Neutral Citation [2015] IEHC 485

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 654 JR]

Between:-

IVOR CALLELY

Applicant

- AND -

MINISTER FOR JUSTICE AND EQUALITY

- AND -

THE GOVERNOR OF WHEATFIELD PRISON

Respondents

JUDGMENT of Mr. Justice Barr delivered on the 21st day of July, 2015

1. The applicant in this case is seeking, *inter alia*, an order of certiorari by way of judicial review quashing the decision of the first named respondent, dated 28th October, 2014, refusing his application for temporary release under s. 2 of the Criminal Justice Act 1960 ("the Act of 1960"); and an order of *certiorari* quashing the decision of the first named respondent, dated 7th November, 2014, refusing his application for enhanced remission under Rule 59(2) of the Prison Rules 2007, as amended ("the Prison Rules").

Background

2. The applicant is a former Teachta Dála, Senator and Minister. He pleaded guilty in the Dublin Circuit Criminal Court to four counts of fraudulently submitting false invoices in support of a mobile telephone expenses claim of €4,207.45, contrary to s. 26 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

3. At his sentence hearing, the court was informed that the applicant had not previously come to the adverse attention of An Garda Síochána, that he was a first-time offender convicted of a non-violent offence in respect of which he had pleaded guilty, and that he had apologised and repaid the money defrauded.

4. The applicant was sentenced to five months' imprisonment on 28th July, 2014. In imposing this sentence, Judge Ring pointed to what she regarded as a "*significant breach of trust*" on the applicant's part and indicated that his role as a public representative was a major factor in the case. Because of this, Judge Ring considered that a custodial sentence was appropriate "*in the public interest*". She further stated that it was the fact of the sentence "*rather than the length*" that was important.

5. The applicant was committed to Mountjoy Prison on 28th July, 2014 and on 1st August, 2014 he was transferred to Wheatfield Prison. In both prisons, the applicant was advised that an assessment would be carried out within seventy-two hours, focused on finding suitable programmes for him. However, no such assessment was carried out. The applicant stated that he was advised that he was suitable for community release, the community support scheme, and temporary release; he further stated that he was advised that he would "*not do full term*."

6. The applicant stated that although he was a first-time offender who was convicted of a non-violent crime, and notwithstanding his suitability for the community support scheme and temporary release schemes as communicated to him by the authorities, he was nonetheless placed on a system of twenty-three hour lock-up as provided for by Rule 63 of the Prison Rules. The applicant found this to be very difficult and mentally challenging. The applicant suggested that the fact that this happened contrary to the Governor's wishes, and when there were eminently more suitable alternatives available, such as temporary release, was the first indication that he was being treated differently to other prisoners who had been granted temporary release. The applicant pointed out that Mr Tony Hickey, who is an Assistant Principal Officer in the Operations Directorate of the Irish Prison Service, does not explain in his affidavit as to why twenty-three hour lock-up rather than temporary release was preferred.

7. At the time of Mr Callely's arrival in Wheatfield Prison, the educational and training facilities were closed for the summer recess. Therefore, in order to ensure he could involve himself in activities and become an "*enhanced*" prisoner, the Governor arranged for "*structured activity*" to be made available to the applicant on the grounds of the prison. The applicant stated that in August 2014 he was informed that the Governor would support an application for community release or temporary release and that he might be out in two or three weeks.

8. The applicant fully engaged with the prison regime and his behaviour was reported to be exemplary. He worked on the grounds seven days a week – that being the only structured activity made available to him – and he had his incentivised regime work-sheet fully stamped to reflect this.

9. With standard one-quarter remission as provided for in Rule 59(1) of the Prison Rules, the release day of the applicant would have been 18th November, 2014. It is not in dispute between the parties that the applicant engaged fully in authorised structured activities during his term of imprisonment and committed no breaches of prison discipline.

10. On 25th August, 2014, 17th September, 2014, and 21st October, 2014, the applicant applied to the Minister for temporary release, and a further application was made by the applicant's solicitor on 23rd October, 2014. The application of 23rd October, 2014, which was addressed to the Governor, Wheatfield Place of Detention, Clondalkin, Dublin 22, was in the following terms:

> "*Re: Mr Ivor Callely*

We refer to our above-named client who has been detained in the Irish Prison Service since 28th July, 2014, under Prisoner Record No. 92995.

We understand that Mr. Callely was committed to Mountjoy Prison on 28th July, 2014 to serve a five month sentence imposed in the Dublin Circuit Criminal Court and he was thereafter transferred to Wheatfield on 1st August, 2014 where he is currently resident.

We understand that on admission our client was advised of an assessment that would be carried out within 72 hours directed at suitable placements or programmes for our client, but to date it appears that no such assessment has been carried out.

Our client was also advised at the outset of his imprisonment of programmes suitable for persons with shorter sentences, i.e. sentences of less than eleven months' duration and he was advised of his suitability for Community Release and/or Temporary Release.

From 2nd August, 2014 our client experienced a period of 23 hour lock-up in Wheatfield but we understand this was reviewed by you, the Governor and the 23 hour lock-up regime purportedly imposed pursuant to Rule 63 was lifted on 12th August, 2014 wherein our client was promised structured activity and indications were given to him that he would be recommended inter alia for Temporary Release.

Since then our client has fully engaged and he has reported seven-days for his "structured activity" (see letter attached). Our client has also been accorded enhanced status, he has had no P19s or other disciplinary issues, he is not addicted to controlled substances, he has sufficient income to maintain himself and he has access to accommodation outside prison. Furthermore, he does not represent any threat to society as the attached Garda references, already submitted to you by our client, fully attest. The five month sentence for a non-violent matter was our client's first criminal conviction and he is now ready and willing to reintegrate into society.

From the outset, our client has had a number of interactions with prison authorities which he has recorded in writing, wherein he was given reasonable cause to expect an early release into the community. However, to date all of these assurances have come to naught and frankly, we are amazed by this situation. The circumstances of our client and the manner in which he has fully engaged with the prison system, participating in all such activities as are available/provided and as he presents no threat to society is such that he is a very deserving candidate for Temporary Release. He has applied for same orally and in writing, one such copy attached herein, and in all the circumstances we ask that he be treated equally and fairly in the process.

As established practitioners in the filed of criminal law, we are aware of many cases where TR is granted in circumstances that on their face, might be objectively considered or appear to be less deserving. We firmly believe that under a fair and transparent application of the procedures and the Prison Rules our client should also be released. In all the circumstances, we ask that you release our client on or before close of business on Tuesday, 28th October and/or furnish us with an explanation as to why this cannot be done. In the event that our client remains detained please be advised that we will have no other alternative but to apply to the High Court for appropriate relief.

In this event we will also seek to fix you with the costs of any such application. We hope that recourse will not be necessary but we await developments.

Yours faithfully,

Padraig O'Donovan & Company."

11. On 21st October, 2014, the decision-maker, Mr Tony Hickey, Operations Directorate, Irish Prison Service, received the following email from Austin Stack, Assistant Governor of Wheatfield Prison:

"Tony,

I have attached below two letters from former ranking members of AGS [An Garda Síochána] which Ivor Callely (92995) has requested be brought to your attention in relation to his most recent application for Temporary Release. The prisoner was informed that one of the reasons given for his last application being refused was due to a "Bad Garda View". He disputes that this is the case & has submitted these letters in support of his case, he would also like to draw your attention to remarks made by members of AGS at his sentence hearing ("never came to our attention prior to this, first time offence").

I have placed another application on the system at the prisoner's request and recommended same. He is a first time offender, there is very little chance of him re-offending and he is not a risk to society. The prisoner is on an Enhanced Regime, his behaviour has been impeccable and he has engaged fully with all the services and structured activities available to him here in Wheatfield.

If released on Temporary Release the prisoner would reside with his sister Emer McDonald at [address redacted].

I highly recommend this application and ask that you give it your full consideration.

Regards,

Austin."

12. Retired Garda Sergeant, Gerard Sexton (Clontarf Garda Station) stated as follows in his letter dated 6th October, 2014, which was addressed to Mr Patrick Kavanagh, Governor of Wheatfield Prison:

"Re. Mr Ivor Callely

With reference to the aforementioned, I am pleased to confirm that I have lived and worked in the Clontarf area for more than thirty years. During that period I have known Mr. Callely both as a neighbour and in his professional capacity

as a public representative.

In relation to Mr Callely's current circumstances, and in consideration of his possible release, I can state that he has never been a user or abuser of illegal drugs.

I am aware that he can support himself financially through his pension, and it is my firm belief that, if released, he will pose absolutely no threat to society.

It is my considered opinion that Mr. Calley will make a most positive contribution on return to his community if considered for Temporary Release or other Community Return Programmes.

Please don't hesitate to contact me at [telephone number redacted] if you have further inquiries.

Forwarded for your information.

Gerard Sexton

Garda Sergeant (retired)."

13. A letter was also received from former Garda Superintendent Mick Curran, of Raheney Garda Station, dated 3rd October, 2014. This letter, which was addressed to the Governor of Wheatfield Prison, was in the following terms:

"Dear Sir,

I have known Ivor Callely, a former member of Dáil Éireann, for over 25 years. During that time, I have never known him to

(1) Be addicted to drugs or other like commodities.

(2) His level of income from his time in Dáil Éireann is more than adequate for a stable life.

(3) If released from custody I am perfectly satisfied that he would be no threat to society.

(4) I understand that this term of imprisonment was as a result of his first breach of the criminal law and

(5) Prior to his present conviction his character and Garda record was above reproach.

I consider that he is a suitable applicant for the temporary release programme.

Yours,

Michael Curran."

14. Assistant Governor Stack forwarded both these letters to Mr Hickey. Despite these positive recommendations, however, the applicant's application for temporary release was refused. In his letter dated 28th October, 2014, Mr Hickey set out the reasons for this decision as follows:

"Dear Sirs,

We refer to your letter dated 23 October 2014 regarding your client, Mr Ivor Callely, which was received in this office on 24 October last.

As part of the induction process prisoners are given information on schemes, such as Community Release Scheme and Temporary Release, which prisoners may qualify for as their sentence progresses. Suitability for either scheme is not assessed as the prisoner enters prison, rather as they progress through their sentence their suitability is assessed based on a number of criteria. At induction, by explaining the availability of the Community Return Scheme and Temporary Release, prison staff are merely indicating that which is available to prisoners. It cannot be taken as an offer or guarantee that that prisoner will either be offered or qualify for same as the decision is a ministerial function and the prison's only role is to forward the application and make a recommendation.

Schemes of temporary release are covered by the Criminal Justice Act 1960, as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003, which provides that sentenced prisoners may be approved temporary release whether it be for a few hours or a more extended period. The Act sets out the circumstances when temporary release may be provided and what matters must be taken into account.

Before a final determination a number of factors may be taken into account including:

- *the nature and gravity of the offence to which the sentence being served by the person relates*
- *the sentence concerned and any recommendation made by the court in relation to the sentence imposed*
- *the period of the sentence served by the person*
- *the potential threat to the safety and security of the public should the person be released*
- *the person's previous criminal record*
- *the risk of the person failing to return to prison at the expiration of the period of temporary release*
- *the conduct of the person while in custody or while previously on temporary release*

• any report or recommendation made by the Governor, the Garda Síochána, a Probation & Welfare Officer, or any person whom the Minister considers may be of assistance in coming to a decision as to whether to grant temporary release

• the risk that the person might commit an offence during any period of temporary release

• the likelihood that a period of temporary release might accelerate the person's reintegration into society or improve his prospects of obtaining employment.

Each application for temporary release is considered on its own merits. In considering Mr Callely's case in the round, the Minister is of the view that the breach of trust and abuse of public funds by a member of the Oireachtas must be considered in the most serious terms and Mr Callely is not considered suitable for temporary release at this stage of his sentence.

In Mr Callely's case, at committal he was assessed as a vulnerable prisoner and he was transferred after 3 days from Mountjoy to Wheatfield, where he has remained to date. As part of his sentence management Mr Callely was approved a move to Shelton Abbey on 10 October 2014 and that approval is still in place. There are in excess of 4,000 prisoners in the prison system at any time and you will appreciate that prisoners cannot be allowed to dictate how their sentence is managed.

In conclusion, the approval for a transfer to Shelton Abbey still stands and it is open to your client to take up this opportunity.

Yours sincerely,

Tony Hickey

Operations Directorate

28th October 2014"

15. On 17th October, 2014, the applicant applied for further remission of his sentence pursuant to Rule 59(2) of the Prison Rules 2007. In his affidavit dated 15th January, 2015, Mr. Hickey noted at para. 7 that the applicant had, on 17th October, 2014, submitted an application for further remission (dated 11th October, 2014) to the Governor of Wheatfield Prison. This handwritten letter of application was in the following terms:

"Dear Governor,

I wish to apply for the one third remission under Rule 59 of the Prison Rules.

I was committed to Mountjoy Prison on 28th July, 2014, for a five month sentence and transferred to Wheatfield Prison on 1st August, 2014.

Advised by Governor that assessment by Prison Services would be carried out within 72 hours of committal to prison for suitable placement/programme – no such assessment was carried out at that time. The governor also insisted that there was a range of programmes specifically focussed for prisoners with a sentence less than 11 months. He outlined my suitability for C.R. / C.S.S. or T.R.

Prison Officer (D450) on Saturday, 2nd August advised I was being placed on Rule 63, this meant I would be locked up 23 hrs a day.

On return from his holidays, Governor Kavanagh met with me and stated he did not agree with officer who had placed me on Rule 63 and will ask officer to review as 23 hour lock up is very difficult and mentally challenging. Governor Kavanagh outlined options in Wheatfield Prison, enhanced regime, school/training access, closed due to holiday time of year, however he confirmed he would find structured activity on the grounds and he would be submitting to the IPS application and recommendation for CR / TR.

Applications and recommendations for CR / CSS were submitted.

I have reported for my structured activity every day, seven days a week since 12th August last.

I am an enhanced category prisoner with no P19. I have been of good conduct at all times. I have no addictive problems. I have sufficient means of financial income and I have accommodation. I am no threat to the safety and security of members of the public and I will not re-offend.

I am fully prepared and ready to re-integrate into the community.

During my time in prison I have complied with prison rules, with officers and I have mixed well with all prisoners.

In conclusion, I believe it is important to draw your attention to the following:

1) When the Garda were asked in court by the judge was I known to An Garda Siochana, the Garda stated I was not known to the Garda and the mobile phone issue was my first and only offence.

2) The prison Chaplin, Sister Kathleen, said to me this week: "I have worked for over 20 years in the prison service. I don't understand how you are still here. It is a tribute to you that everyone who I have spoken with in the prison, Governors, Chiefs, Officers and Prisoners have all spoken very highly of you, only good things to say about you, not a bad word – you are the only one I can say that about in all my years working in the prison service."

I look forward to hearing from you.

Yours sincerely,

Ivor Callely."

16. The Operations Directorate replied to this letter on 29th October, 2014, enclosing the prescribed enhanced remission application form under the amended Prison Rules. The applicant submitted the completed application form through his solicitor, and this was received by the Operations Directorate on 3rd November, 2014.

17. In his application, Mr Callely stated that he had engaged in structured activity on the grounds, seven days a week, since 12th August, 2014. He stated that he had attended the gym nearly every day, other than days on which it was closed; that he had fully cooperated with officers and prisoners; and that he had mixed well with all other prisoners and staff. In this regard, he referred the decision-maker to the comments of Sister Kathleen, the prison Chaplin, which were previously set out in his application of 17th October, 2014. The applicant further stated:

> *"I refer to your communication of the 29th instant in which you refer to my application for one third remission. In my submission of 17th October last I outlined the circumstances of my situation. I was advised by Governor P. Kavanagh the only structured activity available to me was allocation to the grounds. As the other activities were closed for holidays in August and most courses were a 12 month course it would be unfair to deny a prisoner with a sentence who could complete a course. I engaged with the only structured activity made available to me."*

18. The applicant added:

> *"I cross reference this application to my earlier application made on 17th October last via Governor Farrell's office and referred to in your letter of today's date."*

19. This application was refused on 7th November, 2014. The reasons for this decision are set out in the letter of Mr Tony Hickey 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 Prison Rules as amended.*
>
> *The principles governing the awarding of remission are contained within Rule 59 of 2007 Prison Rules as amended by Statutory Instrument no. 385 of 2014 (the Prison Rules). In sum, prisoners may also receive remission of greater than one quarter but not exceeding one third of their sentence if they –*
>
> > *demonstrate good behaviour by engaging in authorised structured activity,*
> >
> > *and*
> >
> > *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 or better able to reintegrate into the community, the Minister will take into account a number of factors including the following:*
>
> > • *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 offence to which the sentence of imprisonment being served by the prisoner relates;*
> >
> > • *the sentence of imprisonment concerned and any recommendations 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.*
>
> *It has been decided not to grant your application for increased remission under section 59 of the Prison Rules 2007. Although you have engaged with some authorised structured activity while in custody, we are not satisfied that as a result, you are less likely to re-offend and better able to reintegrate into the community. In coming to this conclusion, we have also taken into consideration the nature and gravity of the offence. In this case, the offence was a serious breach of public trust and misuse of public funds.*
>
> *Yours sincerely,*

Tony Hickey

Operations Directorate

7 November 2014"

The present proceedings
20. On 6th November, 2014, the applicant was granted leave to apply for judicial review by Faherty J. At this stage, the applicant was seeking, *inter alia*, an order of certiorari in respect of the decision to refuse him temporary release, and an order of *mandamus* requiring the Minister to consider and determine his application for enhanced or one-third remission. The following day the Minister gave her decision refusing the Mr Callely's application for enhanced remission. Accordingly, in the amended Notice of Motion dated 19th March, 2015, the applicant also seeks *certiorari* of the Minister's decision of 7th November, 2014, refusing him enhanced remission.

21. The applicant stated that from 5th August, 2014 onwards, and up to the time that leave was granted by this court on 6th November, 2014, he had interactions with senior prison officers, including governors and chief officers, who informed him that "*it was not right*" that he remained in prison, but that he was regarded as "*high profile*" and a "*hot potato*", and if he received early release it would attract media attention that might be unpalatable at a higher level and cause political disquiet.

The reliefs sought
22. The applicant is seeking the following reliefs:

> 1. An order of *certiorari* quashing the decision of the Minister to refuse the applicant temporary release.
>
> 1A. An order of *certiorari* quashing the decision to refuse the applicant enhanced remission as communicated in a letter dated 7th November, 2014, from the Operations Directorate of the Irish Prison Service to the Governor of Wheatfield Prison.
>
> 2. An order of *mandamus* requiring the Minister to reconsider and determine the applicant's claim to temporary release in accordance with law.
>
> 3. An order of *mandamus* requiring the Minister to consider and determine the applicant's claim to one third remission in accordance with law and/or an order for his release.
>
> 4. A declaration that the applicant has fulfilled all the prescribed prerequisites for temporary release and/or for one third remission and the decision of the Minister to refuse him temporary release and the failure of the Minister to grant him one third remission, flies in the face of reason and common sense, represents the unequal treatment of the applicant, is discriminatory and is unfair in all the circumstances.
>
> 4A. A declaration that the Minister is not entitled to delegate the power to remit sentences of imprisonment and/or in that regard was not entitled to delegate responsibility to the Operations Directorate of the Irish Prison Service for the determination of the applicant's application for enhanced remission.
>
> 4B. A declaration that decisions concerning the grant or refusal of enhanced remission should be made as soon as is practicable having regard to all the considerations, including the length of the sentence and the time remaining and fairness requires that, where possible, the decision on enhanced remission should be made by the Minister before a prisoner enters the final one third of their sentence.

23. The applicant was granted bail on 12th November, 2014, pending the determination of these proceedings on an undertaking that he would return to prison to serve the balance of his sentence if unsuccessful.

24. There are three main issues arising in this case, each of which I shall consider in turn. They are: (i) the decision refusing the applicant temporary release; (ii) the decision refusing the applicant enhanced remission; and (iii) the delegation of Ministerial decision-making power to the Irish Prison Service Operations Directorate.

Temporary Release

The applicable law
25. The Criminal Justice Act 1960 allows the Minister for Justice to grant temporary release to prisoners at any time before they qualify for standard remission, or to life-sentenced prisoners who are not entitled to standard remission. Section 2(2) of the 1960 Act as amended by the Criminal Justice (Temporary Release of Prisoners) Act 2003, provides that the Minister must consider a number of factors when deciding whether to grant temporary release to a prisoner, including the gravity of the offence committed, the individual's circumstances, attitude to rehabilitation, and employment and training skills.

26. While remission marks the complete ending of the sentence, temporary release is a form of release on licence. There are, in effect, two categories of temporary release: (i) temporary release granted with a view to the person returning to detention; and (ii) full temporary release which is intended as ending the period of detention.

27. In his judgment in *Kinahan v. Minister for Justice* [2001] 4 IR 454, Hardiman J. had the following to say on the Minister's power to grant temporary release (at p. 457):

> *"It does not appear to me that temporary release is a specific exercise of the general power of commutation or remission envisaged in the Constitution. Rather, it appears to be a statutory creation administered under the Prisoners (Temporary Release) Rules, 1960, which instrument was in turn made under the powers conferred by the Criminal Justice Act, 1960.*
>
> *Rule 3(1) of the Prisoners (Temporary Release) Rules, 1960, provides as follows:-*

"The Governor or other officer in charge for the time being of a prison may, subject to the directions of the Minister and subject to any exceptions which may be specified in directions of the Minister, release temporarily for a specified period a person serving a sentence of penal servitude or imprisonment in that prison."

[…]

It is clear from the above-mentioned Statute and Rules that temporary release is envisaged as a release from custody for a limited period during the currency of a sentence, subject to conditions and carrying an obligation to return to the prison at its conclusion. In this it seems quite distinct from the general executive power of remission."

28. Section 2 of the Criminal Justice Act 1960, as amended, makes provision for temporary release in the following terms:

"2.—(1) The Minister may direct that such person as is specified in the direction (being a person who is serving a sentence of imprisonment) shall be released from prison for such temporary period, and subject to such conditions, as may be specified in the direction or rules under this section applying to that person—

(a) for the purpose of—

(i) assessing the person's ability to reintegrate into society upon such release,

(ii) preparing him for release upon the expiration of his sentence of imprisonment, or upon his being discharged from prison before such expiration, or

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

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

(i) grounds of health, or

(ii) other humanitarian grounds,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) the Garda Síochána,

(iii) a probation and welfare officer, or

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

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

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

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

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

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

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

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

29. It is clear from the terms of s. 2, and from the relevant case law, that this provision gives a discretionary statutory power to the Minister to grant temporary release, and does not create any right or entitlement on the part of any prisoner.

30. It will be observed that before the Minster gives an order under s. 2 for the temporary release of a prisoner, she is to have regard to a range of factors set out in s. 2(2), which includes, *inter alia*, the nature and gravity of the offence. This list of criteria is identical to the criteria that are to be taken into account under Rule 59(2) of the Prison Rules when deciding whether to grant enhanced remission, save for the fact that the extent to which a prisoner has engaged in authorised structured activities is not among the factors to be taken into account.

31. It is notable that s. 2(3)(a) of the Act of 1960 provides that the Minister shall not give a direction for temporary release if "*she is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to so do.*" This means that if, on the basis of any of the matters set out in subs. 2, such as the nature and gravity of the offence committed, the Minister is of the view that it would not be appropriate to grant the prisoner temporary release, then she may in her discretion refuse to make the order.

32. The discretionary nature of the temporary release scheme has been highlighted repeatedly by the courts. In its decision in *Lynch & Whelan v. Minister for Justice* [2012] 1 IR 1, the Supreme Court referred to the earlier judgment of Fennelly J. in *Dowling v. Minister for Justice* [2003] 2 I.R. 535 where, at p. 541 of the report, the learned judge cited with approval the following passage from the decision of Murphy J. in *Ryan v. Governor of Limerick Prison* [1988] I.R. 198:-

"The temporary release is a privilege or concession to which a person in custody has no right and indeed it has never been argued, so far as I am aware that he should be heard in relation to any consideration given to the exercise of such a concession in his favour. That being so, it seems to me that the only right of the applicant or any other person in custody is to enjoy such temporary release as may be granted to him for whatever period is allowed and subject to such conditions as are attached to it."

33. The Supreme Court observed that at p. 543 of his judgment in Dowling, Fennelly J. confirmed:- "*It is, of course, true that temporary release decisions are entirely within the discretion of the respondent acting in the exercise of executive clemency on behalf of the State.*" The court further noted that:

"In the same case Murray J., in a judgment with which other members of the court also agreed, stated at p. 538:-

"It follows that the temporary release of a prisoner before the sentence imposed by a court has expired is a privilege accorded to him at the discretion of the executive. The liberty which a prisoner enjoys while on temporary release, being a privilege, is clearly not on a par with the right to liberty enjoyed by an ordinary citizen …"

[62] Later in the same judgment, in referring to a decision to terminate a prisoner's temporary release Murray J. stated at p. 539 "Such a decision is an administrative one for the purpose of withdrawing a discretionary privilege to a convicted prisoner whose sentence has not expired".

The standard of review in respect of decisions on temporary release

34. Although it is clear that the Minister has a broad discretion in determining whether to grant temporary release to a prisoner, the exercise by the Minister of that discretion is, nevertheless, subject to supervision by the courts.

35. This issue was considered by Hardiman J. in *Kinahan v. Minister for Justice* [2001] 4 IR 454. In that case, the applicant had a number of previous convictions including one for possession of drugs with intent to supply, for which he had received a six-year sentence. The applicant sought to quash a decision refusing him temporary release on the basis that the decision did not contain adequate reasons; it was also submitted that the reasons provided suggested that the decision was irrational.

36. Hardiman J., having referred to the judgments of Finlay CJ in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at p. 70, and of Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 at p. 658, held as follows (at pp. 458-459):

This classic line of authority was applied to decisions in relation to temporary release in Murray v. Ireland [1991] I.L.R.M. 465. There, the Supreme Court was dealing with a submission that the executive should be directed to grant temporary release to the second plaintiff and his wife, both of whom were serving life sentences for murder. However, the ratio appears equally applicable to persons serving a determinate sentence.

Finlay C.J. stated at p. 472:-

"… it was said that a court should direct the executive to grant temporary release for this purpose … The length of time which a person sentenced to imprisonment for life spends in custody and as a necessary consequence the extent to which, if any, prior to final discharge, such a person obtains temporary release is a matter which under the constitutional doctrine of the separation of powers rests entirely with the executive: Director of Public Prosecutions v. Tiernan [1989] I.L.R.M. 149."

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."*

37. Having quoted the above passages, Hardiman J. held as follows at p. 459:

> *"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."*

Submissions on temporary release

38. The applicant submitted that in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, the Supreme Court held that in considering the test for reasonableness, the basic issue to determine was whether the decision was fundamentally at variance with reason and common sense. The applicant contended that the temporary release decision in this case fails under the test for rationality.

39. The applicant submitted that what has happened to him was similar to what happened in *Corish v. Minister for Justice* [2000] 2 IR 548, and that he has been impermissibly placed in a particular category, namely that of an Oireachtas member who committed an offence involving public funds. The applicant submitted that it is not open to the Minister to refuse temporary release to a particular category of prisoner.

40. In *Corish*, the applicant had been sentenced to five years' imprisonment for the sale or supply or drugs; the final two years of his sentence were suspended. The applicant applied for temporary release, but the Minister refused his application on the grounds that it was "*current policy not to grant this concession to offenders serving sentences for the supply of drugs*."

41. The applicant challenged the decision by way of judicial review and claimed that the decision to refuse temporary release *inter alia* on the grounds that he was in a category of persons ineligible for temporary release was *ultra vires* s. 2(1) of the Criminal Justice Act 1960. O'Neill J. quashed the refusal, holding that the terms of s. 2(1) of the Criminal Justice Act 1960 do not permit the categorisation of prisoners but rather require that prisoners be dealt with on the basis of their individual circumstances.

42. There is now legislation prohibiting temporary release for persons convicted of offences under s. 15A of the Misuse of Drugs Acts 1977 to 1984 and certain firearms offences. The applicants submitted that there is, however, no such prohibition in respect of s. 26 of the Criminal Justice (Theft and Fraud) Offences Act 2001, and there is no prohibition on releases where such offences involve public funds and/or if committed by members of the Oireachtas.

43. The respondents, in reply, referred the court to the judgment of Finnegan P. in *McAlister v. Minister for Justice* [2003] 4 IR 35. In that case, the applicant was serving an eight year sentence in Portlaoise Prison having been convicted under the Firearms Act 1964 and the Larceny Act 1916. In July, 2000 the applicant made applications requesting compassionate temporary release in order to visit his sick mother in Belfast. These applications were refused. The applicant sought, *inter alia*, an order quashing the Minister's decision.

44. In considering the *Corish* decision, Finnegan P. noted that O'Neill J. had held that s. 2(1) of the Criminal Justice Act 1960 did not permit the categorisation of prisoners but rather required that prisoners be dealt with on the basis of their individual cases. Finnegan J. then noted that in the case before him the respondent had a policy in respect of granting temporary release to certain subversive prisoners in Portlaoise prison, namely that, in relation to members of the Real IRA or the Continuity IRA, they were granted two overnights on the death of a parent, spouse or child. Applications for temporary release for other purposes were also considered. Finnegan P. went on to note that when considering applications for temporary release from members of the Real IRA or the Continuity IRA, but also in considering applications for temporary release generally, the Minister took into account the following factors:

> *"(a) the nature of the offence;*
>
> *(b) whether the granting of temporary release would constitute a threat to the community;*
>
> *(c) length of time spent in custody;*
>
> *(d) behaviour of that offender while in custody;*
>
> *(e) the remainder of the sentence left to serve;*
>
> *(f) whether there are any compelling compassionate grounds which merit special consideration."*

45. Finnegan P. then distinguished *Corish* from the facts of the case before him, holding as follows at p. 42 of the report:

> *"In Corish v. Minister for Justice the respondent failed in his paramount duty to consider applications made to him in a fair and impartial manner, having determined that prisoners falling within a particular category would not have their applications considered and, in effect, had foreclosed a proper consideration of any such application. The same objection does not apply to a policy applied in the consideration of applications. I can see no objection to a policy such as that which was applied to the applicant wherein a specific policy in relation to applications relating to the death of a parent, spouse or child was set but it was also provided that applications for temporary release for other purposes would also be considered. In relation to such a policy the court can only interfere where the policy is such that no reasonable minister could have adopted it. The applicant has failed to satisfy me that the policy adopted by the respondent here is unreasonable in the sense in which the phrase is used in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642."*

46. Counsel for the respondents submitted that in *Corish*, the High Court had held that while the respondent was obliged to consider

each application individually, he was entitled to have regard to certain policy considerations in doing so. The respondents further submitted that notwithstanding that there was no express reference to a policy of refusing temporary release to subversive prisoners, Finnegan P. had found that such a policy was a reasonable consideration to which the Minister was entitled to have regard in the context of the statutory criterion of the "*nature and gravity of the offence*" in s. 2 of the 1960 Act.

Decision on the refusal of temporary release
47. The applicant has raised two principal issues in relation to the Minister's decision refusing his application for temporary release. First, he has submitted that the Minister's decision is irrational and flies in the face of reason and common sense; in this regard the applicant emphasised the positive recommendations he received from former members of An Garda Síochána and the Assistant Governor of Wheatfield Prison, who supported his application for temporary release, as well as the nature of the offences of which other prisoners who were granted temporary release had been convicted. Secondly, the applicant has contended that the decision refusing him temporary release is invalid because the Minister has impermissibly placed him in a particular category of prisoner, namely that of an Oireachtas member who committed an offence involving public funds, and in this regard the applicant relied on the judgment of O'Neill J. in Corish. The court will consider each of these matters in turn.

48. In this case the Minister, having considered Mr Callely's case in the round, refused his application for temporary release because she was of the view that the breach of trust and abuse of public funds by a member of the *Oireachtas "must be considered in the most serious terms"* and, accordingly, Mr Callely was considered unsuitable for temporary release at that stage of his sentence.

49. It is clear from s. 2 of the Criminal Justice Act 1960, and from the relevant case law, that the Minister has a wide discretion in respect of decisions on temporary release, and that there is no right to temporary release on the part of any prisoner. Section 2(3) provides that the Minister shall not grant temporary release to a prisoner if she is of the opinion that, for reasons connected with any one or more of the matters referred to in s. 2(2), which includes the nature and gravity of the offence committed, it would not be appropriate to so do. Here, because of her view of the gravity of Mr Callely's offence, the Minister has concluded that he is "*not considered suitable for temporary release at this stage of his sentence.*"

50. In order for this court to interfere with that exercise of the Minister's discretion, it must be established, in accordance with the judgments of Finlay C.J. in *Murray* and of Hardiman J. in *Kinahan*, that the Minister breached the constitutional obligation of the executive not to exercise its powers in *"a capricious, arbitrary or unjust way."*

51. Having considered the facts of the applicant's case, it seems to me that it was reasonably open to the Minister reach the conclusion that she did as to the suitability of Mr Callely for temporary release in view of the nature and gravity of his offence, a matter to which she was obliged to have regard pursuant to s. 2(2)(a) of the 1960 Act. In this regard, the court notes that Judge Ring, when sentencing the applicant, had found that he had committed a "*significant breach of trust*" and that his role as a public representative was a central factor in the case such that a custodial sentence was necessary "*in the public interest*." In the circumstances, the court is satisfied that the applicant has failed to establish that the Minister's decision refusing his application for temporary release was capricious, arbitrary or unjust such as would entitle this court to interfere with it.

52. As regards the applicant's second ground for challenging the temporary release decision, I gratefully adopt the reasoning of Finnegan P. as set out in his judgment in *McAllister* where (at p. 42) he distinguished *Corish* on the grounds that in that case the Minister had "*failed in his paramount duty to consider applications made to him in a fair and impartial manner, having determined that prisoners falling within a particular category would not have their applications considered and, in effect, had foreclosed a proper consideration of any such application."* Finnegan P. found that *"[t]he same objection does not apply to a policy applied in the consideration of applications."* The learned judge thus concluded: *"In relation to such a policy the court can only interfere where the policy is such that no reasonable minister could have adopted it."*

53. The court observes that while in *Corish*, O'Neill J. held that it was impermissible for the Minister to refuse to consider an application for temporary release on the grounds that an applicant falls into a particular category of prisoner, save for in circumstances where this is provided for by statute, that is not what happened here. It seems to me that what happened in this case was that the Minister accepted and considered Mr Callely's application for temporary release and concluded that, in light of the nature and gravity of his offence, a matter to which the Minister is obliged to have regard under s. 2(2) of the 1960 Act when determining such applications, he was not suitable for temporary release at that stage of his sentence.

54. This, it seems to me, is more analogous to the situation pertaining in *McAllister* since the Minister gave individual consideration to Mr Callely's application and, to borrow from the language of Finnegan P., discharged her paramount duty to consider the application in a fair and impartial manner. Furthermore, the Minister did not, in the court's view, foreclose a proper consideration of the applicant's application by the adoption of a rigid policy of refusing to consider temporary release applications from a particular category of prisoner.

55. The court would further observe that to accept the applicant's submission on this issue as correct, would be to effectively require the Minister to disregard the nature and gravity of the offence committed when considering applications for temporary release, contrary to the express terms of s. 2(2)(a) of the 1960 Act, as amended.

56. For these reasons, the court is of the view that the Minister exercised her discretion in a reasonable manner such as she was entitled to do in accordance with s. 2 of the 1960 Act. The court is further satisfied that the applicant has not established that her decision was capricious, arbitrary or unjust. Accordingly, the court declines to interfere with the Minister's decision refusing the applicant's application for temporary release dated 28th October, 2014.

Enhanced Remission

The applicable law
57. Remission refers to the complete ending of a sentence of imprisonment, lawfully imposed by a court, at a reduced point. Currently, there are two forms of remission of sentence provided for in the Prison Rules 2007: standard remission and enhanced remission. Standard remission allows prisoners to earn up to one quarter off their whole sentence through good behaviour. Charleton J. pointed out in *Leonard v. Governor of Wheatfield Prison* [2009] IEHC 336 that in the ordinary course a prisoner is entitled to remission of a quarter of his or her sentence for good behaviour but that such remission may be lost in the event of any infringement of the prison rules.

58. Additionally, the Prison Rules permit up to one-third remission for prisoners who have shown further good conduct by engagement in authorised structured activity and who have satisfied the Minister for Justice and Equality, having regard to the matters set out in Rule 59(2)(f) of the Prison Rules, that they are less likely to re-offend and are better able to re-integrate into the community. This is

known as enhanced remission. It is defined in Rule 59(2)(g) of the Prison Rules as *"such greater remission of sentence in excess of one quarter, but not exceeding one third, as may be determined by the Minister*." Prisoners granted enhanced remission are released without any further supervision or conditions.

59. The power to remit sentences is derived from Article 13.6 of the Constitution, which 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."*

60. In accordance with this provision, the Oireachtas conferred the power of remission on the executive with power, by Order, to delegate to the Minister for Justice and Equality pursuant to ss. 23 and 23A of the Criminal Justice Act, 1951.

61. 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. Section 35 provides:

> *"35.— (1) The Minister may make rules for the regulation and good government of prisons.*
>
> *(2) Without prejudice to the generality of subsection (1) and to Part 3, such rules may provide for—*
>
> *(f) the remission of portion of a prisoner's sentence"*

62. In the Prisons Act 2007, "prison rules" means any rules for the government of prisons made under s. 35 or other enactment and in force at a material time. It was pursuant to s. 35 of the Prisons Act 2007 that the Prison Rules 2007 were promulgated.

63. Rule 59(1) of the Prison Rules makes provision for standard remission in the following terms:

> *"59. (1) A prisoner who has been sentenced to -*
>
> *a term of imprisonment exceeding one month, or*
>
> *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."*

64. Rule 59(2) of the Prison Rules 2007, as amended by the Prison (Amendment) (No. 2) Rules 2014 (S.I. No. 385 of 2014), makes provision for enhanced remission as follows:

> *"(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 prisoners sentence were to be granted to him or her.*
>
> *(d) Where the Minister receives an application under subparagraph (a), the Minister shall, as soon as practicable thereafter—*
>
> *(i) if he or she is satisfied that the prisoner, having regard to the matters referred to in subparagraph (f) is less likely to re-offend and better able to re-integrate into the community, notify the prisoner of his or her decision to grant enhanced remission to the prisoner and the period of enhanced remission of sentence which is to apply, or*
>
> *(ii) notify the prisoner of his or her decision to refuse the prisoners application and the reasons for the refusal.*
>
> *(e) A notification referred to in subparagraph (d) shall be in writing and shall be copied to the Governor of the prison in which the prisoner concerned is serving his or her sentence.*
>
> *(f) The Minister shall, when making a decision in respect of an application under subparagraph (a), have regard to the following matters:*
>
> *(i) the manner and extent to which the prisoner has engaged constructively in authorised structured activity;*
>
> *(ii) the manner and extent to which the prisoner has taken steps to address his or her offending behaviour;*
>
> *(iii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates;*
>
> *(iv) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto;*
>
> *(v) the period of the sentence served by the prisoner;*

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

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

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

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

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

(II) the Garda Síochána,

(III) a probation officer, or

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

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

65. Rule 27(2) of the Prison Rules 2007 (as amended) provides:

"(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 increase the likelihood that a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community."

66. It can be seen therefore that under the amended Rule 59(2) a prisoner who has been sentenced to more than one month's imprisonment, and who has engaged in authorised structured activities, may apply to the Minister for enhanced remission of up to one-third of their sentence.

67. The policy behind Rule 59(2) is to incentivise and reward engagement by prisoners in a pro-active manner in authorised, structured, voluntary activity, with a view both to reducing the risk of recidivism, and enhancing the potential for full and proper re-integration of a prisoner into the general community, following release. (See in this regard *Ryan v. Minister for Justice and Equality* [2014] IEHC 513, per O'Malley J. at paras. 4.9 and 9.4).

68. In order to be eligible to apply for enhanced remission, the prisoner must have engaged in authorised structured activities. The manner and extent to which the prisoner has engaged constructively in authorised structured activities remains relevant in the subsequent decision-making process as it is one among a number of factors, set out in Rule 59(2)(f), which must be taken into account by the Minister in determining whether the applicant has satisfied her that he is less likely to re-offend and better able to re-integrate into the community.

69. It is clear, however, that there is no right to enhanced remission, even for prisoners who have fully engaged in all the authorised structured activities that were made available to them.

70. In *Doody v. Governor of Wheatfield Prison & Ors*. [2015] IEHC 137, Noonan J. provided the following helpful overview of the case law on enhanced remission:

"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.

20. 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.

21. 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.

22. 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.*
>
> *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".*

23. 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 case. 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."*

24. 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."*

25. 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."*

26. 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."*

27. 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."

71. The approach of Kelly J. has since been approved by the Court of Appeal in its judgment in *McKevitt v. Minister for Justice & Equality & Ors*. [2015] IECA 122.

72. It is therfore clear that there is no automatic entitlement on the part of any prisoner to enhanced remission, even in circumstances where the prisoner has fully engaged in all the authorised structured activities made available to him. Moreover, the terms of the amended Rule 59(2) make it clear that in order for the prisoner's application to succeed, he must satisfy the Minister, having regard to the matters set out in Rule 59(2)(f), that he is less likely to re-offend and better able to re-integrate into the community. Once the Minister is so satisfied, she is then obliged to grant enhanced remission; she has no residual discretion at that point to refuse the application, as is clear from the mandatory language of Rule 59(2)(d), which states that where the Minister receives an application for enhanced remission,

> *"the Minister **shall**, as soon as practicable thereafter—*

(i) if he or she is satisfied that the prisoner, having regard to the matters referred to in subparagraph (f) is less likely to re-offend and better able to re-integrate into the community, notify the prisoner of his or her decision to grant enhanced remission to the prisoner and the period of enhanced remission of sentence which is to apply..." [Emphasis added].

73. It is notable that the enhanced remission provisions contain no equivalent to s. 2(3) of the Criminal Justice Act 1960, which provides that the Minister "*shall not*" grant temporary release in respect of a person if, *inter alia, "he is of the opinion that, for reasons connected with any one or more of the matters referred to in subsection (2), it would not be appropriate to do so..."* In contrast, it appears that under the Prison Rules, prisoners who satisfy the Minister that they are less likely to re-offend and better able to re-integrate into the community cannot be refused enhanced remission even in circumstances where the Minister may consider that it would not be appropriate, for policy or any other reasons, to grant enhanced remission to that applicant. Enhanced remission may only be refused if the applicant has failed to satisfy the Minister, having regard to the matters set out in Rule 59(2)(f), that he is less likely to re-offend and better able to re-integrate into the community. This view was confirmed by Faherty J. in her decision in *Ryan v. Minister for Justice and Equality & Ors.* (Unreported, High Court, Faherty J., 6th February, 2015) where she held, at para. 8 of her judgment: *"If the Minister, having regard to the matters set out in Rule 59(2)(f), is satisfied that a prisoner is less likely to re-offend and better able to reintegrate into the community, the Minister is mandated to grant enhanced remission."*

74. In order for a decision on an enhanced remission application to have been validly made, the Minister must have had regard to all of the matters set out in Rule 59(2)(f), which requires that *"The Minister shall, when making a decision in respect of an application under subparagraph (a), have regard to the following matters..."* Accordingly, it is not open to the Minister to pick and choose which matters she will have regard to in reaching her decision.

75. It seems to me, therefore, that unless the Minister's decision contains evidence of her having had regard to each of the prescribed matters, her decision could not be said to have been made in accordance with the Prison Rules. However, once the Minister has taken into account the relevant considerations, and this is clear from the face of her decision, then the weight to be attached to each of them is properly a matter for the Minister in her discretion, subject to the principles of constitutional fairness and justice. In this regard I note the dictum of O'Malley J. in *Ryan v. Minister for Justice* [2014] IEHC 513, where she held, at para. 9.4, that *"a prisoner who seeks extended remission is entitled to have his or her application considered in a fair and rational manner."*

76. Before turning to consider the decision of the Minister refusing Mr Callely's application for enhanced remission, dated 7th November, 2014, it is necessary to set out the applicable standard of review.

The standard of review in respect of decisions on enhanced remission

77. In its judgment in *McKevitt v. Minister for Justice* [2015] IECA 122, which was an appeal from the decision of Kelly J. in *McKevitt v. The Minister for Justice and Equality and Others* [2014] IEHC 551, the Court of Appeal (Irvine J.) held as follows at paras. 32-33 of its judgment:

> *32. It is of course true to say that there are circumstances in which the court may interfere with the exercise of the powers vested in the Minister regarding temporary release, or, as in the present case, concerning enhanced remission. This was advised by Finlay C.J. in Murray v. Ireland [1991] ILRM 465 –where at p.473 he stated: -*
>
> > *"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, having regard to the practical considerations arising with regard to the running of prisons or the security of the detention of prisoners, have reached a different conclusion on the appropriateness of special arrangements for association or of temporary release."*

78. The standard of review applicable to the judicial review of decisions on enhanced remission is therefore the same as that which applies to decisions on temporary release.

Submissions on enhanced remission

79. The applicant submitted that the Minister failed to have proper regard to the appropriate criteria in reaching her decision. In this regard, the applicant argued that the decision of 7th November, 2014 refusing his application for enhanced remission makes it clear that it was only the nature and gravity of the offence that was considered. The applicant submitted that since the appropriate criteria were not considered, the application was determined otherwise than in accordance with the Prison Rules.

80. The applicant further submitted that since the policy behind Rule 59(2) is to seek to incentivise and reward engagement by prisoners in a pro-active manner in authorised, structured, voluntary activity, with a view to ensuring that they are less likely to re-offend and better able to re-integrate into the community, it was very relevant that the applicant had fully engaged in the authorised, structured, activity allocated to him and, in this regard, counsel for the applicant pointed out that the applicant had worked in the grounds every day since 12th August, 2014. The applicant thus submitted that the Minister's statement that he had performed only "some" structured activity was incorrect, was an error going to jurisdiction, was without foundation and entirely failed to have regard to the information provided to the Minister.

81. The respondents submitted that the applicant's submissions seemed to be predicated on an erroneous belief that he had an entitlement to enhanced remission. Counsel for the respondents submitted that the Minister had a wide discretion in applying the criteria set out in the Prison Rules and that, in particular, she was entitled to have regard to the nature and gravity of the offence, and that the Minister's decision was not capricious, arbitrary or unjust.

Decision on the refusal of enhanced remission

82. In determining the applicant's application for enhanced remission, which was made under the amended Rule 59(2), the Minister considered whether the applicant had demonstrated good behaviour by engaging in authorised structured activity, and whether he had satisfied her that, as a result of his engagement in those activities, he was less likely to re-offend and would be better able to re-integrate into the community. The Minister then went on to state that:

> *"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..."*

83. The decision then sets out the matters to which the Minister must have regard under Rule 59(2)(f). Despite this, however, the reasons provided for rejecting the applicant's application for enhanced remission show no engagement with the matters specified in Rule 59(2)(f), save for Rule 59(2)(f)(i) (the extent of the applicant's engagement with the authorised structured activities), and Rule 59(2)(f)(iii) (the nature and gravity of the offence committed).

84. It can be seen from the operative part of the Minister's decision (set out at para. 19 of this judgment) that the Minister rejected the applicant's application for enhanced remission because she was not satisfied that, as a result of his engagement with "some" authorised structured activities, the applicant was less likely to re-offend and better able to re-integrate into the community. The decision then explains that in coming to this conclusion, the decision maker had also taken into consideration the nature and gravity of the offence and that, in this case, the offence was a serious breach of public trust and misuse of public funds.

85. It would appear that these are the only two matters that the Minister took into account in reaching her decision. This is in contrast to the terms of the Minister's decisions in respect of applications for enhanced remission under the amended Rule 59(2) in *Ryan v. Minister for Justice and Equality & Ors.* (Unreported, High Court, Faherty J., 6th February, 2015) and in *Doody v. Governor of Wheatfield Prison & Ors.* [2015] IEHC 137.

86. In *Ryan*, the Minister's decision set out the matters that the Minister will take into account under Rule 59(2) and then stated as follows (at p. 17 of the judgment):

> *"The Minister having considered all the above issues [i.e. the matters set out in Rule 59(2)(f)] has decided to refuse your application as she is not satisfied that as a result of your engagement in authorised structured activity, that you 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 the offence for which you are imprisoned (rape) and due to the manner and extend to which you have taken steps to address your offending behaviour."*

87. Faherty J. was of the view that the Minister's consideration of the applicant's application was valid and complied with Rule 59(2)(f). She stated at para. 59 (p. 39) of her judgment:

> *"His structured activities were considered (including particulars of the difficulties he claimed to have encountered) and his engagement with the prison services was considered, as was the nature and gravity of the offence. The applicant's denial of his guilt was also a factor for consideration. The weight to be attached to the matters set out in Rule 59(2)(f) is a matter for the Minister as the decision maker, having regard to the particular circumstances of the case. Having said that, it would be, to use the phraseology in Lillycrop, "impermissible" for a decision maker to solely weigh the manner or extent to which a prisoner has taken steps to address his or her offending behaviour or on the nature or gravity of the offence being served by a prisoner in the consideration of an application. I do not find anything to persuade me that such occurred in the present case. The case made by the applicant was considered in conjunction with the mandatory matters specified in Rule 59(2)(f).*

88. Faherty J. thus concluded that the Minister's decision was not irrational, arbitrary or unjust.

89. Similarly, in *Doody*, the Minister's decision, which is set out at para. 7 (p. 6) of the judgment, was in the following terms:

> *"The Minister having considered all of the above issues [i.e. the matters set out in Rule 59(2)(f)] has decided to refuse your application as she is not satisfied that as a result of your engagement in authorised structured activity, that you 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 the offence and the potential threat to the safety and security of members of the public."*

90. The terms of these decisions, which were both held to be valid by the High Court, are of significance insofar as they show that the Minister explicitly stated that she had taken the matters set out in Rule 59(2)(f) into consideration, and then proceeded to give the specific reasons for her decision to refuse the application.

91. It seems to me that in Mr. Calley's case the Minister fell into error in reaching her decision insofar as it appears that she failed to have regard to all of the matters set out in Rule 59(2)(f), such as she is obliged to do: at no point does she state that she did in fact take these matters into account, and nor is there any evidence that she did so in the terms of her decision. Instead, she seems only to have turned her mind to the criteria at Rule 59(2)(f)(i), namely the extent of the prisoner's engagement with authorised structured activities, and 59(2)(f)(iii), namely the "*nature and gravity of the offence*" which, in this case, the Minister described as "*a serious breach of public trust and misuse of public funds*."

92. None of the other matters set out in Rule 59(2)(f) appear to have been considered by the Minister. This is despite the fact that, in addition to the requirement under the Prison Rules that regard be had to all these matters, a number of the matters set out in Rule 59(2)(f) are particularly pertinent to Mr Callely's application.

93. Rule 59(2)(f)(ii) requires the Minister to have regard to the manner and extent to which the prisoner has taken steps to address his or her offending behaviour. In this case, Mr Callely pleaded guilty to the offence with which he was charged, apologised for his actions, and repaid the money defrauded. The Minister was obliged to have regard to this in making her decision.

94. Under Rule 59(2)(f)(iv) the Minister is to have regard to the sentence of imprisonment concerned and any recommendations of the court that imposed the sentence in relation thereto. In this case, Judge Ring in sentencing the applicant noted that his offence was a *"significant breach of trust"* and she indicated that his role as a public representative was a major factor in the case. For this reason Judge Ring considered that a custodial sentence was appropriate but she added that it was the fact of the sentence, rather than its duration, that was important. This ought to have been considered in accordance with the Prison Rules and is clearly relevant to any consideration of Mr Callely's application for enhanced remission.

95. Rule 59(2)(f)(vi) requires the Minister to have regard to 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 relates) should the prisoner be released from prison, while Rule 59(2)(f)(vii) requires that regard be had to any offence of which the prisoner was previously convicted. In this case, the applicant is a first-time offender convicted of a non-violent offence. He committed the offence while he was a member of the Oireachtas but he now no longer holds public office and, consequently, has no access to public funds. These, again, are factors that ought properly to have formed part of the Minister's assessment in accordance with the Prison Rules.

96. Rule 59(2)(f)(viii) provides that regard shall be had to the conduct of the prisoner while in custody. In this case, Austin Stack,

the Assistant Governor of Wheatfield Prison, described the applicant's conduct while in prison as "*impeccable*", and again this ought to have been considered.

97. Rule 59(2)(f)(ix) requires that the Minister have regard to any report 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)."*

98. In this case, the decision-maker, Mr Hickey, received an email from Assistant Governor Stack on 21st October, 2014, which stated, *inter alia*, that the applicant was "*a first time offender*", that there was "*very little chance of him re-offending*" and that he was "*not a risk to society.*" The Assistant Governor added that Mr Callely's behaviour in prison had been "*impeccable*" and that he had "*engaged fully with all the services and structured activities available to him in Wheatfield.*" For these reasons, Assistant Governor Stack highly recommended Mr Callely's application and asked Mr Hickey to give it full consideration. In addition to this strong recommendation from the Assistant Governor, Mr. Callely also submitted two letters supporting his application from retired members of An Garda Síochána. Each of these letters were clearly highly relevant to the Minister's assessment of the applicant's enhanced remission application and, under the Prison Rules, the Minister was obliged to have regard to them. There is, however, no evidence in her decision that regard was had to these matters.

99. As Faherty J. pointed out at para. 59 of her judgment in *Ryan*, it is impermissible for the Minister to only have regard to some of the matters set out in Rule 59(2)(f). Accordingly, I am of opinion that the Minister's failure to have regard to these matters, as is required by the Prison Rules, renders her decision *ultra vires* as it was made otherwise than in accordance with the mandatory requirements of Rule 59(2)(f).

100. I am also of opinion that the Minister's decision falls into error in its assessment of the manner and extent to which the applicant engaged in authorised structured activities, by finding that the applicant had engaged with "*some*" structured activities. In fact, the applicant had engaged in all the authorised structured activities made available to him. The respondents do not dispute this; and, moreover, this fact was clearly brought to Mr Hickey's attention both by the applicant himself in the course of his enhanced remission application, and by Assistant Governor Stack in his email of 21st October, 2014. In light of this, the court is of the view that the Minister failed to properly assess the available evidence as to the manner and extent to which the applicant had engaged with the authorised structured activities made available to him. This error is of material significance.

101. For these reasons, the court will quash the decision of the Minister dated 7th November, 2014, refusing the applicant's application for enhanced remission, and remit the matter for fresh consideration.

102. The applicant also sought a declaration that decisions on enhanced remission should be made as soon as practicable having regard to all the considerations including the length of the sentence and the time remaining, and that fairness requires that, where possible, the decision on enhanced remission should be made by the Minister before a prisoner enters the final one third of their sentence.

103. The respondents, in reply, stated that the processing of applications for enhanced remission involves a significant amount of work on the part of the Irish Prison Service to ensure that all relevant material, including proof of involvement in structured activities, is collated before any decision is made. In the circumstances, it was denied that the Minister had failed to make a determination as soon as practicable.

104. In this case, the applicant applied for enhanced remission by letter dated 11th October, 2014, which was submitted to the Irish Prison Service on 17th October, 2014. The Operations Directorate of the Irish Prison Service replied to this letter on 29th October, 2014, enclosing the prescribed enhanced remission application form. The applicant's completed application form was received by the Operations Directorate on 3rd November, 2014. Mr Hickey in the Operations Directorate then determined the applicant's application for enhanced remission on 7th November, 2014, and this decision was delivered to the applicant on that same evening. In the circumstances, it seems to me that the Irish Prison Service determined Mr Callely's application within a reasonable time, such as was fair and appropriate in the circumstances. In light of this, the court does not consider it necessary to make a declaration in the terms sought by the applicant. This relief is therefore refused.

The Carltona Doctrine and the delegation of ministerial powers

105. In this case, the Minister delegated her decision-making function in respect of the determination of the applicant's application for enhanced remission to Mr. Tony Hickey, Assistant Principal Officer in the Operations Directorate of the Irish Prison Service. The applicant has submitted that this was an impermissible delegation of Ministerial power and that the Carltona doctrine is not applicable to decisions on enhanced remission. In this regard, the applicant is seeking a declaration:

> *"That the Minister is not entitled to delegate the power to remit sentences of imprisonment and/or in that particular regard, was not entitled to delegate responsibility to the Operations Directorate of the Irish Prison Service to determine the applicant's application for enhanced remission."*

106. The applicant submitted that the Constitutional power to remit sentences conferred on the government, is vested in the Minister for Justice and Equality pursuant to ss. 23 and 23A of the Criminal Justice Act 1951. The applicant thus contended that the Operations Directorate of the Irish Prison Service acted *ultra vires* in making the impugned decision to refuse the applicant's application for enhanced remission. The applicant stated that the Minister was not entitled to re-delegate that power, a reserved Constitutional function, and the Carltona principle is not applicable. The applicant further submitted that, in any event, it appears it was not an established practice for officials to make such decisions.

107. The respondents submitted that in view of the number and range of decisions which the law imposes on government Ministers, for practical reasons many such decisions are made on their behalf by officials more familiar with the facts of each individual case. The lawfulness of such a practice was upheld by the English Court of Appeal in *Carltona Ltd. v. Commissioners of Works* [1943] 2 All ER 560, in which Greene MR stated as follows:

> *"In the administration of government in this country the functions which are given to a minister… are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in the country. It cannot be supposed that this regulation meant that, in each case, the minister in question should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department. Public business could not be carried on if that were not the case."*

108. The respondents submitted that what has become known as the Carltona doctrine has subsequently been expressly approved in this jurisdiction by the Supreme Court in *Tang v. Minister for Justice* [1996] 2 ILRM 46 and *Devanney v. Shields* [1998] 1 IR 230. In *Tang,* Hamilton C.J. held that a decision of a senior official in the Department of Justice to refuse residence to immigrants, who had breached the terms of their entry conditions, was not an unlawful delegation of the Minister's power in an application of this doctrine.

109. The respondents submitted that similarly in *FL v. Minister for Justice* [2012] IEHC 189, Hogan J. followed his earlier decision in *LAT v. Minister for Justice* [2011] IEHC 404, in holding that the Cartlona doctrine applied to a decision to deport a person under the Immigration Act 1999. In so holding, he recognised as Denham J. had in Devanney, that there were *"exceptions in matters of significant importance where the Minister is expected to make the decision personally."* Notwithstanding the fact that up until very recently it had been the practice for Ministers to make deportation decisions personally and the complexity of such a decision, Hogan J. stated that it was "*entirely open to the present Minister to change existing practice assuming, of course, that there is a legal basis for doing so*." On that basis, Hogan J. went on to uphold his earlier ruling in LAT that a deportation order was not such an exceptional decision as to require a personal decision on the part of the Minister. The learned judge held as follows as para. 15:

> *"15. While I accept that the decision to deport is often a complex one which has significant implications for the individual who is the subject matter of the order, I am not satisfied that it is of such intrinsic importance to the community at large that the decision can be made only by the Minister personally. It must also be recalled that the Minister for Justice has many onerous obligations. It cannot be suggested that the Oireachtas must have intended that he alone should personally take the decision to deport a given individual in every single case, since this would mean that he had responsibility for potentially hundreds of such decisions in any given year."*

110. The respondents submitted that while there is no direct authority for the proposition that the Carltona doctrine applies to decisions whether to grant temporary release or enhanced remission, the logic underlying the foregoing case law strongly supports the proposition that it does. The respondents submitted that there is little distinction in the importance to the community of a decision to deport an immigrant and a decision to release a prisoner early whether by way of temporary release or remission. Counsel for the respondents further stated that, as pleaded in the affidavit of Mr Hickey on behalf of the respondents, the number of such applications in any given year is even greater and the rationale as referred to above that a Minister cannot personally make hundreds of such decisions is therefore equally applicable. The respondents submitted that it should, moreover, be noted that in the only Irish decision as to the applicability of the Carltona doctrine to orders affecting liberty, in *McM v. Manager of Trinity House* [1995] 1 IR 595, it was held to be lawful for a responsible official to transfer a juvenile in a certified industrial school to a reformatory where they were having an "*evil influence*" over other children in the school under the relevant provisions of the Children Act 1908.

111. The respondents submitted that further support for this proposition can be garnered from the practice in Northern Ireland, where it has been held in a number of cases that a decision to grant or refuse temporary release to a prisoner may properly be taken by officials acting on behalf of the Secretary of State in an application of the Carltona principle, and in this regard the respondents cited *Lochhart v. NI Prison Service* [2007] NIQB 35 where Treacy J. held at para. 34:

> *[34] Although the Carltona principle may be displaced by a contrary intention in a particular act (see ex p Oladehinde [1991] 1 AC 254: see pp. 300, 303) I do not accept the Applicant's argument that it has been displaced in this case. On the contrary, there has been a series of cases which have recognised the application of the Carltona principle specifically in the prison context within Northern Ireland e.g. In Re McKernan [1983] NI 83 and Re Samuel Henry's Application [2004] NIQB 11. I am satisfied that the exercise of the power of temporary release can properly be undertaken by officials on behalf of the Secretary of State. Indeed, if the Applicant's arguments were correct it would lead to the anomalous result that decisions regarding temporary release of restricted transfer prisoners would require to be taken personally by the Secretary of State whereas in all other cases, on the Applicant's argument, they could be taken by his officials.*

Decision on the delegation of ministerial decision-making power

112. In determining this issue, it is necessary to set out the relevant portion of the affidavit of Mr Tony Hickey where he avers, at para. 5 thereof:

> *"...in exceptional cases, applications for further remission by sexual offenders, subversive offenders and high profile applicants are considered by the First Named Respondent personally. The Minister would only ever personally consider an application for temporary release involving subversive prisoners and over the Christmas period when certain categories of such applications are dealt with by her. I say in this regard that the First Named Respondent is required to consider a number of matters in making a decision on temporary release or further remission, and much of the relevant information is in the possession of the Operations Directorate of the Irish Prison Service. I say also that the First Named Respondent is required to decide a considerable number of such applications so that for practical reasons it would be impossible for her to deal with every such application personally."*

113. Mr Hickey then went on to point out that:

> *"There were approximately 53,000 applications for temporary release in 2014 and approximately 450 applications for enhanced remission, most of the latter occurring in the last six months of the year. Prior to mid-2014, there were very few applications for enhanced remission. I say therefore that it has always been the practice that applications for temporary release are made by the Irish Prison Service, and that since October 2014 most applications for further remission have similarly been made in view of the increased number of such applications. The Irish Prison Service is part of the Department of Justice and decisions made by Assistant Principal Officers, or officers of higher rank, in relation to the temporary release of prisoners or the granting of further remission to prisoners are made by them as the civil servants designated by the First Named Respondent within her department so to do for her, on her behalf and in her name."*

114. The court accepts that the power to grant or refuse enhanced remission is an important one. I note that in *McKevitt v. Minister*

for Justice [2014] IEHC 551, Kelly J. pointed out, at para. 60 of his judgment, that *"[t]he 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."*

115. Nonetheless, it seems to me that enhanced remission decisions are not of such intrinsic importance to the community at large that they can only be made by the Minister personally. I am satisfied that such decisions are no more or less important than the decision to deport a person from this country; in this regard, I note that in his judgment in *FL*, Hogan J. held that the decision to deport was one which the Minister could lawfully delegate to the responsible officials in her department.

116. The court is mindful that the Minister for Justice, as the political head of her department, answerable to the Oireachtas, is responsible for multifarious policy and other decisions of far-reaching importance to the community; indeed, the Minister's obligations are, as Hogan J. rightly observed in *FL,* onerous. In these circumstances, I am of opinion that, in view of the large number of applications for temporary release and enhanced remission received by the Minister, it would be impossible for her to personally turn her mind to each of these applications in such a manner as to give adequate and proper consideration to the individual circumstances of each prisoner's case, in addition to discharging the many other onerous obligations that fall on her as Minister for Justice.

117. In this case, the Minister has delegated the decision-making function in respect of applications for temporary release and enhanced remission to Assistant Principal Officers in the Operations Directorate of the Irish Prison Service. In my view this is an entirely appropriate delegation of ministerial power to responsible officials in her department who are best placed to give proper and appropriate individual consideration to the circumstances of each prisoner's case.

118. Accordingly, the court concludes that the Carltona doctrine applies to decisions on temporary release and enhanced remission, and that in this case the Minister lawfully delegated her decision making power in respect of these decisions to Assistant Principal Officers in the Operations Directorate of the Irish Prison Service.

Conclusions

119. For the reasons stated above, the court is satisfied that the decision of the Minister dated 7th November, 2014 refusing the applicant's application for enhanced remission, is *ultra vires*. Accordingly, the decision will be quashed and remitted to the Minister for fresh consideration. It is not for the court to determine whether the applicant has fulfilled the criteria for enhanced remission; that is properly a matter for the Minister. The declaration sought in this regard is therefore refused.

120. The other reliefs sought are also refused.