuant to the sub-section, is to decide whether and to what extent the release of a prisoner could impact on the safety of persons, other than the prisoner, who at the time of the respondent's consideration are "members of the public". In other words the "potential threat" is perceived to emanate from "the person" (the prisoner) should he or she be released from prison. To adopt the construction advocated by the respondent would, in my view, do violence to the plain meaning of the subsection and the clear intention of the Legislature.

51. It seems to me therefore that the respondent's reliance on s. 2(2)(d) of the 1960 Act, as the statutory basis to terminate the applicant's scheduled temporary release, cannot in this instance be deemed a lawful basis for the decision.

52. Before addressing the issue further, there is one aspect of the applicant's challenge that is apposite to deal with at this juncture. The applicant asserts that the termination of his scheduled temporary release on the basis of a perceived threat to his safety was akin to the responding hold him in protective custody, a concept which counsel for the applicant states has no place in Irish law. In this regard, counsel cites *O'Callaghan v. Director of Public Prosecutions*. I do not find merit in the contention that the cessation of the temporary release programme is akin to a decision having been taken to place the applicant in protective custody. The reliance placed by the applicant on *O'Callaghan v. Director of Public Prosecutions* is not tenable given that that case involved the circumstances of an individual pre-conviction and where the constitutional right to presumption of innocence must prevail. The applicant's circumstances are that he is in lawful custody. The sole question for the Court is whether the cancellation of the temporary release programme which had been approved for the applicant in February, 2017 was arbitrary, capricious or unjust.

53. In these proceedings, the respondent does not, in relying on s.2(2)(d), make the case that, upon temporary release, the applicant would pose a potential threat to members of the public. Rather, what is posited is that there was a potential threat to the applicant, were he to be granted further temporary release. What is before the Court therefore, as the reason for the decision to stop the temporary release programme, is Mr. Smyth's evidence that he had a concern for the applicant's safety from what was communicated to him by Mr. Burke. Without doubting that as a result of the communication from Mr. Burke, Mr. Smyth held a genuine concern for the applicant's safety, and took the matter seriously, which he was entitled to do, it nevertheless seems to me that Mr. Smyth's opinion, namely that it would not be appropriate to give a direction that the applicant be released from prison, (or indeed cancel the direction that had been made in February, 2017) must be formed for reasons connected to one or more of the factors set out in s.2(2) of the 1960 Act. That however has not been established in this case, to my mind. The Court has discounted the respondent's reliance on s.2(2)(d) insofar as it was argued that the respondent's concerns regarding a potential threat to the applicant's safety were connected to the subject matter of that subsection.

54. Notwithstanding the high threshold which the applicant has to meet in the within challenge, given all the circumstances of the case, I am satisfied that that threshold has been met. I find that the manner in which the decision was taken to refuse the applicant the balance of temporary release programme that had been approved for him in February, 2017 was unjust having regard to the fact that it has not been established to the satisfaction of the Court that the opinion held by the respondent was for a reason connected with one or more of the matters referred to in s. 2(2) of the 1960 Act.

55. I am satisfied that an order of *certiorari* quashing the decision of 22nd February, 2017 is warranted and that the matter be remitted for reconsideration in accordance with the statutory criteria.

Enhanced remission
56. The applicant advances a number of grounds in respect of his challenge which he submits establish that the refusal to grant him enhanced remission was arbitrary, capricious or unjust. Each of the arguments advanced by the applicant is considered below.

Considerations
57. It is common case that the applicant engaged in authorised structured activities over the course of his sentence. His application for enhanced remission set out in considerable detail the work and training programmes he engaged in which, inter alia, included computer, woodwork, art classes, manual handling, and safe pass courses, together with a calf to heifer rearing course. In his application, the applicant highlighted, in particular, seven memorial plaques he had made to be placed on the graves of his dead friends. He outlined the benefits of the courses for future job applications and for his self-awareness as to how his actions had affected other people. He set out details of his work schedule while in prison which included laundry, catering, horticulture, carpentry and cleaning work. He emphasised his involvement in the Bothar project. He went on to set out his remorse for his actions which had resulted in the death of eight people and his awareness of the devastating losses and on-going grief to the families of the eight victims as a result of his actions. He outlined his desire to be involved in work to prevent such accidents in the future. He set out that his intention upon release was to work in London where he had an offer of a job and that he did not intend to return to Donegal given his awareness that his release may open wounds and cause hurt and grief to the families of the victims.

58. Rule 59 of the Prison rules provides as follows:

> "4. Rule 59 of the Principal Rules is amended by substituting the following for
>
> paragraph (2):
>
> "(2) (a) A prisoner who has engaged in authorised structured activity may apply to the Minister for enhanced remission.
>
> (b) An application shall be made in such form and manner and shall be accompanied by such other information and documentation as may be specified by the Minister.
>
> (c) An application under subparagraph (a) shall not be made earlier than 6 months prior to the date on which the prisoner would be released if enhanced remission of one third of the prisoner's sentence were to be granted to him or her.
>
> (d) Where the Minister receives an application under subparagraph
>
> (a), the Minister shall, as soon as practicable thereafter—
>
> (i) if he or she is satisfied that the prisoner, having regard to the matters referred to in subparagraph (f) is less likely to reoffend and better able to re-integrate into the community, notify the prisoner of his or her decision to grant enhanced remission to the prisoner and the period of enhanced remission of sentence which is to apply, or
>
> (ii) notify the prisoner of his or her decision to refuse the prisoner's application and the reasons for the refusal.
>
> (e) A notification referred to in subparagraph (d) shall be in writing and shall be copied to the Governor of the prison in which the prisoner concerned is serving his or her sentence.
>
> (f) The Minister shall, when making a decision in respect of an application under subparagraph (a), have regard to the following matters:
>
> (i) the manner and extent to which the prisoner has engaged constructively in authorised structured activity;
>
> (ii) the manner and extent to which the prisoner has taken steps to address his or her offending behaviour;
>
> (iii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates;
>
> (iv) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto;
>
> (v) the period of the sentence served by the prisoner;
>
> (vi) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the prisoner relates) should the prisoner be released from prison;

(vii) any offence of which the prisoner was convicted before being convicted of the offence to which the sentence of imprisonment being served by him or her relates;

(viii) the conduct of the prisoner while in custody or during a period of temporary release;

(ix) any report of, or recommendation made by—

(I) the Governor of, or person for the time being performing the functions of the Governor in relation to, the prison concerned,

(II) the Garda Síochána,

(III) a probation officer, or

(IV) any other person whom the Minister considers would be of assistance in enabling him or her to make a decision on an application under subparagraph (a).

(g) In this paragraph 'enhanced remission' means such greater remission of sentence in excess of one quarter, but not exceeding one third, as may be determined by the Minister."

59. The applicant's application was acknowledged on 5th April, 2017 advising that a decision would be taken closer to the anticipated release date (August, 2017) date should the applicant be approved for enhanced remission. On 1st August, 2017, the applicant's solicitor wrote to the Operations Directorate seeking an update on the enhanced remission application and that was replied to on the same date advising that a decision on the application was expected to be made in mid-August, 2017.

60. In the within proceedings, the applicant makes complaint that it was unfair that the respondent waited until 17th August, 2017 to decide an application for enhanced remission that concerned a release date, if enhanced remission were granted, of 16th to 18th August, 2017. It is contended that by delaying the decision the respondent left the applicant no reasonable or meaningful opportunity to challenge the impugned refusal. It is submitted that this is doubly unfair because there is no internal appeal available from the respondent's decision.

61. The respondent submits that there is no unfairness in the fact that the decision on enhanced remission was made close to the date of release had the application for enhanced remission been granted. The applicant was given timely information that a decision would be made on his application closer to the time of release if he were to be granted enhanced remission, which was clearly explained to him on two occasions.

62. I do not find that there was unfairness in the timeframe posited by the respondent as to when the application would be considered. The applicant was advised on 5th April, 2017 as to the reason for this, namely that the respondent wished to have the most up to date information possible for the purposes of assessing the enhanced remission application. In those circumstances, I cannot perceive unfairness in the process and most certainly, the respondent's modus operandi cannot be said to be capricious, arbitrary or unjust.

63. The evidence adduced in the within proceedings shows that on or about 15th August, 2015, Ms McGahern of the IPS Operations Directorate commenced her consideration of the applicant's enhanced remission application. She sought reports from a number of professionals, namely Ms Geraldine Carrick, Assistant Governor at Loughan House Open Centre Prison, Ms Margaret Prendergast, Senior Probation Officer, Castlerea/Loughan House and Mr. Brendan O'Connell, Senior Psychologist at Castlerea Prison. All three provided reports that were favourable to the application.

64. Ms Carrick advised that since his arrival al Loughan House the applicant had engaged fully and worked full time on the Prison farm and that there were no disciplinary issues. She was supportive of the application.

65. In his report, Mr. O'Connell advised that he with the applicant on 25th July, 2017 for mental health reasons, following a referral from Ms Carrick on 14th July, 2017. Mr. O'Connell stated that the applicant seemed to be robust and reported no mental health difficulties. He was discharged by Mr. O'Connell on 27th July, 2017, by mutual agreement. It was confirmed that the applicant had complied with any requests to engage with IPS Psychology and had engaged meaningfully. Mr. O'Connell also stated that the applicant had been referred to him on 22nd November, 2016 "with a possible view to offence work". He advised however that such intervention was not currently available at Loughan House Open Centre and that the applicant should not be discriminated against for not undertaking such work if the facilities were not available to him.

66. In her report Ms. Prendergast, Senior Probation Officer, outlined the history of her engagement with the applicant. She referred, *inter alia*, to the applicant's sincere regret and sadness over the deaths which his offence had caused and to his work history both in Castlrea and Loughan House. She went on to state:

> "I would be supportive of any possible programme for Sean as I feel that keeping him to his release date without any form of programme is not in his best interest. From my professional perspective I feel Services need to be supportive of him at this stage in an effort to help him build up confidence and re-integrate back into life outside of custody. He was assessed by the Probation Service, as being in the lower risk category for further offending, just prior to his trial. This would not have changed in the interim period."

67. As is clear from the "Memorandum of decision" exhibited in Ms. McGahern's replying affidavit ("the Memorandum"), the analysis of the applicant's enhanced remission application was conducted 16th August, 2017. The Memorandum addressed the factors which Rule 59(2)(f) mandates the decision-maker to have regard to. The applicant's engagement in authorised structured activities was noted. With regard to the manner in which the applicant had addressed his offending behaviour, it was noted that the applicant had met with both the Probation and Psychology services and that "both report general engagement but no evidence of addressing offending behaviour."

68. The nature and gravity of the applicant's offence was addressed by reference to his conviction for dangerous driving causing the death of eight people. The sentence the applicant had received was noted, including that the Court of Appeal had increased the original sentence which had been imposed in the Circuit Court. It was noted that the applicant had served two years and eight months of his custodial sentence. The potential threat to the safety of the public was addressed by reference to the fact that the applicant had been banned from driving for ten years and that the applicant had a previous dangerous driving conviction. The

potential threat to the public analysis also included a redacted entry which, Ms McGahern, in her affidavit, describes as an entry "that concerns a matter that is treated in absolute confidence".

69. The analysis went on to note the applicant's previous criminal record which comprised the conviction for dangerous driving in 2007 for which he received a fine. With regard to his conduct in prison, it was noted that there were no behavioural issues.

70. The reports from Ms Carrick, Mr. O'Connell and Ms Prendergast, as referred to above, were then noted. The reports section of the Ms McGahern's memorandum also contains a relatively long entry, all of which is redacted. In her affidavit, Ms McGahern accounts for this as follows:

> "In accordance with standard practice, an up-to-date report on the Applicant was also received from An Garda Síochána which inter alia identified the previous conviction that the Applicant had received for dangerous driving in 2007 and for which he had been fined €1,000.00. I say that the Garda report, which formed part of my decision, has been redacted from the Memorandum document as exhibited. I respectfully submit that the reason for the redaction is that it is the position of the Respondent that all communications between the Irish Prison Service and An Garda Síochána for the purposes of making assessments of applications for enhanced remission are protected by public interest privilege."

71. In the Memorandum of decision, under the heading "Is the prisoner less likely to re-offend and better able to re-integrate into the community?", Ms McGahern sets out her decision, and the reasons therefore, as follows:

> "Mr Kelly has engaged positively with the services available to him while in prison and has done good work through his involvement with the Bothar Project. I am of the view that Mr Kelly is not less likely to re-offend or be able to re-integrate into the community. I note his intention following his release to take up employment with his uncle in the UK.
>
> Having taken into consideration the gravity and nature of his offence involving the loss of life of eight persons in a road traffic accident, his previous conviction for dangerous driving and the increased sentence of imprisonment imposed by the Court of Appeal enhanced remission is not recommended."

72. The decision letter of 17th August 2017 from Ms. McGahern to the applicant was in the following terms:

> "I refer to your application seeking to be considered by the Minister for Justice and Equality for enhanced remission under Rule 59 of the Prison Rules 2007 to 2014. The principles governing the awarding of remission are contained within Rule 59 of the Prison Rules 2007 to 2014 (S.I. No. 252 of 2007 and S.I. No. 385 of 2014). In sum, prisoners sentenced to a term of imprisonment qualify for one quarter remission on the basis of good behaviour. In addition, prisoners who have engaged in authorised structured activity may apply to receive enhanced remission of greater than one quarter but not exceeding one third of their sentence, as may be determined by the Minister. In order for [the Minister] to grant a prisoner enhanced remission, the Minister must be satisfied that the prisoner, having regard to [Rule 59(2) (f)of the Prison Rules] is less likely to re-offend and is better able to re-integrate into the community:"

73. After setting out, in bullet points, the matters to which the respondent must have regard pursuant to Rule 59(2)(f), the letter continued as follows:

> "The Minister has considered your application for enhanced remission, including all material supplied in support of the application.
>
> Whilst it is acknowledged that you have engaged in authorised structured activity, the Minister having had regard to the nature and gravity of the offence which involved the loss of life of eight persons in a road traffic accident, your previous conviction for dangerous driving and the increased sentence of imprisonment imposed by the Court of Appeal, has decided to refuse your application".

74. The applicant makes the case that while the decision purports to have take into consideration all of the matters required by Rule 59(2)(f), and whilst the statutory criteria is set out in the decision letter, the decision is utterly lacking in transparency in terms of what weight, if any, was given to the extent to which the applicant had engaged constructively in authorised structured activities; the manner and extent to which he had taken steps to address his offending behaviour and/or his conduct while in custody or during a period of temporary release. It is submitted that it is not clear to what extent the positive performance of the applicant in these areas was taken into consideration in the decision to refuse him enhanced remission. It is further submitted that, prima facie, the applicant was a good candidate for enhanced remission. All of the reports received by the respondent with regard to the application were positive. It is thus contended that there was no real engagement by the respondent with the substance of the applicant's case for enhanced remission.

75. It is the applicant's contention that the respondent erred in fact and in law in failing to find that the applicant's engagement with a number of services specifically calculated to reduce his risk of re-offending and to increase his prospect of reintegrating into society upon release did not at least have some impact on the static factors relied on by the respondent, such as to justify even a partial enhancement of the remission to which he was entitled. Furthermore, it is submitted that there was a failure to take into consideration adequately or at all the applicant's expression of remorse for his offences, his demonstration of insight into his offending behaviour and the concrete offer of gainful employment in London awaiting him upon release, all of which was set out in his application. Accordingly, it is contended that the respondent erred in law in failing to take into account relevant considerations and in taking into account irrelevant considerations.

76. With regard to the applicant's complaints in the above regard, the evidence before the Court shows that the application for enhanced remission was given individual consideration, by reference to each of the statutory criteria, and that there was positive engagement by the respondent with the application. This is evident, in the first instance, by Ms McGahern's pro-active steps in seeking out reports in respect of the applicant. The views of the report makers are clearly recited in the Memorandum, which evidences Ms McGahern's engagement with those reports. The Memorandum also records in some detail the nature and extent of the authorised structured activities undertaken by the applicant. While his authorised structured activities are not listed in the exhaustive detail as set out in the applicant's application that does not, to my mind, impugn Ms McGahern's treatment of the issue. It is well established in the jurisprudence of the Superior Courts that in cases such as the present, once the respondent has considered an application for enhanced remission having regard to all of the criteria set out in Rule 59(2) (f), the weight to be attached to any particular factor is a matter for the respondent. In the decision letter it is clearly acknowledged that the applicant has engaged in authorised structured activities. It is well settled that engagement in authorised structured activities does not guarantee enhanced remission. While, as per *McKevitt v. the Minister for Justice, Equality and Law Reform* [2015] IECA 122, engagement in authorised

structured activity is a necessary matter for the respondent to consider, it is not of itself determinative of any entitlement to enhanced remission. As stated by Irvine J.:

> *"[56] It is also, in the court's view, relevant to note that there are no words in r. 59(2) which expressly or by implication limit or restrict the Minister, when making her decision, to a consideration of the applicant's participation in authorised structured activities, or which preclude her from taking into account other relevant material. In this regard, the court should state that fundamental, in its view, to the exercise by the Minister of the discretion provided for in r. 59(2) is a consideration of the criminal record of the prisoner concerned. It is only with knowledge of that history that a reasoned decision can be made as to whether or not, as a result of their involvement with structured activities, they are less likely to re-offend and would be better able to re-integrate into society."*

77. While *McKevitt* concerned the statutory scheme which predates the present Prison Rules, in my view, having regard to the provisions of Rule 59(2) of the present Rules, the words of Irvine J. that engagement in authorised structured activities of itself is not sufficient to establish an entitlement to enhanced remission remain apt. Pursuant to Rule 59(2), engagement in authorised structured activities forms the starting point from which an application for enhanced remission will be considered in accordance with the criteria set out in Rule 59(2)(f).

78. Furthermore, the Court does not find merit in the applicant's argument that the respondent's weighing exercise should be evident on the face of the decision. The obligation on the respondent is summarised by Barr J. in *Callely v. the Minister for Justice, Equality and Law Reform* [2015] IEHC 485:

> *"In contrast, it appears that under the Prison Rules, prisoners who satisfy the Minister that they are less likely to re-offend and better able to re-integrate into the community cannot be refused enhanced remission even in circumstances where the Minister may consider that it would not be appropriate, for policy or any other reasons, to grant enhanced remission to that applicant. Enhanced remission may only be refused if the applicant has failed to satisfy the Minister, having regard to the matters set out in Rule 59(2) (f), that he is less likely to re-offend and better able to re-integrate into the community. This view was confirmed by Faherty J. in her decision in Ryan v. Minister for Justice and Equality & Ors. (Unreported, High Court, Faherty J., 6th February, 2015) where she held, at para. 8 of her judgment: "If the Minister, having regard to the matters set out in Rule 59(2) (f), is satisfied that a prisoner is less likely to re-offend and better able to reintegrate into the community, the Minister is mandated to grant enhanced remission."*
>
> *74. In order for a decision on an enhanced remission application to have been validly made, the Minister must have had regard to all of the matters set out in Rule 59(2) (f), which requires that "The Minister shall, when making a decision in respect of an application under subparagraph (a), have regard to the following matters…" Accordingly, it is not open to the Minister to pick and choose which matters she will have regard to in reaching her decision.*
>
> *75. It seems to me, therefore, that unless the Minister's decision contains evidence of her having had regard to each of the prescribed matters, her decision could not be said to have been made in accordance with the Prison Rules. However, once the Minister has taken into account the relevant considerations, and this is clear from the face of her decision, then the weight to be attached to each of them is properly a matter for the Minister in her discretion, subject to the principles of constitutional fairness and justice. In this regard I note the dictum of O'Malley J. in Ryan v. Minister for Justice [2014] IEHC 513, where she held, at para. 9.4, that "a prisoner who seeks extended remission is entitled to have his or her application considered in a fair and rational manner."*

79. In this case, the decision letter clearly lists the statutory criteria the respondent was obliged to consider. Moreover, Ms McGahern's Memorandum, albeit it was not furnished to the applicant with the decision letter, clearly establishes that the relevant criteria were engaged in the consideration of the applicant's application.

80. The applicant also contends that there is an element of unfairness in Ms. McGahern's analysis, as contained in the Memorandum, in that it appears to indicate that the application failed because there was no evidence of the applicant having addressed his offending behaviour. It is submitted that this is at odds with the report of the Ms Prendergast, which records that the applicant was at low risk for re-offending at the sentencing stage and that this would not have changed in the interim period, and with the Mr. O'Connell's advice which was to the effect that offence focused work was not available in Loughan House Open Centre and, accordingly, a prisoner should not be discriminated against for not engaging in work which was not available.

81. It is the case that Ms McGahern's analysis refers to there being no evidence of the applicant addressing his offending behaviour. Had the applicant's enhanced remission application been refused on the basis that there was no evidence of offending behaviour having been addressed, he might well have just cause for complaint, in light of Mr. O'Connell's advice that enhanced remission applicants should not be discriminated against for something that was outside of their control.

82. At the end of the day however, neither the rationale for the refusal of enhanced remission, as set out in Ms McGahern's Memorandum, nor that in the decision letter is based on a view having been taken that the applicant had not addressed his offending behaviour. Accordingly, the applicant's complaint in this regard is not made out to the requisite standard.

83. In his grounds of challenge, the applicant asserts that it was "unfair that the refusal of enhanced remission would be based on adverse media reports" that were critical of the decision to grant him temporary release. It is submitted that it is difficult to avoid the conclusion that Ms McGahern's decision on the enhanced remission application was affected by her superior's earlier decision, on 22nd February, 2017, to revoke the temporary release programme that had previously been put in place for the applicant. The applicant emphasises that it was Ms McGahern who declined to re-visit the temporary release issue on 6th July, 2017, and that she referred, in her letter to the applicant's mother, to the prior decision to grant the applicant temporary release as having led to "unprecedented media attention".

84. It is also submitted on behalf of the applicant that in view of the fact that Ms. McGahern adjudged the applicant worthy of temporary release in February, 2017, on the basis of statutory criteria similar to the rules governing enhanced remission, this renders surprising her finding some six months later, as set out in her Memorandum, that the applicant was not less likely to re-offend and not better able to re-integrate into the community. The applicant contends that this is all the more difficult to fathom given the positive reports which supported the granting of enhanced remission.

85. It is certainly the case that Ms McGahern was the decision-maker in the applicant's application for temporary release in February, 2017. It is also the case that she was the person who corresponded with the applicant's mother on 6th July, 2017, refusing to re-visit the decision made on 22nd February, 2017 terminating the applicant's scheduled temporary release.

86. In her replying affidavit, Ms McGahern addresses the applicant's argument in the following terms:

> "I wish to clarify at this point that the media coverage which occurred at the time the Applicant was on temporary release did not affect my decision making in relation to his application for enhanced remission. I acknowledge that I was aware of the newspaper headlines that the Applicant's temporary release had prompted. I did not read any of these articles at the time of making my decision herein, nor was I then aware of the existence of a "media booklet" on that issue. I was aware of the general content of the media reports and the critical attitude they expressed. I was also aware, as I have explained above, that as a consequence of concerns for the Applicant's personal safety arising from the content and nature of these articles, a decision had been taken to cease the Applicant's temporary release. I say that this media coverage did not play any role in my decision to refuse his application for enhanced remission."

87. On the evidence before the Court, I can find no basis upon which to conclude that the decision to refuse the applicant enhanced remission was based or influenced by the adverse press coverage which his temporary release generated in February, 2017. As I have already stated, all the indicators are that there was a positive engagement by the respondent with the enhanced remission application. The happenstance of Ms Mc Gahern having been the decision-maker on the temporary release application, or that she was the person who subsequently declined to revisit the cancellation of his temporary release programme, is not sufficient to persuade the Court that the enhanced remission application was refused because of what had occurred in the wake of the applicant's temporary release. Nor is the fact that Ms McGahern was aware of the media reports at the time of making the enhanced remission decision sufficient to persuade me that the enhanced remission decision should be vitiated on this basis.

88. The case is also made that there is no reference in Ms MGahern's Memorandum or the decision letter to the potential threat to the applicant which Mr. Smyth had identified in February, 2017 as the basis for the termination of the applicant's temporary release programme. The applicant contends that it is at the very least curious that the potential threat to the applicant did not play a role in the remission decision when it featured so prominently in the earlier decision.

89. It is also contended that the applicant is at sea with regard to what is contained in the redacted portion of Ms McGahern's Memorandum under the heading "Report or recommendation from Governor/Prison, Gardai, Probation or another." It is submitted that if the redacted portion contains references to Mr. Burke's briefing to Mr. Smyth in February, 2017, then it is difficult to see why Mr. Burke's name and the fact that he briefed Mr. Smyth about a communication from a victim would be redacted given that these details were contained in Mr. Smyth's affidavit.

90. In her affidavit, Ms McGahern accounts for this redaction on the basis what was redacted was an up-to-date report from An Garda Síochána which, inter alia, had identified the applicant's previous conviction for which he had been fined. Ms McGahern avers that it is the respondent's position that all communications between the IPS and the gardaí for the purposes of making assessments of applications for enhanced remission are protected by public interest privilege. No serious challenge was made by the applicant in the course of the hearing of these proceedings to the position adopted by the respondent with regard to the public interest privilege claimed over the Garda report. In any event, given the statutory criteria relied on by the respondent as a basis for the refusal, it does not appear to the Court that the redaction of the report necessarily renders the decision arbitrary, capricious or unjust.

91. The applicant however alleges as unfair the other redacted entry in Ms McGahern's Memorandum, namely what appears to comprise one sentence under the heading "potential threat to public safety", a matter, Ms McGahern avers "that is to be treated with absolute confidence". While this may be seen as prima facie unfair, I find that of itself it is not a sufficient basis to render the decision to refuse arbitrary, capricious or unjust in circumstances where is was not relied on as a basis for the refusal of enhanced remission.

92. It is also the applicant's case that the process of deciding the applicant's application for enhanced remission had only the mere appearance of fair procedures, given the reasons upon which the enhanced remission was refused. It is submitted that while the applicant was given an opportunity to apply for enhanced remission, if the decision was to be determined on the basis only on the nature and seriousness of the offence for which he was serving a sentence, which he could not alter, his previous conviction for dangerous driving, which he also could not alter, and the fact that the Court of Appeal had increased his sentence, then the process was not a truly fair process since the applicant never had a real opportunity of persuading the decision- maker that he was a suitable candidate for enhanced remission. It is further submitted that three statutory criteria relied upon by the respondent were unalterable and could not be addressed by the applicant through authorised structured activity and, thus, it was unreasonable for the respondent to rely solely on fixed or static considerations over which the applicant had no control.

93. As is apparent from the face of the decision, enhanced remission was refused having regard to Prison Rule 59(2) (f) (iii), (iv) and (vii). While the applicant complains that these factors are static, they are nevertheless factors which the respondent is mandated to consider and they, or indeed any one of them, constitute a valid basis to refuse enhanced remission, provided that the respondent's decision contains evidence of his having had regard to each of the prescribed matters in Rule 59(2) , and once the respondent has taken into account the relevant considerations, and considers the application in "*a fair and rational manner*", to quote O'Malley J' in *Ryan v. Minister for Justice.* The Court has already stated that once the decision-making process is undertaken in the aforesaid manner, the weighing exercise the respondent embarks on cannot be impugned save, as I have said, where it can be shown to offend the principles of constitutional fairness and justice, which I do not find to be the case here. As stated by Ni Rafeartaigh J. in *Bradley v. The Minister for Justice and Equality* [2017] IEHC 422:

> *"While of course Rule 59 does not provide any particular order in which the various factors listed must be considered, nor does it assign any greater weight to any one of them , it seems to me entirely logical that any assessment of the kind required by Rule 59 would need to be anchored in accurate and precise information as to the offence for which the prisoner was sentenced as well as his past criminal record at the time of sentencing".*

94. This would seem to echo the position as set out in *McKevitt*, already referred to above where Irvine J. stated:

> *"In this regard, the court should state that fundamental, in its view, to the exercise by the Minister of the discretion provided for in r. 59(2) is a consideration of the criminal record of the prisoner concerned."*

95. Albeit that the learned Judge was referring to the precursor of the present Prison Rules, I find the dictum no less apt to the process which is mandated by Rule 59 of the present Rules. It seems to me therefore that, albeit that the factors which held sway with the respondent were what counsel for the applicant describes as fixed or static factors which could not be altered, reliance on these factors is within the exercise of the respondent's statutory discretion provided that the exercise of his statutory function is not arbitrary, capricious or unjust.

96. With regard to the reference in the decision to the fact that the Court of Appeal had increased the applicant's sentence, I am not persuaded, having regard to McKevitt, that of itself render the respondent's decision ultra vires in circumstances where what is recited in the decision was factually correct.

97. In all the circumstances the applicant has not established that the respondent's reliance on Rule 59(2)(f) (iii), (iv) or (vii) was arbitrary, capricious or unjust.

98. It is the applicant's principal contention in the within proceedings that the respondent failed to make any finding whether he was or was not satisfied that the applicant was less likely to re-offend or better able to re-integrate into the community upon release, which is the test upon which enhanced remission is refused pursuant to 59(2)(d) of the Prison Rules. Accordingly, it is argued that the respondent failed to apply the requisite test set out in Rules. The applicant contends that it is demonstrably incorrect for the respondent to assert in the statement of opposition that it was clearly stated in the decision letter that the respondent took the view that the applicant is not less likely to re-offend or to be able to re-integrate into the community, given that no such finding is contained in the decision. It is submitted that while Ms. McGahern, in her affidavit, exhibits the underlying Memorandum dated 16th August, 2017, which contains an assessment to that effect, this was not communicated to the applicant as part of the decision to refuse the grant of enhanced remission. Accordingly, counsel contends that the respondent cannot now be allowed to alter the decision as communicated to the applicant by relying on a previously undisclosed analysis.

99. It is submitted on behalf of the respondent that what had to considered is the criteria set out in Rule 59(2)(f) of the Prison Rules and these criteria are clearly recited in the letter of 17th August, 2017. The respondent also rejects the applicant's contention that the letter of 17th August, 2017 does not contain the requisite finding that the applicant was not less likely to re-offend or be able to re-integrate into the community. Furthermore, the respondent contends that the Prison Rules state only that reasons for the refusal are to be provided to the applicant, which was done.

100. Rule 59(2)(d) provides:

> "Where the Minister receives an application under subparagraph (a), the Minister shall, as soon as practicable thereafter—
>
> (i) if he or she is satisfied that the prisoner, having regard to the matters referred to in subparagraph (f) is less likely to reoffend and better able to re-integrate into the community, notify the prisoner of his or her decision to grant enhanced remission to the prisoner and the period of enhanced remission of sentence which is to apply, or
>
> (ii) notify the prisoner of his or her decision to refuse the prisoner's application and the reasons for the refusal."

101. Pursuant to Rule 59(2)(d), the decision that is required to be made by the respondent, is that he is satisfied, having had regard to the factors in Rule59(2)(f), that the prisoner is "less likely to re-offend and better able to re-integrate into the community" or that he is not satisfied, having had regard to the factors in Rule59(2)(f), that the prisoner is "less likely to re-offend and better able to re-integrate into the community" .

102. Was such a finding communicated to the applicant? Certainly, the applicant was advised that his application was refused, and the reasons for the refusal were set out in the 17th August, 2017 letter. This notwithstanding, counsel for the applicant argues that the prescribed statutory basis for the refusal was not set out in the decision, thereby rendering it bad on its face and in substance.

103. It is the case that when the decision specifically addresses the respondent's consideration of the applicant's application for enhanced remission, and when giving reasons as to why the application is being refused, there is no specific reference by the respondent to the effect that the respondent was not satisfied that the applicant was not less likely to re-offend and re-integrate into the community. However, the test set out in Rule 59(2)(d) is referred to earlier in the decision letter, where it is stated "in order for a prisoner (sic) to grant a prisoner enhanced remission, the Minister must be satisfied that the prisoner, having regard [to the matters as listed in the letter], is less likely to re-offend and is better able to re-integrate into the community". While the case can be made that the latter part of the decision might have better phrased, to my mind, there is sufficient material in the decision, when read in its entirety, to establish that the respondent's refusal was because he could not be satisfied that the enhanced remission application met the requirements of Rule 59(2)(d) of the Prison Rules.

104. For all of the reasons set out herein, the relief sought by the applicant in respect of the enhanced remission decision is denied.