THE HIGH COURT
JUDICIAL REVIEW

[179/2018 J.R.]

BETWEEN

B. (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND, C.)

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE AND THE MINISTER FOR CHILDREN AND YOUTH AFFAIRS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Reynolds delivered the 25th day of October, 2018

1. This is an application for an order of *certiorari*, by way of application for judicial review, quashing the respondents' refusal to allow the applicant to apply for enhanced remission of his sentence. Alternatively, the applicant seeks an order of mandamus compelling the respondents to consider the applicant's application for enhanced remission of his sentence and/or a declaration that the failure or refusal of the respondents to allow the applicant to seek enhanced remission is unlawful.

Background

2. The applicant is a minor and is currently detained in Oberstown Children Detention Centre pursuant to the provisions of s. 142 of the Children Act, 2001 (hereinafter referred to as "the Act of 2001").

3. The applicant received a three-year detention order on the 21st November, 2017 (backdated to the 23rd May, 2017) with the final 20 months suspended on conditions of good behaviour. With the usual remission of one-quarter of his sentence, the custodial aspect of the applicant's detention order was due to expire on the 23rd May, 2018.

4. The applicant initially made good progress with his rehabilitation whilst in custody and sought to be considered for enhanced remission, by way of letter sent to the respondent on the 22nd January, 2018.

5. The response on behalf of the first named respondent, by letter dated the 25th January, 2018, was as follows:-

> "Consideration is currently being given, by the Department of Children and Youth Affairs, to the commencement of the relevant provisions of the Children Act, 2001, which provide for remission in the Children Detention Schools."

6. The applicant initiated judicial review proceedings on the 26th February, 2018. The applicant contends that he should be entitled to apply for enhanced remission (up to a third of his sentence) and that the respondents' refusal to consider such application is unlawful.

Grounds upon which the reliefs are sought

7. In his Statement of Grounds, the applicant relies upon the following matters to ground the reliefs sought:

> "7. Notwithstanding the heading of the Order of the Circuit Criminal Court, the Applicant is the subject of supervision and detention pursuant to s. 151 of the Children Act, 2001.
>
> 8. The failure of the Respondents to allow the Applicant to earn remission through industry and good conduct is in breach of s. 151(4) of the Children Act, 2001.
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> 9. The failure and/or refusal of the Respondents to allow the Applicant to apply for remission based on his good conduct and industry is otherwise than in accordance with s. 151(4) of the Children Act, 2001.
>
> 10. The Respondents' failure to create an open, transparent, and fair scheme governing the consideration of applications for remission through industry and good conduct is unconstitutional and a failure to give effect to the will of the legislature.
>
> 11. The Respondents' failure to create an open, transparent, and fair scheme governing the consideration of applications for remission through industry and good conduct is in breach of their obligations pursuant to s. 3 of the European Convention on Human Rights Act, 2003.
>
> 12. The failure to provide the Applicant an opportunity to obtain enhanced remission is in breach of the constitutional rights to equality under the constitution and otherwise than in accordance with the constitution in that it places the Applicant at a marked disadvantage to an adult prisoner.
>
> 13. In all the circumstances, the failure to provide the Applicant an opportunity to obtain enhanced remission is unlawful."

The current circumstances of the applicant

8. Since the proceedings were initiated, the applicant has been unlawfully at large and it is acknowledged that the likelihood of the applicant being successful in any application for enhanced remission has diminished, in the event of such application being considered.

9. However, it is submitted on behalf of the applicant that he retains the right to appeal for an enhanced remission and to have such application properly considered.

The applicant's detention

10. The Order of the Circuit (Criminal) Court dated 21st November, 2017 directed that the applicant be detained pursuant to the Children Act, 2001, s. 142 (as amended) at Oberstown Children Detention Campus.

11. Notwithstanding this, the applicant posits that he is the subject of a supervision and detention order pursuant to s. 151 of the Act of 2001.

The relevant statutory provisions
12. Part 9 of the Act of 2001 governs the powers of the courts in relation to child offenders.

13. Section 142 provides as follows:

> "A court may, in accordance with this Part, by order (in this Part referred to as a "children detention order") impose on a child a period of detention in a children detention school … *specified in the order*."

14. Thereafter, ss. 143-151 make it clear that a court should only detain a child where there is no suitable alternative to the detention.

15. Section 151(4) of the Act further provides that:

> "Where the child is released from detention on earning remission of sentence by industry or good conduct or on being given temporary release under section 2 or 3 of the Act of 1960, supervision of the child in the community under the order shall be deemed to commence on the child's release."

16. This subsection is to be amended by s. 10 of the Children (Amendment) Act, 2015. That section has yet to be commenced. When it does commence, it will provide as follows:

> "Where the child is released from detention on being granted remission of portion of his or her period of detention in a children detention school pursuant to regulations made under section 221, supervision of the child in the community under the order shall be deemed to commence on the child's release."

17. The subsection, therefore, provides for the right to earn remission through industry or good conduct. However, it is silent on whether one is otherwise entitled to remission.

The applicant's claim in relation to enhanced remission
18. The cornerstone of the applicant's claim is that the respondents have acted unlawfully by refusing to allow the applicant to apply for enhanced remission.

19. Any prisoner not serving a life sentence and any child detained under the Act of 2001 is entitled to remission of one quarter off the sentence of imprisonment. This is granted automatically and is calculated at the start of the sentence.

20. In the case of prisoners over eighteen years of age the usual remission is provided for by Rule 59(1) of the Prison Rules, 2007 to 2014. This Rule gives effect to section 35 of the Prisons Act, 2007. Children detained in accordance with the Act of 2001 receive the same ordinary remission but it is granted in accordance with section 23 of the Criminal Justice Act, 1951.

21. Enhanced remission is governed by Rule 59(2) of the Prison Rules. Rule 59(2) (as amended), in its present form, provides that:

> (2)(a) A prisoner who has engaged in authorised structured activity may apply to the Minister [for Justice and Equality] 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 prisoners' 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 re-offend 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 prisoners 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.
>
> […]
>
> (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.

22. Rule 59 therefore creates two different types of remission governed by two distinct sets of parameters. In the first, the prisoner is entitled to a quarter remission of sentence by being of good behaviour for the duration of his imprisonment (as is the applicant and all other children detained under the Act of 2001). In the second, the prisoner is entitled to apply for "enhanced remission", which amounts to maximum of one third of the sentence of imprisonment. The Minister may grant such enhanced remission if he is satisfied that the prisoner has fulfilled the requirements of Rule 59 and the Minister is further satisfied that the prisoner "is less likely to re-offend and better able to re-integrate into the community". In considering such an application for enhanced remission, the Minister is required to have regard to the following factors, by reference to the provisions of the Rules:

> (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; …

(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 release from prison; …

(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 …

23. It is clear, therefore, that the intended purpose of the enhanced remission regime is to create an extra incentive for adult prisoners to follow the prison rules regarding behaviour. It further encourages prisoners to engage with their own offending behaviour and to embark on positive rehabilitation. It is noteworthy that in order to apply for enhanced remission a prisoner must have "engaged constructively in authorised structured activity".

24. The applicant argues that the provisions of s. 151 of the Act of 2001 apply to him and he is not being allowed to "apply for remission based on his good conduct and industry" in consequence of which the respondents are in breach of the applicant's rights under s. 151(4).

The respondent's position
25. The respondent contends that the applicant is lawfully detained in accordance with the provisions of s. 142 of the Act of 2001 as provided for in the detention Order on the 21st November, 2017.

26. Further it is submitted that the applicant is entitled to, and will receive, remission of one quarter of his sentence. The respondent submits that the enhanced remission regime that is provided for by Rule 59 of the prison rules is not suitable for persons detained by the respondents having regard to the requirement to act in the best interests of children in detention and on release from detention.

Section 151 of the Children Act, 2001
27. 16. Section 151 (as amended) is as follows:

"(1) Where a court is satisfied that detention is the only suitable way of dealing with a child […], it may, instead of making a children detention order, make a detention and supervision order.

(2) A detention and supervision order shall provide for detention in a [children detention school] followed by supervision in the community.

(3) Subject to subsection (4), half of the period for which a detention and supervision order is in force shall be spent by the child in detention in a [children detention school] and half under supervision in the community.

(4) Where the child is released from detention on earning remission of sentence by industry or good conduct or on being given temporary release under section 2 or 3 of the Act of 1960, supervision of the child in the community under the order shall be deemed to commence on the child's release.

(5) The supervision provided for in this section shall be by a probation and welfare officer.

(6) A detention and supervision order, in so far as it relates to detention, shall be deemed for all purposes to be a children detention order.

(7) A detention and supervision order may specify such of the conditions provided for in section 117 as the court considers necessary for helping to ensure that the child concerned would be of good behaviour and for reducing the likelihood of the child's committing any further offences.

(8) Section 130 shall apply, with any necessary modifications, to non-compliance with a detention and supervision order, or with any condition to which it is subject, as if for the references to an order in that section there were substituted references to a detention and supervision order."

28. Clearly s. 151 provides for a distinct type of detention and supervision regime that is different from the provisions governing the detention of the applicant, having regard to the Order dated 21st November, 2017, directing he be detained pursuant to s. 142 (as amended).

29. The applicant's contention that he is detained pursuant to s. 151 of the Act is unfounded and based on mere assertion. If the applicant had wished to vigorously pursue this contention, an application to the Circuit Court would have been required to correct the alleged error on the face of the Order, if such error existed.

Constitutional and ECHR considerations
30. The applicant submits that any disparity of treatment between adult prisoners and juvenile prisoners is unlawful by reason of the guarantee of equality before the law contained within Article 40.1.

31. The respondent contends that it is not appropriate to compare the regime that applies to the applicant with the regime that applies to adult prisoners as to do so would not be comparing like with like.

32. Both parties rely on the decision of Hogan J. in *Byrne (A Minor) v. Director of Oberstown School* [2013] IHEC 562. That case involved an inquiry into the different regimes that applied to children in St. Patricks Institution and Oberstown Detention Centre. The applicant therein successfully argued that he was being treated differently from other children in circumstances where he could not obtain remission because he was detained in Oberstown but that he could obtain it if he was detained in St. Patrick's Institution. Hogan J. was satisfied that there was an inequality because the same rights of remission did not apply to children detained in St. Patricks Institution as opposed to those detained in Oberstown Detention Centre.

33. Since March 2017, the practice of detaining juveniles anywhere other than Oberstown has ceased pursuant to ministerial order and all juvenile prisoners in custody are now subject to the same regime as set out in the Act of 2001.

34. However, an important distinction has to be drawn on the facts of the instant case. It is well established that the guarantee of equality before the law as contained in Article 40. 1 does not require identical treatment for all persons without any recognition of different circumstances. Referring to this principle in the *Byrne* case, Hogan J. stated as follows:

> "Yet it is also true that a good deal of latitude must be admitted for the purposes of Article 40. 1 scrutiny where the Oireachtas differentiates between classes of persons for reasons of social policy, provided always that the differentiation is intrinsically proportionate and reasonable…"

35. The applicant's contention that the current regime amounts to a violation of his rights simply does not stack up. He is detained in Oberstown Detention Centre pursuant to the provisions of the Act of 2001 and is subjected to the same regime as all other juveniles detained under the same provisions. The facts therefore of the instant case are clearly distinguishable from those in the *Byrne* case.

36. Upon further analysis, it would appear that if the Court was to accept what was being urged upon it, it would mean that any distinction drawn by the Oireachtas at a policy level between the procedures that govern child and adult detention respectively are unlawful and in violation of the equality guarantee. Put simply, this couldn't have been what the Oireachtas intended. If it had so intended, it would have said so in clear and unambiguous terms.

37. Further, the Court is cognisant of the fact that the regime in place for the detention of juveniles has to be distinguished from that which applies to adult prisoners. The detention of children is primarily focused on rehabilitation rather that punishment, with a multiagency approach that is customised to meet the individual needs of the child and its best welfare interests. The Act of 2001 imposes duties on the respondent in respect of a tailored approach to the individual needs of a child in detention with a view to securing a sustained rehabilitation. It is clear that the opportunity to avail of an enhanced remission regime could potentially conflict with a situation where a planned and coordinated release with other agencies is envisaged. In addition, the Director of Oberstown has considerable discretion in relation to how a child's detention should proceed, including the power to give a child temporary leave from the school where the Director deems it to be appropriate. Such provisions are clearly more appropriate for children than a provision for enhanced remission.

38. In all the circumstances, the Court is satisfied that it is not appropriate to compare the regime that applies to the applicant with the regime that applies to adult prisoners.

39. Conclusions
For the reasons set out aforegoing, the application must fail.