Neutral Citation Number: [2014] IEHC 551

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 513 J.R.]

BETWEEN

MICHAEL MCKEVITT

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRISH PRISON SERVICE, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Kelly delivered on the 9th day of December, 2014

Introduction

1. On 6th August, 2003, the applicant was convicted by a Special Criminal Court of two offences. The first was membership of an unlawful organisation contrary to s. 2 of the Offences Against the State Act 1939, as amended. He was sentenced to a term of six years imprisonment on that charge.

2. He was also convicted of the more serious offence of directing the activities of an organisation in respect of which a suppression order had been made under s. 19 of the Offences Against the State Act 1939, contrary to s. 6 of the Offences Against the State Act 1998. He was sentenced to a term of twenty years imprisonment on that count. The sentences were directed to run concurrently and to date from 29th March, 2001. That was the date upon which the applicant was first taken into custody.

3. It is common case that the applicant has served the entirety of his sentence on the E2 *"Republican"* landing of Portlaoise Prison.

4. The respondents accept that the applicant has a current prospective release date of 26th March, 2016. That date is calculated by giving him full credit for the one quarter remission envisaged in r. 59(1) of the Prison Rules 2007 (the Rules). Such remission can, of course, only be gained by good conduct.

5. The applicant contends that he is entitled to an enhanced remission of sentence in excess of one quarter. Such remission is provided for by r. 59(2) of the Rules. On 14th July, 2014, he applied to the Governor of Portlaoise Prison for one third remission of his sentence which is the maximum permitted under r. 59(2) of the Rules. That application was, in due course, considered by the first respondent who decided not to grant the remission sought. In these proceedings, the applicant seeks an order of *certiorari* quashing that decision of the first respondent dated 11th August, 2014.

The Relevant Prison Rules

6. Rule 59 of the Rules reads:-

> *"(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."*

7. The term *"authorised structured activity"* is mentioned in Rule 27(2) which reads:-

> *"(2) Subject to Rule 72 (Authorised structured activity), each prisoner may, while in prison, engage or participate in such structured activity as may be authorised by the Governor (in these Rules referred to as 'authorised structured activity') including work, vocational training, education, or programmes intended to ensure that a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community."*

Rule 27(3) reads:-

> *"(3) In so far as is practicable, each convicted prisoner should be engaged in authorised structured activity for a period of not less than five hours on each of five days in each week."*

The Applicant's Evidence

8. The applicant swore an affidavit in support of this application on 27th August, 2014. On the same date, the applicant's solicitor made an affirmation in support of the application. The following facts deposed to are relevant.

9. The applicant is now 65 years old and has spent the whole of his sentence on the E2 landing at Portlaoise Prison. He was a serving prisoner when the Rules were introduced. The Rules were notified to prisoners by means of a notice placed on the prison notice board. He made enquiries with the Governor of the Prison shortly after this notification as to the work to be done to gain enhanced remission as provided for in the Rules. He says the Governor was not able to provide an answer and referred him to an official from the Irish Prison Service.

10. That official was, it is said, unable to provide any guidance in respect of the interpretation of Rule 59(2). In particular the official did not advise the applicant that certain activities would be preferred by the Minister or that certain activities were not worth engaging in or that work carried out by inmates on the E2 landing would not count as authorised structured activities.

11. Despite the absence of formal guidance the applicant says that he has always endeavoured to engage in the available activities. He has completed a number of courses and describes himself as a *"model prisoner"* for the last ten years at least. He has been disciplined on two occasions. The first was in 2001 and the second in 2004. On both occasions, he says, the disciplinary measures resulted from a collective action taken by the Prison Service against the general population of prisoners on the landing.

12. He says that he has successfully completed studies in computers, digital imaging, French, English, web design, Photoshop, creative writing, art, speech and drama, music, home economics and yoga. He received a merit in computer literacy through FETAC and has completed Level 3 FETAC courses in French and digital imaging. He also studied with the Leinster School of Communications and London Guildhall and received merits in spoken English and speaking skills. He has also studied creative writing with the Open University. He has been given temporary release on two occasions. The first was in April 2004 and the second in January 2012. Each release was for a period of two days.

The Application for Enhanced Remission

13. On 14th July, 2014, the applicant applied to the Governor of the Portlaoise Prison for one third remission of sentence pursuant to the provision of Rule 59(2) of the Rules. In the course of his application he pointed out that his scheduled release date is March 2016 but, if he were to receive one third remission, he would expect to be released in late July 2014. He stated that throughout his period of detention in Portlaoise Prison, he had engaged in authorised structured activity with the Prison Education Unit. This activity also included health and safety and food management activities on the E2 landing. He completed his application by saying that his conduct had been good and that his positive influence on the landing had resulted in him being categorised as an enhanced prisoner.

14. On 15th July, 2014, Mr. Paul Mannering of the Operations Directorate of the Irish Prison Service responded in the following terms:-

> *"I am directed by the Minister for Justice and Equality, Ms. Frances Fitzgerald T.D., to reply to your recent letter requesting to be considered for one third remission.*
>
> *Section 59(2) of the Prison Rules, 2007 allows for the discretionary granting of additional remission – up to one third as opposed to the standard rate of one quarter – by the Minister where a prisoner has shown the following:-*
>
> > *(i) to have displayed good industry in prison and continue (sic) to be of good conduct.*
> >
> > *(ii) to display the willingness to seek employment through education/coursework whilst in prison to enhance their chances of gaining employment on release.*
> >
> > *(iii) through engagement in authorised structured activity and where, as a result, the prisoner is less likely to re-offend and would be better able to reintegrate into the community.*
>
> *An essential part of the criteria for rewarding one third remission is that applicants engage in offence focused work which in turn should lead to reduced risk of re-offending. The Minister considers committed and concrete engagement with the therapeutic services within the prison, in the context of offence focused work, an essential requirement for the granting of one third remission.*
>
> *I am therefore requesting you to submit evidence of offence focused work (to be supported with the proper documentation) in order for your application to be considered."*

15. On 21st July, 2014, the applicant responded as follows:-

> *"Dear Governor Gavin,*
>
> *I have applied for one third remission under s. 59(2) of the Prison Rules 2007.*
>
> *I believe that I comply with criteria laid down for awarding a one third remission under s. 59(2) of the Prison Rules 2007, namely:-*
>
> > *(1) that during my period of detention in Portlaoise Prison I have displayed good conduct and have a good disciplinary record. I trust that the prison management will verify this fact;*
> >
> > *(2) that I have also consistently participated in authorised structured activity, which encompasses a sustained engagement with the Education Department in Portlaoise Prison and the carrying out of regular health and safety work and food management tasks on the E2 landing. Mr. Mark Kavanagh, Head Teacher, Education Unit, Portlaoise Prison has attached to this application a detailed breakdown of my educational history in Portlaoise Prison and copies of certificates awarded. However, in two instances, I have been unable to obtain copies of relevant certificates. Nonetheless, Mr. Mark Kavanagh has assured me that he will redouble his efforts to acquire fresh copies of the relevant documents. I will forward them at the earliest possible date;*

(3) that I have continually engaged with the Education Department in Portlaoise Prison even though upon my release I will be of pensionable age and, as a consequence, my chances of gaining employment are reduced.

I must stress that were I to be granted one third remission my scheduled release date will be July 26th, 2014. Therefore, my solicitor has instructed me to ask that a decision on my s. 59(2) application be made before July 26th, 2014 in the interests of fairness and in order to avoid any litigation.

Many Thanks

Yours sincerely

Michael McKevitt."

16. On 6th August, 2014, the applicant's solicitor wrote to Mr. Mannering of the Irish Prison Service and the Governor of the prison. This is what he said:-

"Dear Sirs

We act on behalf of Michael McKevitt, who is presently (sic) detained on E2 wing of Portlaoise Prison serving a sentence of imprisonment and who has made an application to the Irish Prison Service for enhanced remission. For ease of reference, we enclose herewith the correspondence between Mr. McKevitt and the IPS on this issue.

As you may already be aware, the basis for Mr. McKevitt's application is in substance identical to that of Mr. Niall Farrell, a prisoner also detained on E2 wing who was unconditionally released by the High Court (Hogan J.) yesterday; on the basis that the Minister for Justice had culpably and unlawfully failed to extend the provisions of Prison Rule 59(2) to him and thereby, to grant him the enhanced remission that he was entitled to.

I am sure that you are also aware that in considering Mr. McKevitt's application for enhanced remission, there can be no question of the IPS waiting for Garda reports to be furnished to them or of relying on anything other than information relevant to Mr. McKevitt's work history while on E2 wing and his educational attainment there. The decisions in Farrell and in the recent case of Edward Ryan, make it clear that no regard can be had to matters extraneous to an applicant's engagement in authorised structured activity.

The IPS is therefore in possession of relevant material on foot of which to make a determination in McKevitt's case. This information and material was provided by him to the IPS on 14th and 21st July, 2014. On 21st July, it was requested by Mr. McKevitt that a decision be reached on his enhanced remission before 26th July, when it was due to come into effect; and that failing a decision being taken litigation might be required.

There was and is only one conclusion that could be reached in respect of Mr. McKevitt's entitlement to enhanced remission. In all the circumstances, it is unlawful that the grant of enhanced remission to him has not yet been implemented. Having regard to the ongoing failure of the IPS to release Mr. McKevitt on foot of the inevitable determination that he qualifies for enhanced remission dating from 26th July, 2014, we contend that Mr. McKevitt is now in unlawful detention.

In this regard, we draw your attention to the comments of Barrett J. in the case of Edward Ryan:-

> *'There is no legal or other pre-requisite to habeas corpus applications that a party who considers that he is being unlawfully detained or his advisers, should engage in potentially protracted correspondence with the Executive, during the period of that alleged illegal detention so that he can gauge more accurately whether his suspicions as to the legality of his continuing detention are in fact correct.'*

Accordingly, we hereby notify you that if Mr. McKevitt is not released from detention by 5pm tomorrow, Thursday, 7th August, we will have no choice but to bring an application pursuant to Article 40.4.2 of the Constitution seeking his unconditional release. This will be done without further notice to you and this letter will be relied upon in support of an application for Mr. McKevitt's reasonable costs in respect of the application.

We await hearing from you at your earliest convenience."

The Next Move

17. On 8th August, 2014, an application was indeed made under Article 40.4.2 of the Constitution to Sheehan J. on behalf of the applicant. That judge made the order sought returnable for hearing initially on that day but then he adjourned the matter to the 11th August.

18. On 11th August, Mr. Brian Murphy, the director of operations of the second respondent, swore an affidavit which communicated the decision of the first respondent on the application for enhanced remission. I will turn to a consideration of that response presently but before doing so I should complete what happened in respect of the applicant's claim for release under Article 40 of the Constitution.

19. Following receipt of the affidavit of Mr. Murphy, the application was adjourned until 12th August, 2014. It was heard on that day and judgment was reserved. On 1st September, 2014, the reserved judgment was delivered and the application was refused by Barton J.

20. On the same day, the applicant applied to Cross J. for leave to commence these judicial review proceedings. That order was made.

21. A statement of opposition to this application was filed on 22nd September, 2014, and was accompanied by a lengthy affidavit from Mr. Brian Murphy. By now he was the Governor of Mountjoy Prison. Not surprisingly, there are many similarities in the affidavit sworn by him in these proceedings and the one sworn in the Article 40 application. However, it is to the affidavit sworn in opposition to this application for judicial review that I must turn my attention.

The Affidavit of Mr. Murphy (1)
22. Mr. Murphy points out that in sentencing the applicant, the Special Criminal Court observed that it was satisfied that Mr. McKevitt had directed and played a leading role in a paramilitary organisation which had planned and premeditated serious harm to property and individuals. He went on to say that there was no evidence whatsoever available to the Minister that the applicant had accepted responsibility for the offence for which he was convicted let alone any regret or remorse for the criminality of his actions. He pointed out that there was nothing emanating from the applicant from which the Minister could conclude that Mr. McKevitt has determined to end his involvement in and association with or directing of an unlawful organisation.

23. Mr. Murphy exhibited correspondence where Mr. McKevitt referred to himself as a *"political hostage"* and had had representations made on his behalf by the *"spokesperson for Republican prisoners"*.

24. Mr. Murphy pointed out that in order to properly and lawfully assess Mr. McKevitt's application for enhanced remission, information had to be obtained from the Garda together with details of the applicant's conduct since the commencement of his sentence and information regarding his engagement with authorised structured activity.

25. He deposed that, together with Mr. Mannering on 11th August, 2014, they furnished the Minister with documentation along with a detailed recommendation based on the criteria in Rule 59(2) regarding the fundamental question of whether the Minister could be satisfied that the applicant was less likely to re-offend and would be better able to reintegrate into the community. This material was exhibited. Privilege was claimed over such portion of the recommendation as referred to the Garda view of Mr. McKevitt and this was redacted from the exhibit. The Minister considered the recommendation and stated her agreement with it. She decided not to grant greater remission to the applicant pursuant to Rule 59(2). He deposed that the decision of the Minister represented *"her careful and considered analysis of the applicant's application and the proper and lawful exercise of her discretion"*.

26. I will return to a consideration of other aspects of this affidavit later but at this stage it is appropriate to make reference to the submission which was made to the Minister and which is exhibited in the affidavit.

The Submission to the Minister
27. The first part of the submission consists of statements pertaining to the background of the conviction of Mr. McKevitt.

28. The second part sets out what is described as the Garda view and it is expressed to be highly confidential. Part of the material in this portion of the submission is redacted. This part of the submission concludes with the expression of the following views by the writers:-

> *"It is our assessment that Michael McKevitt will re-engage in dissident Republican activity at a senior level upon his release. We base this assessment on a number of factors:-*
>
> > *his position within the IRA at the time of his conviction and also that he was the first (and only) person convicted of directing an unlawful organisation*
> >
> > *the illegal organisation which he represented at the time of his conviction continues to pose a significant threat to this State and the jurisdiction of Northern Ireland*
> >
> > *it is our assessment that the release of Michael McKevitt would undoubtedly provide a major boost to his illegal organisation"*

29. The next part of the submission is headed *"Sentence Management"*. It deals with the two occasions upon which he was disciplined in 2001 and 2004. It points out that he has been on what is called the "enhanced" regime since 20th October, 2012. It says:-

> *"However, the position is that the Incentivised Regimes policy does not operate in the E-block for the reason that the regime operating there is inconsistent with the terms of the policy. The E regime, in place for many years, is unique to E-block Portlaoise and is one that is heavily affected by the prisoners operation of quasi military structures reflecting their membership or relationship to proscribed organisations. The Incentivised Regime's policy could not operate in this environment as this policy is founded on the relationship between Class Officer and individual prisoners. The regular prisoner in the E-block has little or no contact with staff and contact occurs only through the 'Officers in Command' (OC's). The same follows for contact with Governors.*
>
> *On the prisoner accounts management system, E-block prisoners receive the maximum gratuity available and are classified as enhanced for payment of gratuity purposes <u>only</u>. At the time of the introduction of the IR policy it was decided for operational reasons not to affect the gratuity levels to E-block prisoners similar to the changes affecting other prisoners."*

30. The submission then deals with the two periods of temporary release which were afforded to the applicant.

31. The next part of the submission deals with his education and work. It recites the courses which the applicant has completed with the Guildhall School of Music and Drama, FETAC Level 3 French and digital imaging and a merit in computer literacy. It also points out the classes in a variety of subjects which he was attending at the time of the submission.

32. The submission goes on to point out that Mr. McKevitt was described by the head teacher as hardworking and conscientious and that details of his achievements included a letter from that teacher. The submission recites that Mr. McKevitt carries out some duties on the E2 landing in Portlaoise which include food safety and some cleaning duties. No records were available to verify how much work was carried out by Mr. McKevitt because the work is organised by his inmates themselves and is not supervised by trained prison staff

and therefore would not be considered authorised structured activities by the Irish Prison Service or Portlaoise Prison in the context of Rule 59(2).

33. Under the heading *"Reducing Offending Behaviour"*, the following is to be found:-

> *"The Probation Service have confirmed that there is an eight week course available to the prisoners accommodated in the E-block called the Choice and Challenge Programme which would assist him in reducing his offending behaviour. This would be made available to the prisoners who could request access to the course through the Governor of Portlaoise Prison. The voluntary engagement in such a course would be a strong indicator of a genuine intention by the prisoner to reduce their risk of re-offending on release.*
>
> *They have further confirmed that Mr. McKevitt has had no interaction with their service since his committal in 2001."*

34. The next part of the submission to the Minister was headed *"Additional Information"*. It pointed out that Mr. McKevitt is currently the spokesperson for the group styling itself Óglaigh na hÉireann, otherwise the IRA in Portlaoise. It points out that that is an illegal organisation and that the applicant's continued association and standing in it would lead the Prison Service to conclude that he will continue to engage in that organisation on his eventual release. It refers to documentary material supportive of this conclusion.

35. The final part of the submission contains the recommendation which is in the following terms:-

> *"Based on the information which has been supplied by Mr. McKevitt in support of his application and the additional information received from Portlaoise Prison, the Probation Service and An Garda Síochána, Operations Directorate believe that Mr. McKevitt has not completed the necessary work which would assist him in reducing his offending behaviour and that he is still at risk of re-offending on his release.*
>
> *It is recommended that his application for one third remission under Section 59(2) of the Prison Rules 2007 should be refused."*

36. This recommendation was accepted by the Minister, hence this application.

The Affidavit of Mr. Murphy (2)

37. Having exhibited the recommendation which was made to the Minister and which she accepted, the affidavit then proceeded to exhibit the communication of the Minister's decision to the applicant by a letter of 11th August, 2014. The letter is signed by Mr. Mannering and reads as follows:-

> *"I refer to your application of 14 July, 2014, seeking to be considered by the Minister for Justice and Equality for increased remission under Rule 59 of the Prison Rules.*
>
> *The principles governing the awarding of remission are contained within Rule 59 of Statutory Instrument No. 252 of 2007 (the Prison Rules). In sum, prisoners sentenced to a term of imprisonment exceeding one month 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 –*
>
> > *(i) demonstrate good behaviour by engaging in authorised structural activity, and*
> >
> > *(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.*
>
> *In considering whether a prisoner's engagement in authorised structured activity is likely to lead to the prisoner being less likely to re-offend, the Minister will take into account a number of factors including public safety, the views of local prison management and the services with which the prisoner has engaged, the prisoner's behaviour/conduct whilst imprisoned or during any periods of temporary release and the views of An Garda Síochána.*
>
> *In this regard, I am to advise that having considered your application, the Minister has decided not to approve your application on the grounds that you do not meet the criteria as set out in Rule 59(2) of the Prison Rules 2007."*

38. Mr. Murphy's affidavit contends that the power vested in the Minister pursuant to Rule 59(2) is a permissive discretionary one but does not give a right to any such remission. He also contends that the Rule both explicitly and by implication, not merely allows but requires the Minister to consider:-

> (a) the prisoner himself, his base offence, his characteristics and circumstances; and
>
> (b) whether the Minister is satisfied that the particular prisoner is less likely to re-offend as a result of the prisoner's engagement with authorised structured activity and is better able to reintegrate into the community.

Mr. Murphy swore that the Minister's decision regarding Mr. McKevitt was made in the light of all the relevant facts at the time that his application fell to be considered. He further said that the Minister was not obliged by operation of the Rule to consider the prisoner in a vacuum i.e. solely on the basis of whether he had studied French, music or yoga or any other specific activities but in the overall context of what is known about the prisoner and having regard to his participation in structured activities. What would be known about the prisoner would necessarily come from a number of sources including the local prison authorities themselves, the Parole Board, the Probation Services and all other information which the Minister would normally be in possession of in regard to a particular prisoner, as was the case here.

39. The affidavit also points out that whilst engagement in the structured activities contemplated in Rule 27(2) is intended to ensure that a prisoner, when released from prison, would be less likely to re-offend or better able to reintegrate into the community, the well tested experience of the Irish Prison Service is that, although that is the intention, whether it has been achieved or not will depend entirely on the prisoner engaging in the activity and the nexus between the activity and their offending behaviour. Mr. Murphy says in the affidavit that the purpose of the authorised structured activities is clear but that it does not give rise to a presumption that any

activity that purports to address risk factors for re-offending will actually do so, or assist in the reintegration of a particular prisoner. The assessment of whether the engagement has had the desired effect on any particular prisoner is one which the Minister must undertake and which requires a careful analysis of the prisoner's circumstances and other information regarding conduct and character and not merely a consideration of the fact that they have completed the authorised structured activity.

40. Finally, Mr. Murphy averred that the Minister properly weighed in her consideration the fact that the applicant chose not to engage with the Probation Service despite opportunity to do so. The Probation Service provides reintegration services for prisoners and the main goal of probation officers in prisons is to help reduce re-offending. Had the applicant engaged with the Probation Services, they could have worked successfully to reduce re-offending with him as a willing participant. But that process is entirely voluntary. Engagement with the process can be a significant indication of a prisoner's genuine efforts to reduce the likelihood of re-offending and increase the likelihood of reintegrating successfully into the community. Conversely, a failure on the part of a prisoner to engage is *"in the experience of the Prison Service, a strong indication to the contrary"*. There was no engagement on the part of the applicant to engage with the Probation Services.

41. The affidavit also dealt with other matters which do not have a direct relevance to these proceedings.

The Legal Position

42. The applicant's contention is that on the proper construction of Rule 59(2), once the applicant participated successfully in authorised structured activities of the kind contemplated by Rule 59(2), the Minister is bound to conclude that the applicant is entitled to the enhanced remission contemplated in Rule 59(2). This is because, *inter alia*, Rule 27(2) makes clear that the very definition of authorised structured activities in that sub-rule presupposes that by participation in such activities, the applicant is less likely to re-offend. In support of this contention, heavy reliance was placed upon the decision of Barrett J. in *Ryan v. Governor of Midlands Prison* [2014] IEHC 338 and the decision of Hogan J. in *Farrell v. Governor of Portlaoise Prison* (5th August, 2014).

43. In the course of discussion with counsel for the applicant, I asked him if the following summary of his submission in reliance on these two decisions was a fair one. This is what I said:-

> *"It seems to me that this is the proposition you are putting to me: that in the interpretation of the word 'may' at the commencement of Rule 59(2) I am to read it as 'may' but this transmutes into 'must' or 'shall' if the subsequent conditions are met. The subsequent conditions involve the prisoner engaging in authorised structured activity in accordance with the regulations. Once that is done successfully then the Minister is not to be concerned with whether as a result the prisoner is less likely to re-offend. It is to be assumed that such is the case*
>
> *Mr. O'Higgins: I think that is a fair summary Judge."*

Thus, it is clear that the applicant contends that once appropriate authorised structured activity is engaged in by a prisoner there is no question but that he is entitled to enhanced remission. This alleged proper construction of Rule 59(2) involves not merely the substitution of "shall" for "may" in the first clause, but the deletion of the entirety of the latter part of the Rule requiring the Minister to be satisfied that the prisoner is less likely to re-offend and will be better able to reintegrate into the community.

44. Given the reliance which is placed upon the two judgments referred to in support of this proposition it is necessary to examine them in some detail.

Ryan v. Governor of Midlands Prison

45. In this case, Barrett J. conducted an inquiry into the legality of the detention of the applicant pursuant to the provisions of Article 40.4.2 of the Constitution. The applicant in that case, Mr. Ryan, was a prisoner who sought enhanced remission pursuant to Order 59, rule 2 on the basis that he had participated in authorised structured activities. There are some features in the *Ryan* case which are not present in the instant one such as the Minister indicating that he would only exercise his power under Rule 59(2) *"sparingly and in the most exceptional cases"*. There is no such contention made here. But other elements are similar. The judge in that case held that what he described as deficient information had been placed before the Minister. However, he then went on to winnow away the deficient information and came to the following conclusion:-

> *"(18) if one winnows away any deficient information on which the Minister relied and has regard to such correct information on which he ought to have relied, there is only one possible logical conclusion that the Minister could have reached pursuant to Rule 59(2), namely that Mr. Ryan had participated in various authorised, structured, in-prison activities, which activities have the aim and, it appears not to be disputed, the effect of reducing recidivism or facilitating post-imprisonment reintegration into the community; thus through his participation in those courses it could only be that Mr. Ryan was less likely to re-offend and so better able to reintegrate into the community;*
>
> *(19) in this last regard the court is not substituting its opinion for the opinion of the Minister; rather it is recognising the logical reality that if the Minister had regard to the correct information that ought to have been before him and did not have regard to the deficient information that was in fact before him, he could only have arrived at the above-stated conclusion."*

46. That approach of Barrett J. to the construction to be afforded to Rule 59(2) lends support to the contention which is made by the applicant in the present proceedings.

47. The judgment of Barrett J. was appealed to the Supreme Court and on 22nd August, 2014, the court allowed the appeal. That court through Denham C.J. expressed the view that the Minister's decision was *prima facie* valid and complaints about the procedures leading to it ought to be examined by judicial review and not under Article 40 of the Constitution. The special and extraordinary features of the Article 40 procedure were not required for the examination of that complaint. Whilst it is conceded that the decision of Barrett J. was reversed, it is argued that the construction which he placed upon Rule 59(2) is nonetheless valid.

Farrell v. Governor of Portlaoise Prison

48. This is a decision of Hogan J. delivered on 5th August, 2014, some few weeks before the Supreme Court delivered its judgment in *Ryan's* case. Again, this was an application for relief under Article 40.4.2 of the Constitution. This case, on its facts, is closer to the instant one than that of Mr. Ryan.

49. In this case, Mr. Farrell had been sentenced by a Special Criminal Court to a term of five years imprisonment for membership of an illegal organisation. He had completed a number of courses whilst in prison. He maintained that he was entitled to be released on the

ground that he had met the enhanced remission requirements for the purposes of Rule 59(2) by satisfactorily engaging in authorised structured activities. The Minister pointed out that the applicant had not engaged with the Probation Services with a view to reducing the risk of re-offending. She pointed to the fact that the applicant could, for example, have availed of a specified eight week course dealing with offending behaviour but did not do so. The same applies in the present case.

50. In *Farrell's* case, the Minister pointed out that the applicant had chosen to associate with other members of an illegal organisation in the E-block of Portlaoise Prison. Those prisoners consider that they are *"political"* prisoners and that they have not been properly convicted of any criminal offences. She considered the fact that the applicant elected to remain with those prisoners as a highly relevant factor in the consideration of the likelihood of re-offending.

51. The recommendation made to the Minister in *Farrell's* case, was framed in the following way:-

> *"Although Mr. Farrell has been a well disciplined prisoner during his time in Portlaoise and engaged with the education services in the prison, due to a lack of engagement with the Probation Service and the lack of any work which would assist with reducing his offending behaviour, Operations Directorate are not satisfied that the prisoner is less likely to re-offend and be better able to reintegrate into the community."*

52. Hogan J. conducted an analysis of Rule 59(2). This is what he said:-

> *"19. What, then, are the essential elements of Rule 59(2)? First, a prisoner must have shown further good conduct 'by engaging in authorised structured activity'. Second, the Minister must be satisfied 'that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community'. (Emphasis added).*
>
> *20. These underlined words are ('as a result') of some importance. The issue is not whether, generally speaking, the prisoner will be more likely to re-offend as a matter of abstract prediction, but rather, whether by reason of the prisoner's participation in authorised structured activities, he is thereby less likely to re-offend. In considering whether to grant remission in the present case, the Minister had regard to a range of views expressed by others with whom she consulted. Thus, for example, An Garda Síochána expressed the view that, having regard to Mr. Farrell's strong links with a particular illegal organisation, they had no reason to believe that he would not re-engage in subversive activities. It was for that reason they counselled against the grant of enhanced remission to Mr. Farrell.*
>
> *21. The Gardaí may well be correct in their assessment, but it is not a factor which the Minister can legitimately take into account for the purposes of a Rule 59(2) application. The single question permitted by Rule 59(2) is whether the Minister is satisfied that by reason only of a prisoner's participation in authorised structured activities, that prisoner is less likely as a result to re-offend and to re-integrate into the community.*
>
> *22. It must also be recalled that the definition of 'authorised structured activity' in Rule 27(2) envisages participation in work, education, vocation training and other programmes sanctioned by the Governor which are in themselves intended to ensure that 'a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community'. Rule 27(3) further envisages that 'insofar as is practicable' each convicted prisoner 'should be engaged in authorised structured activity for a period of not less than five hours on each of five days in each week'.*
>
> *23. The scheme of the Prison Rules, therefore, ordains that prisoners should generally engage in regular authorised structured activity for twenty-five hours each week. Such activities are, however, by definition, designed to ensure that participants 'will be less likely to re-offend and to re-integrate into the community'. (Rule 27(2) uses the disjunctive 'or' rather than the conjunctive 'and' which appears in Rule 59(2), but I do not see that this difference is material so far as the assessment of the present legal issue is concerned.) The entire relationship between Rule 27(2) and Rule 59(2) is accordingly somewhat circular. The permitted structured activities are those which are likely to reduce the risk of re-offending. It follows that where a prisoner participates successfully in such activities for the requisite periods of time in the manner ordained by Rule 27(3), the Minister would be obliged to conclude that he was less likely to re-offend, so that the enhanced remission provisions of Rule 59(2) would accordingly be triggered. (My emphasis)*
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> *24. This, however, is the very point which Barrett J. made in his masterly analysis of this entire issue in Ryan v. Governor of Midlands Prison [2014] IEHC 358. This was a case where very similar issues to the present case also arose and Barrett J. noted that the applicant in that case:-*
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> > *'.....was never advised, nor does it appear from the evidence before the court that prisoners are generally advised, that despite the fact that, pursuant to Rule 27(2) of the Prison Rules, all authorised, structured, in-prison activities have as their equal aim making a prisoner 'less likely to re-offend or better able to re-integrate into the community', some such activities are considered preferable to others. No party before the court has contended that any of the structured prison activities offered by the Irish Prison Service are, in and of themselves, in any way deficient in achieving their stated aim and thus it follows logically that, by participating in the authorised structured activities in which he did, Mr. Ryan must have rendered himself less likely to re-offend and so better able to re-integrate into the community.'* (My emphasis)
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> *25. As I have just observed, the facts of Ryan were very similar to the present case. In that case, the applicant had participated in a woodwork workshop on a full-time basis (for which he had received a commendation). He had not, however, participated in a range of other courses, including anger and stress management courses and he had not engaged with the Probation Service. Nor had he participated in any addiction courses, but as he did not suffer from such problems, then, as Barrett J. noted, 'he can hardly be criticised...for a failure to engage with addiction counselling'.*
>
> *26. Barrett J. held that the applicant had accordingly complied with the requirements of Rule 59(2) by engaging in authorised structured activities. It was irrelevant that he had not engaged in certain type of activities which are apparently officially preferred (such as the engagement with the Probation Services), even though there was nothing to suggest that the applicant in that case (or, for that matter, in the present case) had ever been made aware of this fact.*
>
> *27. In these circumstances, Barrett J. concluded that the Minister had fettered his discretion and had acted irrationally because, even if irrelevant material was discarded-*

> *'...there is only one logical conclusion that the Minister could have reached in the context of the application made by Mr. Ryan pursuant to Rule 59(2), namely, that it has been demonstrated that Mr. Ryan, through his participation in authorised, structured, in-house activities, was less likely to re-offend and so better able to re-integrate into the community post-release, which conclusion yields the consequence that the Minister's denial of additional remission to the Minister (sic) was unjust.'*

> *28. The decision in Ryan effectively compels the same result in the present case for precisely the same reasons. It is plain that the Minister has had regard to a number of irrelevant considerations and, critically, has failed to apply the correct test contained in Rule 59(2). First, as Barrett J. pointed out, Rule 59(2) does not distinguish between different types of structured activities. All that is required is that the structured activities in question are authorised. Second, a prisoner cannot be faulted or disadvantaged by reason of the fact that he or she has not participated in particular types of such activities - such as engagement with the Probation Service or participation in 'offence focused work' - provided that he or she has otherwise successfully participated in authorised structured activities. Third, if there were indeed in practice a requirement that an applicant must participate in particular types of courses (such as, for example, 'offence focused work'), this should have been explained to the prison population. Just as in Ryan, there is no evidence that this was ever done. Indeed, as the response from the Governor of the 13th June 2014 in the present case made clear, prisoners were free to engage with such of the therapeutic services as met their needs. Fourth, in any event, if there were indeed such a requirement, this would amount de facto to an amendment of the 2007 Rules."*

53. Hogan J. then expressed his conclusions in the following terms:-

> *"29. In the present case, it is not in dispute but that the applicant participated successfully in authorised structured activities of the kind contemplated by Rule 59(2). As Rule 27(2) makes clear, the very definition of authorised structured activities contained in that sub-Rule presupposes that by participation in such activities the applicant was less likely to re-offend as a result. Just as in Ryan, therefore, the very 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).*
>
> *30. It follows, therefore, that, just as in Ryan, had the appropriate legal tests been applied, then the Minister would have been bound to have concluded in the circumstances that the applicant satisfied the requirements of Rule 59(2). On this basis, therefore, he ought to have been released on 1st April 2014."* (My emphasis)

54. The respondents invite me not to follow these two decisions as they contend they are incorrect in the construction which they place on Rule 59(2) and the approach had to the exercise of the ministerial discretion.

The Power to Remit Sentences

55. Article 13.6 of the Constitution provides:-

> *"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."*

56. In accordance with that provision of the Constitution, the legislature conferred the power of remission on the Government with power to delegate to the Minister for Justice and Equality pursuant to ss. 23 and 23A of the Criminal Justice Act 1951, as amended. Thus, the power to remit a sentence is an executive function.

57. Section 35 of the Prisons Act 2007 confers power on the Minister for Justice and Equality to make rules for the regulation and good government of prisons. The regulations may provide for the remission of part of a prisoner's sentence.

58. So, it can be seen that the constitutionally authorised power of remission is granted to the Minister. The Minister may make regulations under s. 35 of the Prisons Act which can be used to specify how that power is to be administered.

59. It should be borne in mind that the effect of the grant of remission (as distinct from early release or temporary release) is to terminate a sentence lawfully imposed by a court.

60. The exercise of this constitutionally reserved function which by legislation now rests with the Minister for Justice is one of great importance not merely for the individual prisoner but also for society at large.

61. The approach of the courts to the exercise of this ministerial power is dealt with in the judgment of Hardiman J. speaking for the Supreme Court in *Kinahan v. Minister for Justice* [2001] 4 I.R. 454. In that case, the applicant sought to quash a decision to refuse him temporary release in circumstances where he contended that the decision did not contain adequate reasons and such reasons as were given suggested that the decision was irrational.

62. In the course of his judgment, Hardiman J. referred to the judgment of Finlay C.J. in *Murray v. Ireland* [1991] ILRM 465, where that judge said:-

> *"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."*

63. Hardiman J. went on to say of that dictum:-

> *"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 circumstances in which the court would be justified in interfering with a decision in relation to temporary release."*

64. I do not believe that the approach of the court should be any different when asked to interfere with a decision concerning the

refusal of remission.

Construction of Rule 59(2)
65. It is instructive to compare the language which is used in Rule 59(2) with that which is contained in Rule 59(1).

66. Rule 59(1) provides for the ordinary one quarter remission of sentence. It is framed in mandatory terms. It uses the word *"shall"*. It confers an entitlement on the part of a prisoner to one quarter remission provided, of course, that the prisoner earns it by good conduct.

67. The provisions of Rule 59(2) are dramatically different. The Rule does not confer an entitlement to enhanced remission. It uses the permissive word *"may"* and thus, confers on the Minister, a discretion in deciding to grant or refuse the enhanced remission envisaged by it. It is not to be assumed that the use of the word *"may"* in Rule 59(2) as distinct from the use of the word *"shall"* in Rule 59(1) is other than deliberate.

68. In my view, Rule 59(2) was intended to and does in fact confer on the Minister a discretionary power in respect of the grant of enhanced remission.

69. I am fortified in this view by the observations of the Supreme Court per Clarke J. in *Callan v. Ireland & Attorney General* (18th July, 2013). There, that judge said as follows:-

> *"Under the prison rules currently in force (the 2007 Rules) certain prisoners are entitled, under Rule 59, to remission on account of good behaviour. In the ordinary way prisoners are entitled to remission in the amount of one quarter of their sentence although there is a discretionary provision to allow such remission to be increased to one third in cases where the prisoner concerned has made a particular effort in fields such as education or other activities. If Rule 59 applies to Mr. Callan, then he would undoubtedly be entitled to be considered for remission of a quarter which would reduce his term of imprisonment to 30 years (a period which would, it would appear, expire in just under three years) and further would, at least in principle, have available to him the possibility that the greater remission of one third might be applied in his case which would allow him the possibility of immediate release."*

70. On the plain wording of Rule 59(2), if a prisoner wishes to be considered for the grant of enhanced remission, he must demonstrate further good conduct by engaging in authorised structured activity. But having done so, the Minister has to be satisfied that, as a result, the prisoner is less likely to re-offend and would be able to reintegrate into the community. I am unable to share the view of Hogan J. set forth in the conclusion to his judgment in *Farrell's* case where he said:-

> *"As Rule 27(2) makes clear, the very definition of authorised structured activities contained in that sub-Rule presupposes that by participation in such activities the applicant was less likely to re-offend as a result. Just as in Ryan, therefore, the very 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)."*

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.

72. An automatic assumption that the mere engagement in authorised structured activities reduces the likelihood of re-offending could bring about absurd results. For example, a convicted child pornographer who pursues advanced computer courses or an embezzler who engages in advanced accountancy courses is by that fact alone surely not to be assumed to be reducing the likelihood of re-offending. Equally, a prisoner who engages enthusiastically in authorised structured activities but makes it quite clear that on release he will resume criminal activities would, under the approach in *Farrell's* case, have to be released. That cannot have been the intention of Rule 59(2).

73. In this regard, I share the views of Peart J. in *Keogh v. Governor of Mountjoy Prison* [2014] IEHC 402, where he said in the context of Rule 59(2) as follows:-

> *"On one reading, and this is touched upon by Barrett J. in his decision in Ryan, the rule is indicating that it is by virtue of having engaged satisfactorily in such structured activities that enables the Minister to be so satisfied. On the other hand that may be an over-simplification, as simply because one signs up for a number of courses and attends is no guarantee that any benefit has been derived. A prisoner might just go through the motions of attending the course and be no better for it. If that is correct then some form of subjective examination of the success of the prisoner's attendance should be required."*

74. I believe that the latter is the correct approach to the interpretation to be give to Rule 59(2). It cannot be assumed that simply because a prisoner has engaged in authorised structured activities which have as their object a diminution of the likelihood to re-offend that such an object is achieved. Whether such is the case or not is a matter entirely for the judgment of the Minister in any particular case.

75. Whilst I accept that Peart J. did not specifically decline to follow the judgment of Barrett J., he outlined another and more convincing view of the construction to be given to Rule 59(2). He delivered his judgment on the same day that Hogan J. delivered judgment in *Farrell's* case and so had no opportunity to deal with it.

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.

77. The alternative approach taken by Hogan J. has the effect of converting Rule 59(2) into an almost mechanical process where all that must be shown on the part of an applicant prisoner is engagement in an authorised structured activity regardless of whether it has succeeded in its object with an obligation on the part of the Minister to grant the enhanced remission. That appears to me to effectively negate the ministerial discretion and turn her into a cypher. Returning to the discussion with counsel which is set out at para. 43, it means that once the authorised structured activity has been engaged in the *"may"* in Rule 59(2) must be read as *"shall"* and the final sub clause in that Rule is effectively deleted. That appears to me not to interpret the Rule but rather to recast it entirely.

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.

79. It has to be borne in mind that the exercise of this discretionary jurisdiction by the Minister can have the most serious implications not merely for a prisoner applicant but also for the community at large. That is particularly so having regard to the nature of the crimes committed by Mr. McKevitt and the strong views expressed as to the likelihood of him re-offending.

80. It has been said that there was no entitlement on the part of the Minister to consider the views of the Garda. Even if that is correct and one excludes the Garda view in its entirety, it is clear that there was abundant other information furnished to the Minister which would enable any reasonable Minister to form the view in suit.

81. I am unable to perceive in the decision arrived at by the Minister anything which would justify this Court interfering with the Minister's decision. There is no evidence that the decision was exercised in a capricious, arbitrary or unjust way.

82. For what it is worth, the interpretation which I have sought to place on Rule 59(2) appears to be shared by the author of *Prison Law* (Bloomsbury 2014) where the author, Mary Rogan, says concerning the judgment of Barrett J. in *Ryan's* case:-

> *"The decision raises some concerns regarding the difficult and fine line the courts tread along the separation of powers in such cases. The terms of Rule 59(2) not only state that enhanced remission may be granted when a prisoner shows further good conduct, but also where 'the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and would be better able to reintegrate into the community'. Such an assessment is a specialised one, and within the purview of prison administrators and experts. It cannot be enough for a prisoner to show engagement with certain activities, considerations of risk must also apply."* (my emphasis)

Stare Decisis

83. The applicant contends that if I hold that the refusal of enhanced remission was lawful, this would amount to a refusal to follow the judgments of Barrett and Hogan JJ. It is argued that by reference to the views of Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] ILRM 50, I would not be entitled so to do. In that case, that judge said:-

> *"I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the arguments.*
>
> *Whatever may be the case in courts of final appellate jurisdiction a court of first instance should be very slow to act on such a proposition unless the arguments in favour of it were coercive. If a decision of a court of first instance is to be challenged I consider that the appellate court is the proper tribunal to declare the law unless the decision in question manifestly displays some one or more of the infirmities to which I have referred. The principle of stare decisis is one of great importance to our law and few things can be more harmful to the proper administration of justice, which requires that as far as possible lay men may be able to receive correct professional advice than the continual existence of inconsistent decisions of courts of equal jurisdiction."*

84. In considering this question, it must be remembered that the decision of Barrett J. in *Ryan* has already been reversed by the Supreme Court.

85. The decision of Hogan J. in *Farrell* relied heavily upon the approach of Barrett J. The decision of Hogan J. is under appeal. It is certainly not for me to make any predictions concerning it, but there must be a high likelihood of the Supreme Court taking a similar approach as in *Farrell's* case.

86. Even if it is argued that notwithstanding the overruling of Barrett J., his reasoning nonetheless remains good on the question of the interpretation of Rule 59(2), it must be borne in mind that his views do not appear to have been shared by Peart J. Accordingly, I am faced with two different views being expressed by different judges of equal rank. In such circumstances, I am entitled to prefer one over the other. I prefer the view of Peart J.

87. Even if I am incorrect in these views, I am of opinion that the construction placed upon Rule 59(2) by Barrett and Hogan JJ. is simply incorrect and failed to take into account the crucially important discretionary nature of the exercise being embarked upon by the Minister and the obligation on her to have regard to the actual likelihood of re-offending on the part of Mr. McKevitt. Rather than construing Rule 59(2), the decisions in *Ryan* and *Farrell's* cases rewrote it in my view. Thus, I am, I believe, justified in not following them.

Conclusion

88. In the light of the information before the Minister (even if one excludes the Garda view) there was ample material to enable her to form the view which she did and thus refuse to grant enhanced remission.

89. In these circumstances, I decline to quash the Minister's decision and this application is refused.

90. The prison rules under which the Minister considered Mr. McKevitt's application have since been amended by the Prisons (Amendment) (No. 2) Rules 2014, S.I. No. 385 of 2014. Neither that fact nor any element in the amended rules has played any part in my consideration or in arriving at my decision in this case.