Neutral Citation: [2015] IEHC 137

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 725 JR]

BETWEEN

DARREN DOODY

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 4th day of March, 2015

Introduction

1. In the within judicial review proceedings, the applicant seeks the following reliefs:

> (1) An order of *certiorari* quashing the respondent's decision made on the 29th of October 2014 to refuse the applicant's application for one third remission.
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> (2) A declaration that the respondents failed to consider, properly or at all, the applicants application for one third remission before refusing same.
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> (3) A declaration that the respondents, in making any administrative decision which may adversely affect the applicant, are obliged to set out full and proper reasons upon which that decision is based.
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> (4) A declaration, by way of application for judicial review, that the applicant is entitled to have his application for one third remission considered in accordance with the legislative basis provided for under Rule 59 of the Prison Rules 2007 and that the applicant's application may not be refused on the basis of unfounded assertions.
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> (5) An order of *mandamus* to provide the respondents full and proper reasons for the respondent's decision to refuse the applicants application for one third remission.

Background facts

2. On the 23rd of February 2012, the applicant was convicted of the offence of false imprisonment under s.13 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (as amended). On the 26th of March 2012, the applicant was sentenced to seven years imprisonment with the last three years suspended. The applicant was incarcerated in Wheatfield Prison where he is now on an enhanced regime. He is eligible for one quarter remission so that his expected release date is the 25th of March 2014, being three weeks from now.

3. While in prison, the applicant completed the following training courses and achieved the following qualifications and certificates:

- Fetac certificate Setting Learning Goals
- Fetac certificate for Spanish
- First Aid qualification Fetac Level 5
- Fetac Level 3 Spanish
- Junior Certificate Spanish
- Two music certificates from the Associated Board of the Royal Schools of Music
- Grade 1 music certificate
- Grade 1 guitar certificate
- Rock School guitar certificate
- Occupational First Aid certificate
- Cardiac First Response Community certificate
- Health and First Aid in Action Programme certificate

- Alternative to Violence Level 1 certificate
- Alternative to Violence Level 2 certificate
- Relapse prevention course
- Mindfulness course certificate
- Pre-release course certificate.

4. In addition to the foregoing, the applicant attended 43 sessions with the prison psychology service between August 2013 and July 2014. These sessions consisted of personal and offence-focussed therapeutic work and in a letter dated the 6th of November 2014, the prison counselling psychologist stated that the applicant had positively engaged in this work.

5. In March 2014, the applicant contacted the second respondent ("the IPS") to enquire about applying for one third remission and was advised by return of correspondence that he should speak to the Governor and the Integrated Sentence Management team who would be able to explain the different services available and help him put a structured plan in place. The applicant says that he followed that advice but that it emerged that he had in fact already completed all the courses.

6. It would appear that on the 5th of July 2014, the applicant made an application for enhanced remission. By letter of the 22nd of August 2014, Mr. Tony Hickey of the IPS responded to the application, which he noted was pending at the time, in order to inform the applicant that Rule 59(2) of the Prison Rules 2007 had been amended and furnishing him with a copy of the amended rule. Mr. Hickey advised the applicant that there had been no substantive change to the manner in which his application would be determined and he was not required to make any further submissions but could do so if he wished.

7. It would appear that a meeting took place on the 17th of September 2014 at the prison in relation to the applicant's application for remission, although who was present and what was discussed are not known. By letter of the 24th of September 2014, the applicant's solicitors corresponded with the IPS in relation to the application for remission and set out the detailed basis for the claim. By letter of the 29th of October 2014 from Mr. Hickey sent directly to the applicant, the third named respondent ("the Minister") gave her decision on the application in the following terms:

> "I refer to your application seeking to be considered by the Minister for Justice and Equality for increased remission under Rule 59 of the 2007 Prison Rules as amended.
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> The principles governing the awarding of remission are contained within Rule 59 of Statutory Instrument No. 252 of 2007 (the Prison Rules), as amended by 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. Further, prisoners may also receive remission of greater than one quarter but not exceeding one third of their sentence if they –
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> (i) demonstrate good behaviour by engaging in authorised structured activity, and
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> (ii) satisfy the Minister that as a result of (i) they are less likely to re-offend and would be better able to reintegrate into the community.
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> In considering whether a prisoner's engagement in authorised structured activity is likely to lead to the prisoner being less likely to re-offend or better able to reintegrate into the community, the Minister will take into account a number of factors including the following:
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> - The manner and extent to which the prisoner has engaged constructively in authorised structured activities;
> - The manner and extent to which the prisoner has taken steps to address his or her offending behaviour;
> - The nature and gravity of the of the offence to which the sentence of imprisonment being served by the prisoner relates;
> - The sentence of imprisonment concerned and any recommendation of the court that imposed the sentence;
> - The period of the sentence served by the prisoner;
> - 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);
> - 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;
> - The conduct of the prisoner while in custody or during a period of temporary release;
> - Any report or recommendation made by the Governor, the Garda Síochána, probation officer or any other person whom the Minister considers would be of assistance in enabling him or her to make a decision on such an application.
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> The Minister having considered all of the above issues has decided to refuse your application as she is not satisfied that as a result of your engagement in authorised structured activity, that your are less likely to re-offend or better able to reintegrate into the community. The reasons for this decision are due to the nature and gravity of your offence and the potential threat to the safety and security of members of the public."

8. The applicant's solicitor responded in a further letter of the 12th of November 2014 arguing that the basis for the refusal appeared to lie mainly with the seriousness of the offence and that such could not itself act as a bar to the applicant being granted additional remission. It was further argued that the threat to safety and security of members of the public had never previously been suggested and had no basis. Their client was completely unaware of any reason that such a conclusion could be drawn. The applicant proposed to seek relief in the High Court.

The Prison Rules
9. S.I. No. 252/2007 – Prison Rules, 2007 provides at Rule 59 as follows:

"(1) A prisoner who has been sentenced to –

(a) a term of imprisonment exceeding one month, or

(b) terms of imprisonment to be served consecutively the aggregate of which exceeds one month,

shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate.

(2) The Minister may grant such greater remission of sentence in excess of one quarter, but not exceeding one third thereof where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community".

This rule was amended by the Prison (Amendment) (2) Rules 2014, S.I. No. 384 of 2014, which came into force on the 15th of August 2014, by the substitution of the following rule for sub rule (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) any 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 greather remission of sentence in excess of one quarter, but

not exceeding one third, as may be determined by the Minister."

The Affidavits

10. The grounding affidavit was sworn by the applicant's solicitor Mr. Robert Purcell and sets out the matters already outlined herein. The replying affidavit was sworn on behalf of the respondents by Mr. Hickey. He sets out the background to the operation of the Prison Rules 2007 (as amended). He avers that as a result of two cases decided by this court in the latter half of 2014, approximately 400 applications for one third remission were made. By virtue of these numbers, it is naturally not feasible for the Minister to personally decide each case and as is not uncommon in such situations, applications are in fact decided by civil servants in the Department of Justice of Assistant Principal Officer rank or higher on behalf of and with the authority of the Minister. Mr. Hickey was the decision maker in the present case.

11. In exercising the discretion conferred by the rules, Mr. Hickey reviewed the applicant's file which included all the material advanced by him and also information received from the relevant therapeutic services, prison management and the Gardaí for the purpose of ascertaining whether the applicant is less likely to re-offend and better able to reintegrate into the community. Having reviewed all this information, Mr. Hickey concluded that he was not satisfied that the applicant was less likely to re-offend or that he would be better able to re-integrate into the community.

12. He says that in particular he took into account the nature and gravity of the offence in this case. He describes in detail in his affidavit the circumstances of the offence. He accepts that the applicant has generally been of good behaviour subject to some infringements but he has received already the normal remission of one quarter because of that good behaviour amounting to a year off his sentence.

13. In particular, Mr. Hickey says that he received a confidential report from the Gardaí, who indicated that, based on their knowledge of the applicant, they were not of the view that he was unlikely to re-offend. They were also apparently of the view that, with respect to the applicant, there is a potential threat to the safety and security of members of the public. He also refers to the fact that the applicant has fourteen previous convictions for a variety of different offences.

14. A second affidavit was sworn by Mr. Purcell in reply to Mr. Hickey's affidavit. In that, he makes a number of complaints which are in reality legal submissions. He complains particularly about the fact that it has now emerged from Mr. Hickey's affidavit that he was in receipt of a confidential report from the Gardaí not previously notified to the applicant. Mr. Purcell avers that he requested a copy of this report but his request was refused on the grounds of confidentiality. He complains that this is fundamentally unfair to the applicant in circumstances where he has been unable to deal with whatever matters have been raised in the Garda report and in consequence, the respondent's decision is in effect "insulated" from review.

15. Mr. Hickey responds to these criticisms in a second affidavit. Mr. Hickey says that he did not take the view that the seriousness of the offence of which the applicant was convicted was a bar to remission but rather was one factor to be weighed in the balance as provided by the Rules. He says in particular with regard to the Garda report that this is specifically provided for in the Rules and this is well known within the prison population. In his second affidavit, Mr. Hickey says the following:

> "8. I say that I also had regard for a confidential Garda report which addressed the issue of whether the applicant was less likely to re-offend and was better able to reintegrate into the community. Such a report is one of the specific matters referred to in Rule 59 (2) (f) of the Prison Rules. I say that it is the regular practice for the Irish Prison Service to take into consideration the view of An Garda Síochána when it is considering an application for up to one third remission and it is well known within the prison population that the Irish Prison Service seek views from the Gardaí on issues such as remission and temporary release. When a prisoner is committed to prison, the Irish Prison Service receives a warrant which outlines the crime and sentence. However, there are few details of the crime, the criminological history of the prisoner and other issues which may have a bearing on behaviour and safety within the prison and also which will have an impact on issues regarding release. In order to get as complete a picture as possible, the Irish Prison Service contact An Garda Síochána for background information. This is a long standing arrangement and the information provided by the Gardaí is done so on the basis that it is given and received on a confidential basis.
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> 9. I cannot make any comment on the information provided by An Garda Síochána in this case as it was specifically provided and received on the basis that it is confidential. I have specifically taken instructions again from An Garda Síochána to see if any of this information can be divulged and I am instructed that all of such information is to remain confidential in the public interest. However, as a general matter, some confidential information provided by An Garda Síochána may relate to ongoing investigations, which the Gardaí would not wish to be known by any prisoners and some might relate to other individuals who could be placed in danger if it became known. It is necessary to preserve the confidentiality of this information so as to preserve the candid channels of communication between the Irish Prison Service and An Garda Síochána. If the Irish Prison Service, is hindered in its ability to receive confidential information from the Gardaí or if the Gardaí are forced to become circumspect in what information they provide, it could have serious safety issues both within the prison and in the community.
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> 10. I say that I do not accept that the applicant was not aware that the views of An Garda Síochána would be taken into account in the context of his application for remission. I say that it was represented on behalf of the applicant in the application dated September 24th, 2014, that An Garda Síochána in Store Street Garda Station "*would have a favourable view of him and would not have any objection to Mr. Doody being granted one third remission*." For the avoidance of doubt, it is not the function of An Garda Síochána to object to one third remission, as the decision on one third remission is a matter for the third respondent and not for An Garda Síochána. However, An Garda Síochána provided the Irish Prison Service with a confidential report indicating that they were not in a position to recommend that the applicant should get any form of early release. Insofar as the applicant is concerned, they were of the view that there is still a potential threat to the safety and security of members of the public."

Submissions

16. In a nutshell, the applicant contends that the decision under challenge cannot have been fair in circumstances where the real basis for it, i.e. the Garda report, has never been disclosed and he has never been given an opportunity to engage with the content of that report. He argues that in every conceivable respect, he has complied with all possible requirements which would entitle him to be considered for enhanced remission. He poses the question, in the circumstances of this case, what more could he have done?

17. He argues that the gravity of the offence and his previous convictions, whilst matters that the Minister is entitled to take into

account, under the Rules, cannot amount to, in themselves, his exclusion from entitlement to consideration for remission as the Minister appears to suggest here. These are all matters that were taken into account when the applicant was sentenced for the original offence and to regard them as an insurmountable obstacle to enhanced remission in effect amounts to double punishment. He submits further that in circumstances where the applicant has engaged meaningfully and positively in relation to every conceivable course and form of training required of him and has received no negative appraisal, the decision cannot be rational. At the very least, he says that in such circumstances, the burden must be cast upon the respondents to show what he ought to have or could have done to qualify himself for enhanced remission. In the circumstances, the applicant contends that the Minister in providing basic formulaic reasons in reality has given no reasons at all.

16. The respondents dispute this. They say that the exercise of the executive power of the Minister in a case such as this cannot be interfered with by the court unless such exercise has been demonstrated to be unjust, arbitrary or capricious. The onus of proving that rests upon the applicant. Reasons have been given in this case and an explanation furnished for why more detailed particulars cannot be given. The respondents in effect contend that it would be contrary to public policy to compel them to disclose, even in a general way, the information received from the Gardaí for all the reasons set out in Mr. Hickey's second affidavit.

17. The respondents contend further that the duty to give reasons can be abridged in circumstances such as arise in this case.

Recent relevant cases

18. There is a degree of confusion arising in the law relating to enhanced remission as a result of a number of conflicting decisions of this court in the recent past. In *Ryan v. Governor of Midlands Prison* [2014] IEHC 338, Barrett J. conducted an enquiry into the legality of the detention of the applicant pursuant to Article 40.4.2 of the Constitution. In that case, as here, the applicant sought enhanced remission on the basis of participation in authorised structured activities under Rule 59(2) of the Prison Rules. Barrett J. considered that since these activities had the aim and effect of reducing recidivism and facilitating reintegration into the community, the only conclusion that the Minister could have reached was that the applicant was less likely to re-offend as a result of his participation and thus better able to reintegrate into the community. Accordingly the court ordered the applicant's immediate release.

19. On appeal, the Supreme Court reversed this decision primarily on the ground that the Article 40 procedure was inappropriate to the circumstances of that particular case which ought to have been brought by way of an application for judicial review. The Supreme Court did not conduct any analysis of the reasoning behind the decision of the High Court.

16. A similar conclusion was reached by Hogan J. in *Farrell v. Governor of Portlaoise Prison* [2014] IEHC 392. This again arose out of an application for enhanced remission under Rule 59(2). As in Ryan, the applicant had engaged in authorised structured activity in the prison but despite having done so, was refused enhanced remission. Hogan J. adopted the same reasoning as Barrett J. in the earlier case and came to the conclusion that the fact that the applicant successfully participated in these activities must by definition have rendered him less likely to re-offend in the sense understood by Rule 59(2). It is worth noting that in *Farrell*, decided under the old Rule 59, as was Ryan, that the Minister had regard to a negative Garda report on the applicant. Hogan J. felt that this was not a factor which the Minister could legitimately take into account for the purpose of a Rule 59(2) application because the single question permitted by Rule 59(2) was whether the Minister was satisfied that by reason only of a prisoner's participation in authorised structured activities, that prisoner was less likely as a result to re-offend and to reintegrate into the community (Hogan J.'s emphasis). Of course under the new Rules, that consideration no longer arises as the Minister is not only entitled, but explicitly required, to have regard to any report of, or recommendation by, An Garda Síochána. *Farrell* is currently under appeal to the Supreme Court.

17. By unfortunate happenstance, on the same day as Hogan J. delivered his judgment in *Farrell*, Peart J. delivered his judgment in *Keogh v. Governor of Mountjoy Prison* [2014] IEHC 402 which appears to have reached a different conclusion on the proper construction of Rule 59(2). Although the outcome of the case turned on different issues, Peart J. seemed to consider that the earlier view expressed by Barrett J. might be an over simplification and that if one simply signs up for a number of courses and attends, there is no guarantee that any benefit has been derived. A prisoner might just go through the motions for the purpose of enhancing his chances of early release.

18. Mr. Ryan, who was the subject of the earlier Article 40 enquiry by Barrett J. came before the High Court again in November 2014 but this time by way of an application for judicial review which was heard by O'Malley J. She disagreed with the construction of Rule 59(2) adopted by Barrett J. and Hogan J. and preferred that of Peart J. She said:

> "9.1…it seems to me that what the rule required was, firstly that the prisoner should have engaged in activities of the type described. However I do not accept that proof of this necessarily compelled the Minister to accept that the prisoner was, as a result, less likely to re-offend and better able to reintegrate into the community.
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> 9.2 As Peart J. points out, attendance at a course does not guarantee such a result…in my view the rule reserved to the respondent the task of considering, based on the information provided to him, whether or not the applicant had in fact become less likely to re-offend as a result of engaging in the relevant activities. In making this determination he was entitled to have regard to other, relevant information tending to show whether or not the applicant did indeed intend to avoid criminal behaviour in the future".

19. Barely a month later, this court (Kelly J.) delivered another judgment on the same point in *McKevitt v. The Minister for Justice and Equality and Others* [2014] IEHC 551. It is important to remember that this case, as with the others above mentioned, concerned the old Rule 59(2). The applicant had, during the period of his incarceration in Portlaoise Prison, engaged in the appropriate authorised structured activity. In reliance on the judgments in *Ryan* and *Farrell*, the applicant contended that he was thus entitled to enhanced remission. Kelly J. conducted an analytical examination of the judgments in *Ryan* and *Farrell* and came to the rather stark conclusion that they were simply wrong. He felt entitled to come to this view having regard to the conflicting opinion of Peart J. in *Keogh* which he preferred and adopted. Perhaps surprisingly, he does not appear to have been referred to the equally supportive views of O'Malley J. in the second *Ryan*. He said:

> "71. Whilst participation in authorised structured activity no doubt has as its object a reduction in the prisoner's likelihood of re-offending, it does not follow *ipso facto* that such object is achieved. It is, in every case, a matter for the Minister to be satisfied that such objective has been achieved as a matter of fact."

20. He went to say that the approach adopted in *Ryan* and *Farrell* could lead to absurd results and gave examples. He continued:

> "76. In my view, the discretionary power conferred on the Minister under Rule 59(2) requires her not merely to be satisfied that an applicant prisoner has shown further good conduct by engaging in authorised structured activity but also that as

> a result of that exercise, the prisoner is less likely to re-offend and will be better able to reintegrate into the community. She is not obliged to assume that the mere participation in the authorised structured activity has succeeded in its object."

21. In a further passage particularly relevant in this case, Kelly J. observed:

> "78. In my view, in the present case, the Minister had to satisfy herself that the applicant engaged in the authorised structured activity and that as a result he was less likely to re-offend and would be better able to reintegrate into the community. In making her decision in that regard, the Minister was not confined to a consideration merely of the courses completed by the applicant. She was also entitled to consider whether the object sought to be achieved by participation in them had, in fact, been achieved. In that regard, I am of opinion that the Minister was entitled to take into account all of the information which was put before her in the submission which led to her decision. All of that material appears to me to have a relevance in informing the Minister on the likelihood of the applicant re-offending or being better able to reintegrate into the community. They are crucial considerations for the Minister in exercising this important power."

22. Kelly J. approved a passage from *Prison Law* (Mary Rogan, Bloomsbury, 2014) which said, *inter alia*, in commenting upon the judgment of Barrett J. in Ryan's case:

> "It cannot be enough for a prisoner to show engagement with certain activities, considerations of risk must also apply."

23. Insofar as relevant to these proceedings, it seems to me that the approach adopted by Kelly, Peart and O'Malley JJ. on this point is the correct one and I should follow it. However, whilst the latter issue has featured to some extent in this case, it is not the primary one. The applicant's principle complaint is that the Minister has failed to give adequate reasons for her decision. It is argued on the applicant's behalf that in circumstances where he successfully completed offence focussed therapeutic work and a number of courses directly addressed to the issue of recidivism, an onus was cast upon the Minister to show how he could not be regarded as a person less likely to offend or better able to reintegrate into the community.

Discussion

24. In the wake of the decision of the Supreme Court in *Mallak v. Minister for Justice* [2012] 3 I.R. 297, cases where decision makers are absolved from the duty to give reasons must be exceedingly rare. One such instance arose in *H v. Director of Public Prosecutions* [2006] 3 I.R. 575, where the Supreme Court held that the Director of Public Prosecutions could not be called upon to give reasons for deciding not bring a prosecution in a particular case. There are obvious policy reasons why that should be so.

25. Where reasons must be given, as in most cases, the nature and extent of the reasons will necessarily vary by reference to the circumstances of the case. As noted by this court in *Nowak v. Irish Auditing and Accounting Supervisory Authority* [2015] IEHC 94, there have been many cases where brief and succinct reasons have been held sufficient – see for example *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 and *FP v. Minister for Justice* [2002] 1 I.R. 164. Other cases may arise where the nature of the issue concerned imposes a duty on the decision maker to furnish detailed and elaborate reasons.

26. In the present case, it cannot be said that no reasons have been furnished by the Minister. Clearly two have been given. The first one is the nature and gravity of the offence and the second the potential threat to the safety and security of members of the public. On their face, these are clearly valid reasons expressly envisaged by Rule 59(2)(f)(iii) and (vi). The applicant says that the first reason cannot in itself amount to a bar to remission. The sentencing judge must be taken to have factored the nature and gravity of the offence into the sentence and therefore to regard it as excluding the possibility of remission amounts to double punishment. Mr. Hickey in his affidavit accepts that proposition but says that it was no more than a factor in the decision.

27. With regard to the second reason, the applicant complains that it has no basis in fact, or at least one of which he has been made aware. If such conclusion derives from the content of the Garda report, then the applicant says he is entitled to see it, even in redacted format, or at the very least to be given the gist of the complaint against him. Mr. Hickey says that this cannot be facilitated in the public interest and has explained why. For obvious reasons, the Minister has to be able to receive information from An Garda Síochána that is full, frank and uninhibited by reference to the need to protect sources who might otherwise be placed in danger or the need to maintain confidentiality in relation to criminal intelligence matters.

28. The inevitable tensions between these opposing points of view gives rise to a troubling dilemma. One can readily appreciate how the applicant may feel aggrieved by being deprived of the opportunity to address something which may be decisive but is unknown to him. On the other hand, it is easy to conceive of circumstances where disclosure of even the gist of the complaint would have the effect of revealing the source who might thereby be endangered.

29. In delivering the judgment of the Supreme Court in *Mallak*, Fennelly J., with considerable foresight, said:

> "79…it will be a matter for [the Minister] to decide what procedures to adopt in order to comply with the requirements of fairness. It is not a matter for the court to prescribe whether he will give notice of his concerns to the applicant or disclose information on which they may be based or whether he will continue to refuse to disclose his reasons but to provide justification for doing so. Any question of the adequacy of reasons he may actually decide to provide or any justification provided for declining to disclose them can be considered only when they have been given."

30. The standard to be applied in judicial review applications in a case of this nature was discussed by the Supreme Court in *Kinahan v. Minister for Justice and Law Reform and Ors* [2001] 4 I.R. 454. In that case, the applicant, who was serving a sentence of imprisonment, challenged the Minister's refusal to grant him temporary release. The basis for the challenge was that no, or no adequate, reasons had been given by the Minister for the refusal. The decision under challenge set out six criteria for the purpose of assessing applications for temporary release and concluded as the sole reason for refusal that it was too early in the sentence to grant it. Hardiman J., in delivering the judgment of the court, referred to an earlier Supreme Court decision on the question of temporary release in *Murray v. Ireland* [1991] I.L.R.M. 465. He referred to the earlier dicta of Finlay C.J. in Murray and said (at p. 459):

> "Having dealt with other contentions in relation to the conditions of imprisonment, the learned Chief Justice at p.473 continued:-
>
> > '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.'

> It is not, however, in my view, permissible for the court to intervene merely on the grounds that it would…have reached a different conclusion on the appropriateness…of temporary release.'
>
> In my view, this decision properly emphasises the importance of the constitutional separation of powers in dealing with the implementation by the executive of a judicially imposed sentence of imprisonment. It also correctly identifies the sole circumstance in which the court would be justified in interfering with a decision in relation to temporary release."

31. In *McKevitt*, Kelly J. held that this passage showed the appropriate approach that should be adopted in cases concerning a refusal of enhanced remission.

32. The question of the disclosure of sensitive information in a reasons based judicial review challenge to a decision does not appear to have directly arisen in this jurisdiction but was considered by the Court of Appeal for England and Wales in *Tucker v. Director General of the National Crime Squad* [2003] EWCA Civ 57. The appellant was a detective inspector whose employment with the National Crime Squad was terminated summarily. No reasons were given other than a statement that the Director General of the National Crime Squad was acting on information which could not be disclosed. In dealing with this issue, Lord Justice Scott Baker delivering the court's judgment said:

> "43. It is clearly established that where there are real concerns about national security, the obligations of fairness may have to be modified or excluded…but as Mr. Westgate points out this case does not involve any issue of national security. It does however involve, using the expression broadly, 'sensitive intelligence information.' There is no reason in principle why the ordinary obligations of fairness should not be modified in this class of case just as they are in cases where issues of national security are involved. Certainly there is no authority that limits any modification or exclusion of the latter category…
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> 47. All this, it seems to me, adds up to the fact that this is a case that falls into the 'sensitive intelligence information' category. In this type of case the duty of fairness requires no more than the decision maker acts honestly and without bias or caprice."

33. It will be seen therefore that the views expressed by the English Court of Appeal on the review standard are not dissimilar from those of the Supreme Court in *Kinahan*.

34. In effect, the applicant here contends that once he had done all the courses and taken all the steps that he was advised to take, he could do no more and thereafter the onus shifted onto the respondents to advise him of any other steps he needed to take. I cannot accept that proposition. It seems to me that in effect it amounts to virtually the same argument that was advanced in *Ryan* and *Farrell* where it succeeded and in *McKevitt* where it failed. I have already expressed my view on this issue.

35. The applicant also argued that his case fell to be considered under the old Rule 59(2) because it was not "pending" on the date of the introduction of the new rule. The basis for this contention was that the applicant applied in March 2014 and the Minister made a decision in relation to that application on the 13th of March 2014 so that his application was not in fact "pending" on the 15th of August 2014 when the new Rules came into effect. I find that submission to be without merit. Clearly no substantive decision had been made on the 13th of March 2014 and the logic of the applicant's contention is that there were in fact two decisions made which is patently incorrect. I am satisfied therefore that the application fell to be dealt with under the new rule.

Conclusion.

36. It seems to me to be beyond argument that the onus is on the applicant to demonstrate that the decision in this case was capricious, arbitrary or unjust. In my view, he has failed to discharge that onus. Reasons were given and the applicant seeks to go behind those. The Minister has declined to divulge the information underlying her conclusion that there is a threat to the safety and security of members of the public. She has explained why. The fact that the views of the Gardaí were going to be taken into account cannot have been a surprise to the applicant as his solicitor's submission included a statement to the effect that the Gardaí in Store Street would support the application.

37. In my opinion, the Minister was as a matter of policy entitled to take the view that the disclosure of the information relied upon would not be in the public interest. It was within her competence to so decide and in the absence of any evidence of bad faith, it is not a matter in which the court can intervene.

38. Accordingly I will dismiss this application.