THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 675 J.R.]

BETWEEN

BRIAN MC GINLEY

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr Justice Paul Coffey delivered on the 22 day of November 2017

1. On 5th November, 2010 the Applicant was convicted by the Circuit Criminal Court of the offence of Aggravated Burglary contrary to section 13 of the Criminal Justice (Theft and Fraud) Act 2001, for which he was sentenced to a term of imprisonment of ten years backdated to the 5th November, 2010.

2. Subject to good conduct the Applicant has a current prospective release date of the 5th May, 2018, which is calculated by giving him full credit for the one quarter remission envisaged in r. 59 (1) of the Prison Rules 2007 ("the Rules").

3. The Applicant contends that by virtue of his engagement in "authorised structured activity" whilst in prison he is thereby entitled to "enhanced remission" of his sentence in excess of one quarter but not exceeding one third as provided for by r. 59(2) of the Rules.

4. On the 16th February, 2017 the Applicant applied to the Respondent ("the Minister") to be considered for enhanced remission under r. 59(2) of the Rules which was refused by the Minister by letter dated 18th July, 2017.

5. The relevant portion of the letter states as follows:

> "The Minister, having considered your application for enhanced remission, including all materials supplied in support of the application and the matters outlined above has decided to refuse your application. While it is acknowledged that you have engaged in some authorised structured activity, the Minister having had regard to the nature and gravity of the offence to which the sentence of imprisonment being served relates, the potential threat to the safety and security of the public and the Garda view, is not satisfied that you are less likely to reoffend and are better able to re-integrate into the community".

6. In subsequent correspondence, the solicitors for the Applicant requested "the Garda Report" underlying "the Garda view" referred to in the letter and further invited the Minister to reconsider the matter on the basis that there should at least be "some additional remission" from his sentence but received no reply.

7. The Applicant has sought judicial review of the Minister's refusal of his application for enhanced remission of his sentence on the grounds that the refusal was "capricious, arbitrary or unjust" and seeks the following reliefs:

> (1) an Order of *Certiorari* quashing the decision of the Minister to refuse the Applicant enhanced remission of his sentence under r. 59(2) of the Prison Rules;
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> (2) an Order for *Mandamus* directing the Minister to reconsider the Applicant 's application for enhanced remission of his sentence;
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> (3) an Order for Discovery of the documents comprising "the Garda view" relied upon by the Minister in refusing the application for enhanced remission of the Applicant 's sentence.

8. Following legal argument, it was agreed that two issues arise for determination in the following order:

> (1) whether the Applicant is entitled to the discovery sought (in which case the matter will have to be re-entered for further argument);
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> (2) if not, whether the refusal of enhanced remission was "arbitrary, capricious and unjust" by reason of the fact that the Minister appears to have primarily relied upon the nature and gravity of the offence which it is contended is a "static" and "unalterable" matter which the Applicant could never have addressed by engaging in "authorised structured activity".

The relevant Prison Rules

9. Rule 59(1) of the Rules as amended by S.I. of 227/2014 makes provision for ordinary remission and provides that prisoners who have been sentenced to a term of imprisonment or terms of imprisonment to be served consecutively, "shall" be eligible by good conduct to earn remission not exceeding one quarter of their term.

10. Rule 59(2) of the Rules as amended by S.I. of 385/2014 confers on the Minister a discretion to grant "enhanced remission" of a sentence in excess of one quarter but not exceeding one third if the prisoner has engaged in "authorised structured activity" and the Minister is satisfied, having regard to the matters referred to in subsection (f) of the Rule that the Applicant is "less likely to re-offend" and will be "better able to reintegrate into the community".

11. Under r. 27(2) "authorised structured activity" is defined as an activity authorised by the Governor, "intended to ensure that the prisoner, when released from prison, will be less likely to re-offend and is better able to re-integrate into the community".

12. The matters to which the Minister must have regard when deciding whether a prisoner is less likely to re-offend and is better able to integrate in the community are set out in r. 59(2)(f) as follows:-

> "(i) the manner and extent to which the prisoner has engaged constructively in authorised structured activity;
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> (ii) the manner and extent to which the prisoner has taken steps to address his or her offending behaviour;
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> (iii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates;
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> (iv) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto;
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> (v) the period of the sentence served by the prisoner;
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> (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;
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> (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;
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> (viii) the conduct of the prisoner while in custody or during a period of temporary release;
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> (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)."

Factual Summary

13. The Applicant was born in March, 1972 and is a married man with six daughters. He is currently serving a sentence of imprisonment of ten years for Aggravated Burglary which was imposed on him by the Circuit Criminal Court on 1st December, 2010 following his conviction before a Judge and Jury on the 5th November, 2010.

14. The offence was committed on the 13th of February, 2005 at a family home in Athlone, Co. Westmeath. The Applicant was one of four men who entered the house, tied up and bound the father of the family using cable ties whilst locking the mother and their four young children in a bathroom. Threats of violence and threats of a menacing sexual nature were made including a threat to use a knife and a verbal threat to anally rape the father if their demands were not complied with. Ultimately the gang made off with a personal safe and a considerable quantity of money and valuables.

15. The Applicant was the only one of the four intruders to be prosecuted and convicted having been identified by DNA which was extracted from a crime stain at the scene.

16. Following his conviction, the Applicant unsuccessfully appealed both his conviction and sentence to the Court of Criminal Appeal.

17. Whilst in custody the Applicant received disciplinary notices on 16th March, 2012, 22nd June, 2012 and 21st July, 2013 but has otherwise has been a model prisoner. He has been "an enhanced prisoner" since 2012 and "a trustee" for two years and eight months. He has availed of training and education opportunities in prison and engaged in "authorised structured activity" in a wide range of areas including:-

- Anger management;
- An eight step management of abusive behaviour programme;
- Alternatives to violence projects;
- Alternatives to violence second level;
- A peace education programme.

18. In addition, the Applicant has worked as Head Gardener in charge of the poly tunnels and the prison grounds at Castlerea Prison and is trusted to work outside the prison grounds. He is also a qualified listener in the "Listener Scheme" and has attained numerous skills including woodwork skills, metal work skills and computer literacy.

19. Although it is suggested that he had engaged with Irish Prison Service Psychology Service in respect of his offending and that the Service had "signed off on him" on the basis that he had rehabilitated, the true and unchallenged position would appear to be that the Applicant was in fact discharged from the Psychology Service on two separate occasions in 2015 because, upon being asked, he denied any involvement in the relevant offence.

20. It is an important feature of the case that although it is contended that he has engaged in authorised structured activity of "an offence focused" nature, the Applicant did not make an unqualified acknowledgement of his guilty until as recently as the 8th February, 2017 when he wrote a letter to the Governor both to acknowledge his guilt and disclose an intention to apply for enhanced remission "straightaway".

21. It is also significant to note that despite the Applicant's stated remorse and insight into the trauma of his victims, he has not co-

operated with the Gardaí or given any assistance to them in their endeavours to bring the other three perpetrators before the courts.

The relevant Law
22. The power to remit a prison sentence is given by Article 13.6 of the Constitution in the following terms:-

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

23. Section 35(2)(f) of the Prisons Act, 2007 confers on the Minister for Justice and Equality the power to make rules providing for the remission of a portion of a prison sentence pursuant to which the Prison Rules of 2007-2014 have been made.

24. The meaning and effect of r. 59(2) of the Rules has given rise to much judicial controversy which was finally settled by the Court of Appeal in *McKevitt v. Minister for Justice and Equality* [2015] I.R. 216 which established the following:-

> (1) where a prisoner engages in "authorised structured activities" he thereby establishes an entitlement to be considered by the Minister for "enhanced remission";
>
> (2) the fact that a prisoner has engaged in the relevant activities does not of itself automatically entitle him or her to receive an enhanced remission; rather, it is for the Minister to decide whether "as a result of" such activities, the prisoner is or is not less likely to reoffend and would or would not be better able to reintegrate into society;
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> (3) the decision by the Minister whether or not to grant enhanced remission is an Executive rather than administrative function to which a restricted standard of review applies;
>
> (4) The restricted standard of review which applies to the exercise of the discretion given to the Minister by r. 59(2) to the Rules is that stated by Finlay C.J. in *Murray v. Ireland* [1991] I.L.R.M. 465 at p. 473 as follows:-
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> > "The exercise of these powers of the Executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way".

25. A prisoner who applies for "enhanced remission" has a right to a Ministerial decision that is not "capricious, arbitrary or unjust". The protection of that right requires the court to ensure that when he has refused such an application, the Minister has nominated a reason or reasons for so doing that are of such a nature as to afford a logical and rational basis for refusing enhanced remission having regard to the matters set out in r. 59(2)(f) of the Rules. Provided the Minister has nominated such a reason or reasons for his decision, a wide margin of appreciation must be allowed to the Minister to determine what weight ought to be given to the relevant factors that are in play. The scope for review by the courts is thus "very narrow" and the fact that a court might come to a different conclusion based on the same information that was available to the Minister is not a reason for finding that the Minister has acted contrary to law (see *Bradley v. Minister for Justice and Equality* [2017] IEHC 422 at para. 8). The fact that the scope for judicial review is limited, however, does not mean that such review is nonexistent. A refusal of enhanced remission by the Minister would be unlawful if, for example, it was made dishonestly or for no stated reason or where the reason or reasons nominated are manifestly unsupported by the known facts and circumstances of the case or otherwise demonstrably contradictory or irrelevant.

26. The onus of proof is at all times on the Applicant to demonstrate that the impugned decision was "arbitrary, capricious or unjust". Accordingly, it is for the Applicant to bring forward evidence to establish that the refusal was dishonest or unreasoned or in some other way fundamentally deficient.

The Application for Discovery
27. The Applicant has sought discovery of a document which apparently conveys "the Garda view" to the Minister. It is contended that it is relevant and cannot be "safely excluded" because the relevant document underlies one of the three reasons nominated and relied upon by the Minister for his refusal of enhanced remission. The Minister objects to the discovery being sought both on grounds of relevancy and further on the grounds that the document is privilege arising from the public interest in ensuring that the Minister is able to receive information from an Garda Síochána in relation to such matters that is full, frank and uninhibited in order to protect sources who might otherwise be placed in danger or the need to maintain confidentiality in relation to criminal intelligence matters.

28. There are two conflicting decisions of the High Court on the issue of whether it is within the competence of the Minister to decide as a matter of policy that disclosure of information provided in confidence by the Gardaí to him in relation to an application for "enhanced remission" would not be in the public interest. Following the decision of the Court of Appeal for England and Wales in *Tucker v. Director General of the National Crime Squad* [2003] EWCA CIV 57, Noonan J. in *Doody v. Governor of Wheatfield Prison and Others* [unreported judgment delivered 4th March, 2015] held that it was within the competence of the Minister to make such a policy decision and that in the absence of any evidence of any bad faith, it was not a matter in which the court could intervene. A different approach was adopted by Ní Raifeartaigh J. in *Bradley v. Minister for Justice and Equality* supra, who rejected the very idea that there could be a class of documents which as a matter of law could be withheld from production in all circumstances simply because they related to confidential communications between the Gardaí and the Irish Prison Service and/or the Minister. She stated that even in a case involving a review of Executive action to which the "arbitrary, capricious or unjust" test is applicable, the principles established by *Murphy v. Dublin Corporation* [1972] I.R. 215 applied whereunder the court is required to adjudicate on a claim of privilege on a case by case basis and by reference to a particular document. Insofar as there is a conflict of judicial approach on this issue, it seems to me that I am bound by the decision of the Supreme Court in *Murphy v. Dublin Corporation* [1972] I.R. 215 and, therefore, I adopt the law on this issue as stated by Ní Raiferataigh J. in *Bradley*.

29. The mere fact that discovery is available in a case concerning a review of Executive action to which the "arbitrary, capricious or unjust" test applies does not mean that every time a prisoner makes an application for enhanced remission that he is automatically entitled to see the underlying Garda report or that every time there is a challenge to a refusal of enhanced remission by way of judicial review, there must necessarily be an inspection by the court of the underlying Garda report in respect of which privilege is claimed (see *Bradley* at para. 50). As was stated by Ní Raifeartaigh J. in *Bradley*, each case must be decided within its own "evidential context". Thus, in *Bradley*, the Court was persuaded to consider the issue of privilege only because the Garda report was "sufficiently important" to warrant a consideration of the issue. Specifically, there was an "unusual evidential context" arising from "an apparent conflict" between the garda views which were expressed on oath in open court at the time of the sentence hearing and the garda views as apparently expressed to the Minister in a report which formed part of the reason for the refusal of enhanced remission.

Accordingly, the Court only considered it necessary to consider the issue of privilege because there was *prima facie* inconsistency between what was contained in the report and what was previously stated by the Gardaí at the sentence hearing.

30. This critical feature is absent in the instant case where no proper or any evidential foundation has been laid to even suggest that the Minister's reliance on "the Garda view" was in any way "arbitrary, capricious or unjust". Instead, discovery of the relevant document is sought on a purely speculative basis and is designed not to assist a case that has already been made but rather to assist a case that may or may not unfold from an inspection of the document whose discovery is sought. It seems to me that in order to establish a *prima facie* entitlement to discovery in a case of this nature, the Applicant must demonstrate that the relevant document or material is required to resolve a live issue that arises from evidence of some fact or circumstance that *prima facie* suggests that insofar as the Minister has relied on the "Garda view" his refusal of enhanced remission was "arbitrary, capricious or unjust". Such a situation might arise, for example, where the Gardaí had given evidence at the sentence hearing of the Applicant to the effect that his offending was "out of character" or that he was "unlikely to reoffend". Against such a factual background, it would be both unexpected and indeed a surprise if the Minister refused the relevant application based on "the Garda view" and in such circumstances, there would be a *prima facie* entitlement to discovery subject to whatever issues of privilege that might arise. As the Applicant has failed to demonstrate the required or any "evidential context" to show why discovery is necessary in this case, the issue of privilege does not arise and the application is refused.

The lawfulness of the refusal
31. The Applicant contends that the refusal was "arbitrary, capricious and unjust" because the Minister primarily relied on the nature and gravity of the relevant offence which it is argued is a "static" and "unalterable" matter which the Applicant could never have addressed by engaging in "authorised structured activity". It is further argued that if the Minister is allowed to refuse an application on such a ground that this would have the unintended consequence of effectively excluding all persons convicted of serious offences from enhanced remission.

32. The fact that a prisoner has participated in "authorised structured activity" cannot of itself in any meaningful way assist the Minister in deciding the threshold question which at bottom, is whether the Applicant is or is not "a good risk". The starting point in any assessment of this issue must be a consideration of the criminality of the prisoner as disclosed by the facts and circumstances of the relevant offence or offences in respect of which he has been convicted and imprisoned. This must be particularly so where the prisoner, as in this case, has been convicted of a very serious criminal offence having regard to the fact that enhanced remission not only has consequences for the prisoner but also has very serious consequences for the community at large. Far from being a "static" and, therefore, irrelevant factor in the assessment, it seems to me that the prisoner's criminal record but more importantly the particular facts and circumstances of his or her offending ought to be the defining context for the Minister's determination of whether and to what extent the prisoner's subsequent participation in incentivised activities in prison can offer a reliable guide as to likely future conduct in society.

33. There is no rule of law which says that the Minister cannot rely predominantly or exclusively on "static" matters and specifically the nature and gravity of the offence for which the prisoner has been convicted which in many cases will throw a flood of light upon his or her potential threat to the safety and security of the public. Moreover, far from being "static" and "unalterable", the facts and circumstances relevant to the prisoner's offending may be ongoing matters of relevance where, as in this case, the prisoner has failed either to acknowledge his or her guilt or has done so belatedly or where a prisoner has failed to give any or any meaningful assistance to the Gardaí where such assistance ought reasonably be expected in all the circumstances.34. Even if these factors were not present in the instant case, I am nonetheless satisfied that facts and circumstances of the Applicant's offending are so serious and alarming in their nature and gravity as to afford a sufficient ground on its own to warrant refusal of enhanced remission.

35. For the foregoing reasons, I refuse the application.