[2017] IEHC 422

THE HIGH COURT

RECORD NO: 2016/713 JR

Alan Bradley

Plaintiff

AND

The Minister for Justice and Equality

Defendant

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 26th May, 2017

1. This is a case in which the applicant seeks reliefs, including *certiorari*, by way of judicial review in respect of a decision refusing him enhanced remission in relation to a sentence of imprisonment. The case has in my view raised important questions as to the appropriate procedures concerning a claim of confidentiality in respect of a Garda report furnished to the decision-maker, and the proper role of the Court in a judicial review of Executive action in the area of remission. For reasons which will become apparent, this is not a final judgment in the case.

The circumstances of the present case
The applicant's sentence

2. The applicant was sentenced by the Dublin Circuit Criminal Court on the 16th April, 2012, to a sentence of 9 years imprisonment with the final two years suspended. The offence in respect of which he was sentenced was conspiracy to commit theft. The sentence was reduced on appeal on the 16th July, 2014, to a sentence of 8 years with 18 months suspended. It was a condition of the suspension that he enter a bond to keep the peace and be of good behaviour for a period of one and a half years from the date of his release from custody.

3. The applicant made a number of applications for enhanced remission which were refused by the Minister. The most recent of these refusals is the subject of these proceedings. A prior application which was refused was the subject of an earlier set of judicial review proceedings which were compromised in July, 2016, *inter alia* on the basis that the Minister would consider a further application for enhanced remission. The applicant then made an application for enhanced remission dated the 28th July, 2016. In support of his application, he submitted, *inter alia*, that he had engaged in authorised structured activities in a number of areas. At the time of his application, the applicant was serving his sentence in Portlaoise prison and had the status of 'enhanced prisoner.'

The letter of refusal
4. The application for enhanced remission was refused by letter dated the 10th August, 2016. The letter was signed by Paul Mannering of the Operations Directorate in the Irish Prison Service. The letter set out the nine factors which the respondent was required to take into account under Rule 59 of the Prison Rules, 2007, as amended. The letter went on to say as follows:

> "The Minister, having considered your application for enhanced remission, including all materials supplied in support of the application and the matters outlined above has decided to refuse your application. Whilst it is acknowledged that you have engaged with the education services whilst in custody, the Minister having had regard to the nature and gravity of your offence, potential threat to the safety and security of members of the public, limited engagement with services to address your offending behaviour and the views of An Garda Síochána is not satisfied that you are less likely to re-offend and are better able to reintegrate into the community."

There then followed correspondence between the solicitor on behalf of the applicant and Mr. Mannering, in which the applicant's solicitor complained about the decision and sought further reasons for it. *Inter alia*, the applicant's solicitor referred to the evidence of the Gardaí at the sentence hearing, inquired as to the basis for the conclusion that the applicant represented a threat to the safety and security of the public, and requested a copy of the Garda report, redacted if necessary. This particular letter received no reply from Mr. Mannering or anyone else on behalf of the respondent. Leave to seek judicial review was granted on the 13th September, 2016, and the applicant was granted bail on the 20th September, 2016. No discovery application was made by the applicant in pursuance of the judicial review proceedings.

Assessment Document of Mr. Mannering
5. A document of relevance to the case was introduced into the proceedings in a somewhat peculiar manner in the course of the exchange of affidavits. In a third replying affidavit sworn on the 8th November, 2016, the applicant exhibited a particular document which had been disclosed to him in the earlier judicial review proceedings which had been compromised. Mr. Mannering then swore an affidavit dated the 9th November, 2016, in which he exhibited what appeared to be the same document, which he described as a document prepared by himself "in which the applicant's application for enhanced remission was fully assessed." He said that as this document contained certain privileged information, parts of it had been redacted prior to exhibition. He did not indicate which parts had been redacted. The document included the following:

"Manner prisoner has engaged in ASA

> Prisoner has engaged with the Red Cross in Portlaoise prison since January 2013 and has become a facilitator and overdose facilitator for the service. He has also engaged with the Education Service in Portlaoise and has completed a number of courses including Health and Fitness and Event management. He is also studying for his QQI Level 5 in Business Law and Start your own business course.

Manner prisoner has addressed offending behaviour

> Prisoner has engaged with the Psychology Service for stress management and claims that he was never made aware of the fact that they deal with offence focussed work.
>
> He also states that he attempted to engage with the Probation Service however due to resource constraints they will only engage with prisoners who have a court order. This was confirmed in a call to Probation in Portlaoise.

Nature and Gravity of offence
Conspiracy contrary to Section 71 of the Criminal Justice Act 2006 and Section 4 of the Criminal Justice (theft and Fraud Offences) Act 2001.

Sentence and recommendations of Court
8 Years (1 Year and 6 months suspended)

Period of sentence served
4 Years 4 Months

Potential threat to safety of public (including victim)
No VLO registered however the nature and gravity of the offence, which the trial judge considered to be at the upper end of the scale means that I believe that there could be a potential threat to the safety and security of the public.

Previous criminal record
Prisoner has a number of previous convictions for offences including No Insurance and Threatening Behaviour

Conduct of prisoner in prison or on TR
Mr Bradley is an enhanced prisoner and has been for some time. He does not come to the adverse attention of prison management and has only 2 P19 disciplinary reports for minor offences for which he received a caution.

Report or recommendation from Governor/Prison, Gardaí, Probation or another.

DECISION AND REASON (reasons go in letter to prisoner)

> **Is the prisoner less likely to re-offend and better able to re-integrate into the community?**
> Mr Bradley had engaged well with the education service and other services in the prison and has a good disciplinary record. However he has not shown enough evidence that he has addressed his offending behaviour. All prisoners committed to Portlaoise Prison are provided with a handbook which outlines the services available to them and it is incumbent on the prisoner to make an effort to address his offending behaviour. While the engagement with education is worthwhile, it does not address the index offence for which the prisoner was sentenced or any risk factors associated with this.
>
> Based on the nature and gravity of the offence, potential threat to the safety and security of members of the public, limited engagement with services to address his offending behaviour and the views of AGS, I am not satisfied that the prisoner is less likely to re-offend and is better able to re-integrate into the community therefore this application for enhanced remission under Rule 59 (2) is refused."

The document is signed by Mr. Mannering and dated the 10th October, 2016.

The legal context
Rule 59 of the Prison Rules (as amended)

6. The content of Rule 59 of the Prison Rules, as it stood at the date of the refusal of the applicant's application for enhanced remission, was as set out in SI 252/2007, as amended by SI 227/2014 and SI 385/2014. It provides that a prisoner who has been sentenced to a term of imprisonment "*shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term*" and that "*a prisoner who has engaged in authorised structured activity may apply to the Minister for enhanced remission*." The Minister's decision-making parameters are described as follows:

> "(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 at 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 prisoner's application and the reasons for the refusal." (emphasis added)

Subparagraph (f) provides that the Minister shall have regard to the following matters when making a decision in respect of an application:

> "(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 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)."

7. I pause to make some comments in relation to the above matters. In the first instance, it is clear that the overarching test informing the Minister's decision is that highlighted in bold above, namely whether she is satisfied "that the prisoner is less likely to re-offend and better able to re-integrate into the community." The individual factors listed are matters to which the Minister must have regard in considering this overall issue. Secondly, there can be a considerable degree of overlap or inter-relationship between the individual factors. For example, the question of "the potential threat to the safety and security of members of the public," one of the listed factors, must surely be informed by matters such as the nature and gravity of the offence itself, the previous record of the offender, and the manner and extent to which the prisoner has taken steps to address his or her offending behaviour, all of which are separately listed factors. Further, the question of the "potential threat to the safety and security of members of the public" is arguably simply a differently worded formulation of part of the overarching test, namely whether the prisoner "is less likely to re-offend…." Thirdly, it may also be noted that some of the matters are 'static' or incapable of being changed by the prisoner, being events or facts which have taken place in the past (such as the previous convictions of the prisoner, or the nature and gravity of the offence for which he is currently serving imprisonment), while others are more open-textured and future-oriented and within the control of the prisoner to some degree at least, such as steps taken by the prisoner while serving the sentence (including "the manner and extent to which the prisoner has engaged constructively in authorised structured activity" and "the manner and extent to which the prisoner has taken steps to address his or her offending behaviour"). Of course, the control exerted by the prisoner over these matters is constrained to the extent that the activities, courses and programmes available to the prisoner are limited to those made available to him by the prison service. Fourthly, it is explicitly envisaged that certain reports may be available to the Minister when making her decision, including a report from An Garda Síochána. Fifthly, it is clear, in view of the language used at various points in Rule 59, that while the Minister is entitled to grant a maximum period of enhanced remission of one third of a term of imprisonment, she could also award a lesser period between the automatic 25% and the maximum 33%. This point was confirmed by the Court of Appeal in *McKevitt v. Minister for Justice and Equality and Ors* [2015] IECA 122. Finally, I note the phrase "safety and security," in sub-para. (f)(vi), about which there was some debate during the hearing before me. I take the view that it is not limited to threats of violence or offences against the person, but that the use of the word 'security' in particular is intended to include the risk of crimes relating to property also, such as theft or burglary. It seems to me inconceivable that the Minister, if she considered that a prisoner, who had a track record of crimes against property and was considered to present a high risk of committing further offences against property, would not be entitled to take account of the risk of further property-related offending even if the prisoner had never committed a crime of violence and was considered low or zero risk of doing so in the future.

The Standard of Review applicable to enhanced remission judicial review cases

8. It is clear that when the Minister, or an official on her behalf, is making an assessment of whether a prisoner should be given enhanced remission, she is exercising an executive function in accordance with the powers provided for under Article 13.6 of the Constitution and as provided for by legislation. There was no dispute between the parties that, in those circumstances, the standard of review by the courts is whether the Minister's decision was capricious, arbitrary or unjust, as described in *Murray and Anor v. Ireland* [1991] I.L.R.M. 465, and *Kinahan v. Minister for Justice and Equality and Ors* [2001] 4 I.R. 454. The test is emphatically not whether the court would have reached a different conclusion itself and the range or scope of review is narrow. This was confirmed as recently as 2015 by the Court of Appeal in *McKevitt v. Minister for Justice & Ors* [2015] IECA 122.

9. The jurisdiction to review Ministerial decisions concerning enhanced remission has been the subject of intense scrutiny by the Courts in the last three years. After a number of High Court decisions reaching different conclusions as to how the Minister's discretion under Rule 59 should be approached, the matter has been put beyond doubt by the Court of Appeal in *McKevitt*, in which the Court upheld a decision of the High Court (Kelly P.) refusing *certiorari* of the Minister's decision to reject an application for enhanced remission. It was made clear that participation by a prisoner in "authorised structured activities" does not give the prisoner any automatic entitlement to enhanced remission. The applicant in that case had been convicted of directing the activities of the I.R.A. and of membership of the I.R.A.. He was serving his sentence on the E2 'Republican' landing of Portlaoise Prison, which operates on the basis of what the Court of Appeal described as an unofficial quasi-military structure reflecting the prisoners' relationships to the proscribed organisation. The applicant had engaged in various educational activities such as computer-related courses, French, English, Creative Writing, Music, Art, Home Economics and Yoga. The Court of Appeal confirmed that because the Minister was exercising an executive function under Article 13.16 of the Constitution, the appropriate test was the test set out by Finlay C.J. in *Murray and Anor v. Ireland* [1991] I.L.R.M. 465, of whether the power was exercised in a "capricious, arbitrary or unjust" way. The Court rejected what it described as "quite a radical argument" that the Minister, once satisfied that a prisoner has successfully engaged with some "authorised structured activity," would be "required" to grant enhanced remission. The Court rejected the view to this effect expressed by Barrett and Hogan JJ. in the cases of *Ryan v. Governor of Midlands Prison* [2014] IEHC 338 and *Farrell v. Governor of Portlaoise Prison and Ors* [2014] IEHC 392 respectively, and preferred the analysis of Kelly P. in the case before them. The Court gave a number of examples to illustrate that much would depend on the individual circumstances of the offender and the extent to which the courses taken by him or her in the prison actually targeted the sources of his or her offending behaviour. The Court emphasised the Minister's discretion in deciding whether or not to grant enhanced remission, based on the need for the Minister to take into account the degree to which the offender had actually sought to address the root causes of his criminal conduct. It followed that there could be no automatic entitlement to enhanced remission simply because an offender had engaged in some authorised structured activities.

10. It is therefore clear from the authorities that the scope for review by the court of the discretion to grant enhanced remission is very narrow. That said, it is not the case that there is no scope at all for review. The test is whether the decision was "arbitrary, capricious or unjust." Rare though such cases may be, the Court has an obligation to determine whether this has occurred in any particular instance brought before it for adjudication. I note the comments of O'Donnell J. delivering the judgment of the Supreme Court in *Murphy v. Ireland and Ors* [2014] 1 I.R. 198, albeit in the different context of the degree to which reasons must be given by the DPP in relation to the grant of a certificate that an accused should be tried in the Special Criminal Court. O'Donnell J. referred to an argument made on behalf of the plaintiff that a decision of the DPP was in effect unreviewable and pointed out that a review of

the decided cases over the previous 15 years showed that the DPP's decisions were reviewable both in theory and in fact, and that challenges had succeeded on three occasions. He said:

> "Thus, the courts have rejected any contention that a decision of the Director is unreviewable and have, in exceptional but real and justifiable cases, been prepared to review and if necessary quash such a decision. The fact that a jurisdiction is for good reason narrow, does not mean that it should be dismissed as non-existent. On the contrary such an outcome should direct attention to the considerations limiting review. In these cases a careful balance has been struck between a general principle restricting review and specific circumstances in which it will be permitted."

It seems to me that, similarly, although the scope for judicial review of decisions on applications for enhanced remission is, for good reasons related to the constitutional separation of powers, limited in scope, this does not mean that such review is non-existent. However, the Court should be careful not to overstep the boundaries and the underlying good reasons for the narrow scope of the zone of reviewability must at all times be borne in mind.

The Basis for the Application in the Present Case

11. In the present case, it was argued on behalf of the applicant that, notwithstanding the wide discretion afforded to the Minister in this area as emphasised in the authorities referred to above, the decision in respect of the applicant did meet the threshold of "capricious, arbitrary or unjust." This was said to arise from a combination of factors:

> (a) An unjust approach taken in relation to the extent of the applicant's engagement with the services;
>
> (b) The absence of any consideration of a Governor's report, which he had indicated in his application he wished to rely upon;
>
> (c) The reliance upon a Garda report which was apparently adverse to him, in circumstances where this view was apparently in direct conflict with the Garda view as expressed on oath at his sentence hearing;
>
> (d) Some possible confusion or error regarding the nature of his previous convictions.

12. The letter of refusal in this case, while acknowledging that the applicant had engaged with authorised structured activities, listed four matters as providing the basis for refusing the application: (1) the nature and gravity of the offence; (2) the potential threat to the safety and security of the public; (3) his "limited" engagement with the services to address his offending behaviour; and (4) the views of An Garda Síochána. In assessing whether the decision-maker strayed into the "capricious, arbitrary or unjust" zone, it is necessary to consider how these various matters were addressed by the decision-maker, insofar as the Court can do so. I will deal first with the question of the applicant's engagement with the services to address his offending behaviour, and thereafter with the remaining matters.

The applicant's engagement in authorised structured activities

13. The refusal letter of Mr. Mannering dated the 10th August, 2016, referred to the applicant's "limited engagement" with authorised structured activities. I would construe this as a criticism; in other words, that Mr. Mannering was thereby suggesting that the applicant could have done more and that his engagement was inadequate to put to rest concerns about his potential for re-offending. I will examine the evidence in this regard, bearing in mind at all times the fact that the decision-maker is to be afforded a wide range of discretion by the courts, as emphasised most recently by the Court of Appeal in *McKevitt*.

14. At the time of his application, the applicant enclosed a letter from Mark Kavanagh, Head Teacher in the Education Unit in Portlaoise Prison. This indicated that he regularly attended classes in the Education Centre, that he was pleasant and polite, and reliable and conscientious with regard to his studies. He studied:

- Health Related Fitness- Q.Q.I. Level 3
- Event Management- Q.Q.I. Level 6- Distinction
- Health Related Fitness- Q.Q.I. Level 5- Distinction
- Physical Education- I.T.E.C. Body Building- Distinction
- Sports Injuries/First Aid- Q.Q.I. Level 5
- Strength and Conditioning- Q.Q.I. Level 6
- Music- Rockschool Guitar and Keyboard
- Royal Academy of Music- Distinction in Theory & Harmony
- Comhaltas Ceoilteoiri Eireann- Levels 1 & 2- Banjo- Honours
- Spanish
- Home Economics
- Crime Awareness
- Anger Management
- Parenting Course- Barnardos
- Peace Education Programme
- Spreadsheets- Q.Q.I. Level 3

• ITEC Personal Fitness Trainer

• DSW Bootcamp Fitness Instructor

He was currently studying for his Q.Q.I. Level 5 in Business Law and a Q.Q.I. Level 5 Start Your Own Business course. He was also involved in the Red Cross C.B.H.F.A. programme and completed a Q.Q.I. Level 5 in Occupational First Aid. Mr. Kavanagh said that the applicant had an excellent rapport with his teachers and found time to encourage other prisoners. The applicant himself in his written application said he was in the gym 6 days a week working on his skill set and applying what he had learned from coursework. He said that he now had the skills to start his own business in personal training, health and fitness, and event management upon his release, and also that he wished to take up again a role as chairperson in his community as he had done before his imprisonment. Under the heading "psychology service," he said that he had attended for stress management but was never made aware that they dealt with offence-focussed work. He said he did not suffer from addiction. He said the probation service would not engage with him, although he sought to engage with them several times, because there was no court order. As noted, Mr. Mannering's assessment document confirmed that this was the case. He said he had engaged with every service available to him in the prison and sought out external courses to equip him with different styles of fitness training and event management. It was also argued on the applicant's behalf that his status of 'enhanced prisoner' should have weighed in his favour in his application for enhanced remission.

15. In his affidavit, Mr. Mannering emphasised the broad discretion in respect of the decision whether or not to grant enhanced remission. He said that the fact that the prisoner was an 'enhanced status' prisoner was not something which gave rise to any presumption that he was entitled to enhanced remission as this status related solely to conduct within the prison. He said that the fact that a prisoner had engaged in authorised structured activities did not of itself give rise to any presumption that he was entitled to enhanced remission because the Minister must have regard to a wide range of factors under Rule 59 and make a decision in light of them all.

16. In response, the applicant swore an affidavit asserting that the decision failed to take account of his efforts to engage constructively in authorised structured activities and exhibited two letters. The first was a letter dated the 9th May, 2016, from the applicant to a Mr. Edward Brennan, Integrated Sentence Management Officer, in which the applicant requested a copy of his sentence management plan, a copy of any recommendations by the officer in relation to his sentence management, and a copy of all offence focused courses available in the prison. The second was a letter dated the 28th June, 2016, from the applicant to Governor Conroy, in which he complained that his previous request to Mr. Brennan was being "stonewalled" and requesting the same information. He also said in this letter: "[a]t no point during my sentence has ISM Officer Brennan engaged with me in any way, shape or form, regarding the management of my sentence or advised me of any offence focused work that may be available to me."

17. Assistant Governor David Conroy swore an affidavit on the 21st October, 2016. He averred that following receipt of the letter dated the 28th June, 2016, he met with the applicant on the 4th July, 2016. He said that "the matters referred to in Mr. Bradley's letter were fully discussed by us in the course of that meeting on the 4th July 2016." He does not, however, say what the content of this discussion was or whether any advice was given. He went on to exhibit notes of Mr. Brennan, who was on holidays at the time of the swearing of the affidavit, which said that the ISM office

> "has link in with prisoner Alan Bradley every six months to see if he needs any assistance from the services provider in the Prison, after that, I have very little interaction with this prisoner from a services point of view, for the following reasons;
>
> Addiction: self-report to have no addiction issues
>
> Probation; not a probation case
>
> Education: Attending and Engaging daily
>
> Psychology; Self-report no issues and has made no request to engage
>
> TEO: No Services for the last 18 months
>
> Work and Training: Self report not interested
>
> Resettlement; on waiting list, referred 31/8/16."

The notes then list the various courses that the applicant had engaged in and completed. The Governor went on to say that his own discussions with the applicant during the course of his prison sentence "would have" highlighted the following:

> "(a) That he self-reported that he was not in need of addiction counselling;
>
> (b) That there was no court ordered probation post-release supervision order made in respect of him;
>
> (c) That he was attending education regularly;
>
> (d) That work and training activities were available to him if he wished to engage with them;
>
> (e) That no requirement for psychological intervention in respect of Mr. Bradley had been brought to the prison management's attention.
>
> (f) That Mr. Bradley intended to be self-employed in the entertainment/events management industry on his release from prison."

18. The applicant then swore a further affidavit dated the 26th October, 2016, saying, in terms, that he had not found his interactions with Mr. Brennan satisfactory, even after the meeting with the Assistant Governor on the 4th July, 2016, and that he had never been given an integrated sentence management plan. He also averred that he was "at a complete loss" as to how it could be said that he was "not interested" in work and training, despite his "continued and proven efforts" to improve himself in terms of work and training during his sentence. He also took issue with the suggestion that he did not report any issues to the psychology service, given that he had attended them for stress management and had stated this in his application for enhanced remission.

19. Mr. Brennan swore an affidavit on the 16th November, 2016, in which he said that he was not the I.S.M. manager at the time of

the applicant's committal to Portlaoise Prison, but that he refuted his claim that there was no engagement with him. He said he had "regular contact with him" and referred to some diary entries he recorded contemporaneously showing this. With respect, all that these diary entries appear to contain are matters such as the applicant's name, indicating that they met, but there is nothing of any substance showing that anything akin to a sentence management plan was ever arrived at or discussed. Nor is there any suggestion that particular programmes were recommended to the applicant and that he declined to pursue them.

20. Having regard to all of the above, it is not entirely clear why the applicant's engagement with the courses and activities on offer was considered to be less than satisfactory. There does not seem to have been anything in the way of a structured sentence management plan, or any recommendations to do particular courses, such that one could point to a particular omission or failure on his part to take a particular course. He did not have addiction problems, so the issue of tackling an addiction did not arise. He was not a politically motivated prisoner, such as Mr. McKevitt, who had continued to show all the signs of associating with other prisoners of a similar outlook. There are no indications that he had deep-seated psychological problems requiring intensive psychological assistance. He engaged in a large number of courses with a view to starting up a fitness-related career after his release, and his prison teacher gave him an excellent report. However, I am mindful of the wide range of discretion given to the decision-maker in this area and the fact that the onus rests with the applicant to demonstrate that the decision was arbitrary, capricious or unjust. Although I view the absence of an explicit explanation for the view taken that the applicant's engagement with the services was "limited" with some disquiet, I am not prepared to take the view that the decision was arbitrary, capricious or unjust in circumstances where the decision-maker had quite an amount of information before him as to what courses the applicant had done, and in circumstances where none of the courses in fact attended by the applicant could be said to *directly* challenge the causes of offending behaviour. The question of engagement with courses designed to tackle offending behaviour is a matter which seems to me to be particularly within the expertise and experience of the prison authorities and an area of Executive discretion with which the Court should be particularly slow to intervene. I would refuse the application for judicial review if it rested solely upon this ground, but it does not. I therefore turn to the remaining matters referenced by the decision-maker in refusing the application for enhanced remission.

The nature and gravity of the offence, the potential threat to the safety and security of the public and the views of An Garda Síochána

21. The remaining three matters explicitly referenced by the decision-maker, Mr. Mannering, in his letter refusing the application for enhanced remission were: the nature and gravity of the offence, the potential threat to the safety and security of the public, and the views of An Garda Síochána.

22. While of course Rule 59 does not provide any particular order in which the various factors listed must be considered, nor does it assign any greater weight to any one or more of them, it seems to me entirely logical that any assessment of the kind required by Rule 59 would need to be anchored in accurate and precise information as to the offence for which the prisoner was sentenced as well as his prior criminal record at the time of sentencing. Without a clear picture of those matters, I cannot see how any decision-maker could meaningfully consider what kind of engagement with authorised structured activities would be necessary, in the case of the particular individual prisoner, in order to reduce risks of further offending to a sufficient degree that enhanced remission might be considered appropriate. I say this because, in considering the likelihood of a prisoner re-offending, the starting point must be to know what the offending behaviour was, which may in turn shed light on the underlying motivation of the offender and therefore what factors may influence rehabilitation or likelihood of re-offending. To give some examples, the motivation of a drug addict who is sentenced for theft, robbery or burglary will be utterly different from the motivation of a person convicted of directing the I.R.A.. In the former case, tackling the addiction is likely to be a key factor for preventing future offending; whereas in the case of an ideologically driven offender, the question of preventing re-offending will be considerably different and present entirely different challenges. The root causes of a recidivist sex offender's crimes are different from those of a so-called "white-collar" offender who has been convicted of a fraud offence. In each case, one would have to have an accurate picture of the offending crime and criminal history in order to assess what the offender needs to do in order to address his offending behaviour. Accordingly, I turn in the first instance to the circumstances of the applicant's offence and his criminal history at the time of his sentence, and how these matters were dealt with by the decision-maker, Mr. Mannering.

The nature and gravity of the offence for which the applicant was sentenced

23. The only evidence before the Court concerning the nature and gravity of the offence for which the applicant was sentenced was an extract from the transcript of the sentence hearing on the 27th March, 2012, exhibited on behalf of the applicant. No further extracts from the transcript were exhibited on behalf of the respondent nor were any details of the offence set out in the affidavit of Mr. Mannering, other than his averment that "the trial judge specifically described the offence […] as being at the upper end of the scale." I note that during the sentence hearing, counsel said "I have to accept it's a very serious offence and it's an offence which I'd have to accept is obviously, had he been convicted, at the upper if not the top level in terms of seriousness," to which the Judge said "there's no doubt about that" and "it's a conspiracy that was within 10 minutes of fruition." Counsel said "there's no suggestion of any violence to be used in this offence and, indeed, no suggestion of weapons," to which the Judge replied "[y]es, that did strike me as perhaps an odd feature of something of this size or potential size."

24. In his assessment document, Mr. Mannering wrote: "No VLO registered however the nature and gravity of the offence, which the trial judge considered to be at the upper end of the scale means that I believe that there could be a potential threat to the safety and security of the public." It is unclear what information Mr. Mannering had before him in relation to the circumstances of the offence at the time of his decision. It is not clear, for example, whether he had a full transcript of the sentence hearing, or a report from the Gardaí summarising the facts of the case.

25. It is unfortunate that the Court, which has a role, albeit a very limited one, in reviewing the discretion exercised by the decision-maker, is placed in a position where it does not have a clear picture of what materials the decision-maker had before him in respect of the circumstances of the offence for which the applicant was sentenced or his particular role in it. It may be that Mr. Mannering had a Garda report describing the circumstances of the offence or a full transcript of the sentence hearing. However, the Court does not. All the Court can do is note that it was a conspiracy, which in itself is a very serious matter, and that it was apparently a large scale operation to steal property which came within minutes of execution. It was treated by the Court as being at the upper end of the scale of the offence in question, namely conspiracy to engage in theft. Since there was no plea of guilty to robbery, whether simpliciter or by way of conspiracy, it cannot be assumed that there was any violence or force used or contemplated. From this sparse information, it is somewhat difficult to assess what the decision-maker had by way of information about the offence in order to assess the applicant's possible motivation for being involved in the offence (other than presumably monetary gain) or what the root causes of his offending might have been.

The applicant's prior record

26. At the sentence hearing, an excerpt from the transcript of which was exhibited in the affidavit of the applicant's solicitor, the applicant's counsel told the Court that he had no previous convictions involving violence. If the Gardaí disagreed with this viewpoint at the time, they would undoubtedly so have informed the Court, but the comment was apparently made by counsel without any opposition. A dispute arose in the present proceedings as to one particular matter somewhat related to this. In an affidavit sworn on the 8th November, 2016, the applicant averred that he had "no convictions in respect of threatening behaviour." In an affidavit sworn on the 18th November, 2016, Mr. Mannering averred that the applicant's claim in this regard was not true or accurate because he had been charged and convicted of an offence of engaging in threatening, abusive and insulting words and behaviour on the 13th July, 1999, and sentenced to three months imprisonment, which conviction was upheld on appeal by the Circuit Court. He exhibited a certified copy of the court order. In response, the applicant swore a fourth replying affidavit on the 22nd November, 2016, in which he said that he had no recollection of a conviction for threatening behaviour and that in 2007, (at the time of his sentence for conspiracy to commit theft), the Garda Síochána had sent to his solicitor a document disclosing his previous convictions, which document did not refer to the conviction in question. This Garda document was then exhibited. I have examined this document, which contains a list of 31 District Court convictions between 1990 (when the applicant was a teenager) and 2006. These convictions were primarily in respect of road traffic matters relating to actions such as a failure to produce driving licence and insurance, careless driving and dangerous driving. I note that there were also a number of District Court convictions in respect of theft (one in 1995 and one in 2000), and one of unauthorised interference with a vehicle. I note also a number of convictions in 1994/5 for possession of articles under the Firearms and Offensive Weapons Act, 1990, one of which was possession of a screwdriver. The list also contains a conviction for "disorderly conduct in a public place (night-time), sentence of 3 months, dated 17/04/2000 Dublin District Court no. 46." This seems to be the same offence as was referred to by Mr. Mannering as being an offence of threatening behaviour, because the order exhibited by him refers to the accused having been convicted on the 17th April, 2000, at District Court no 46, the same date as the conviction recorded in the Garda document for "disorderly conduct." The offence is "use or engage in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned contrary to section 6 of the Criminal Justice (Public Order) Act 1994." It is clear that the applicant was relying on the list of convictions furnished by the Garda Síochána, which uses different language to the technical language of the offence. This presumably explains the confusion that arose in relation to this matter in the present proceedings. However, what is in issue is what material the decision-maker had before him and how this was woven into his overall decision to refuse enhanced remission.

27. In Mr. Mannering's assessment document, he wrote under the heading of "previous criminal record": "Prisoner has a number of previous convictions for offences including No Insurance and Threatening Behaviour." This seems to me a rather cursory description of the applicant's criminal record as described above. Given the importance of a potential threat to the safety and security of the public to the overall decision on enhanced remission, it is surprising to see so little in the way of comment on the number and type of "threatening behaviour" offences, and the date of them or the age of the offender at the time. There is a significant difference, for example, between an offender who has a history of repeated and serious offences of violence and threats to individual persons, and someone who has one conviction for what the Gardaí at the time clearly viewed as a public disorder offence. Again, it is not clear what precise information Mr. Mannering had before him when making his decision; did he have the full list of District Court convictions, or was he relying on a general description contained in the Garda report? Did he assume that there were multiple convictions for serious forms of threatening behaviour? The Court does not know.

The Garda view

28. The Court was particularly struck in the present case by the state of the evidence regarding the Garda view. At the sentence hearing, only a limited portion of which transcript was exhibited to the Court, Senior Counsel on behalf of the applicant told the sentencing Judge that "the evidence that was given by the detective garda and that was, since the commission of this offence, that the accused has not come to the adverse notice of the Gardaí." What is particularly interesting about this in the present case is that, unusually, a period of 5 years had elapsed between the date of the offence and the sentencing hearing, during which the applicant was on bail. Thus, the applicant had not come to adverse Garda attention for the five years prior to the imposition of his sentence. What is also noteworthy is that the question was deliberately asked by Senior Counsel of the detective garda in the broadest possible terms and was not merely limited to whether the applicant had any convictions or charges during that period. As counsel said during the sentence hearing: "Now, I don't ask questions loosely and it's a very precise question and it's not limited to convictions, to charges, it's a wide open question, as the Court will be only too aware from its experience over the years. And the answer was no, and that is extremely significant." Thus, the Garda "clean bill of health" went considerably beyond the more routine and typical response that an offender had no convictions in the interim period; he had not come to "adverse attention" of the Gardaí at all during the five years prior to sentence.

29. The written character references handed in to the sentencing court on behalf of the applicant also appeared to show that during that period, he had been working with young people on a voluntary basis in sporting activities, and also that he had been significantly involved in community activities in respect of his housing estate.

30. On the evidence put before the Court in these proceedings, it would seem that the applicant's previous conviction history indicated that he had a long record of petty criminality, starting from when he was a minor. Significantly, all of his convictions were District Court convictions. There was no obvious suggestion that any addiction might be fuelling the offending, as there was an absence of drug-related convictions. There was no pattern of serious violent offending. Nor was there any pattern of involvement in serious property offending; at most there were two District Court theft convictions and one unauthorised taking of a vehicle. Coupled with that history, the Garda Síochána had expressed the view that in the five years prior to sentence, an unusually long sentence period, he had not come to their attention adversely in any manner. He appeared to be involved in sporting and community activities during those five years, according to the written character references. Despite the seriousness of the offence for which the applicant was sentenced, from this evidence, one would have thought that that there might be reason to believe that he had turned over a new leaf by the time he started his sentence.

31. It is not clear whether Mr. Mannering, when he was considering the application for enhanced remission, was aware of what the Garda officer had told the Court, as described above, at the sentence hearing. What is clear from his letter of refusal is that a Garda report was furnished to him prior to his decision on enhanced remission. It is also clear from the terms of the refusal letter that the Garda view was negative and played a role in the decision of Mr. Mannering to refuse enhanced remission, because it is expressly referred to in the letter of refusal as one of the reasons for the refusal. On the face of it, there seems to be a conflict between the Garda view in 2016 and the Garda view as expressed at the sentence hearing in 2012.

32. There may be some explanation for this and one can readily imagine hypothetical circumstances which would explain away the apparent inconsistency in the Garda views. For example, it may be that the Garda Síochána are in possession of intelligence that the applicant has been associating with people within the prison such as to cause concern about his potential behaviour on release. Having said that, a report from the prison governor might have assisted in that regard, but it is simply not clear whether the prison

governor furnished a report or not, although the applicant requested that one be furnished because he believed it would be favourable to him. Another example might be that the Garda Síochána received intelligence subsequent to the sentence hearing which gave them cause for concern that the applicant's associations and conduct pre-sentence were not as crime-free as they had understood at the time the Garda evidence was given to the Court. Or perhaps there was already something in his history that gave them concern, which somehow did not strictly fall within the phrase 'has not come to the attention of the Gardaí in the past five years,' which was the phrase used in Court, difficult though it is to envisage such circumstances. On the other hand, it is also a hypothetical possibility that the Garda report is not based upon reliable or intelligence-based information at all, and that any decision based upon it would be, from an objective point of view, utterly irrational.

33. The problem for the Court is that it does not have access to this particular piece of information that was available to the decision-maker, and yet is called upon to adjudicate as to whether the overall decision was capricious, arbitrary or unjust, without knowing what the information was, or even what the source of the information was, in general terms. Not every Garda view expressed in a report is necessarily based on sensitive intelligence.

34. Indeed, the applicant pointed out, in his affidavit sworn on the 8th November, 2016, that in his previous judicial review proceedings there had been reference in Mr. Mannering's assessment document to the Garda view being "poor" and included the statements "very likely to re-offend" and "see press report," which referred to a newspaper article published in April, 2012, which in turn quoted an anonymous Garda source stating that the applicant was suspected of having been involved in offences dating back to the 1990s with which he was never charged. If the decision-maker was preferring a four-year-old newspaper report quoting an anonymous source, over sworn testimony of a Detective Garda and all of the efforts made by the applicant while in prison, I would consider that to satisfy the test of capricious, arbitrary or unjust. But I simply have no information about the Garda view which played a role in the present refusal decision, not just in terms of what the information was, but even its general provenance.

35. A curious feature of the case was that not only was the Garda report itself not before the Court, but there was no claim of privilege in relation to it. The only reference to the matter in the Statement of Opposition is the somewhat oblique reference in paragraph 16, which pleaded:

> "*It is clearly in the public interest that the Respondents or each of them do not disclose the information or the content of internal discussions which they have had in relation to the grant of remission in respect of any prisoner. It is in the public interest that such disclosure does not take place or occur; otherwise it would be impossible for the prison authorities to make safe and secure decisions in the public interest in relation to the management of prisoners' sentences*."

None of the affidavits of Mr. Mannering made any reference to the issue of the Garda Report at all, a peculiar situation in circumstances where the Garda view was relied upon in the refusal letter as one of the grounds for refusal.

36. The absence of information about the Garda report and the absence of a formal claim of privilege over it caused the Court some concern during the original hearing. It may be that there was no claim of privilege over the report because there had been no formal discovery application for it from the applicant, although there had been requests for the report in correspondence on behalf of the applicant prior to the commencement of judicial review proceedings. At the hearing, counsel on behalf of the respondent relied upon a general claim of "confidentiality" in respect of Garda reports furnished to the prison authorities, and upon the decision of Noonan J. in *Doody v. Governor of Wheatfield Prison & Ors* [2015] IEHC 137 in this regard.

37. Subsequent to the hearing, finding myself troubled by the issue and, in particular, by the absence of a formal claim of privilege and the question of how privilege, if claimed, would interact with the narrow type of judicial review in question, I requested further submissions in respect of the question of the extent to which established principles and procedures on the role of the courts in adjudicating privilege apply in cases involving a review of executive action to which the "arbitrary, capricious or unjust" test applies; the applicability of certain case law, including *Murphy v. Dublin Corporation* [1972] 1 I.R. 215, on this issue; and whether there exists a general privilege or confidentiality which can be claimed by the Minister over Garda reports in this context. The Court also requested submissions on whether any, or any valid, claim of privilege was advanced in the present case.

38. In further written and oral submissions on behalf of the respondent on foot of this request, it was argued that there is an important public interest in the free flow of confidential information as between the prison authorities and An Garda Síochána, and that for a prisoner to be told what was in a Garda report in response to his application for enhanced remission, or for the Court to be told such information upon his application for judicial review, would have serious repercussions for this free-flow of information. The case of *Doody v. Governor of Wheatfield Prison & Ors* [2015] IEHC 137 was relied upon for the view that a general privilege or confidentiality applies to Garda reports in this regard, as it had been at the original hearing. It was argued on behalf of the applicant that there had been no valid claim of privilege on affidavit in the present case and that, following the line of authority established by *Murphy v. Dublin Corporation*, there could be no 'blanket' claim of privilege over certain categories of document before a Court established to administer justice under the Constitution and that the matter fell to be adjudicated by the Court on a case-by-case basis.

39. I have given consideration to the application, if any, of the principles established by *Murphy v. Dublin Corporation* [1972] I.R. 215 to Garda reports relied upon by a decision-maker on an application by a prisoner for enhanced remission. The facts of *Murphy v. Dublin Corporation* are of course at a considerable remove from the present case. The case concerned a compulsory purchase order in respect of land and the report in issue was that of an inspector appointed by the Minister for Local Government, in respect of which there was a claim of privilege, in the context of a discovery application in plenary proceedings challenging the compulsory purchase order. As Walsh J. pointed out at pp. 234-5, "[a] case such as the present one is far removed from the considerations which would apply in matters concerning the safety or security of the State." Nonetheless, the Court made important and far-reaching pronouncements of a very general nature, rejecting the idea that documents may be withheld from production simply because they belong to a particular class of documents, and discussing the role of the Court in adjudicating between competing public interests. The question of non-disclosure of Garda communications in particular arose in *Breathnach v. Ireland and Ors (No.3)* [1993] 2 I.R. 458, which was also in the context of a plenary proceeding, this time for damages for false imprisonment and malicious prosecution. The Court rejected the contention of the DPP that the claim for privilege should apply in a general manner to all such documents as being "wholly at odds" with the position of the courts as laid down in the authorities, although it was emphasised that the importance of communication between the Gardaí and the DPP was "clearly a matter which has to be taken into consideration in determining whether the public interest in the particular case requires its production." However, Keane J. (as he then was) did go on to say that "there may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down." He gave examples: (1) information supplied in confidence to the Gardaí, at least in cases where the innocence of an accused person was not in issue; (2) material which would be of assistance to criminals by revealing methods of detection or combatting crime; and (3) cases involving the security of the State, where even the disclosure of the existence of the document

should not be allowed. He said there might be other examples which had not even occurred to him. I also consider it important that Keane J. went on to assess the claim for privilege in the case before him in light of the evidential context as it then appeared to him, namely that the Court of Criminal Appeal had already determined that the primary facts found by the Special Criminal Court could only have led to the inference that the interrogation of the plaintiff had not complied with fair procedures and could not be regarded as voluntary. This distinguished the case from a case where a person who was acquitted of a criminal charge might simply embark on a fishing expedition through the garda files by instituting proceedings for wrongful arrest or malicious prosecution.

40. In *Skeffington v. Rooney and Ors* [1997] 1 I.R. 22, the issue of the disclosure of documents again arose in the context of plenary proceedings seeking damages for assault and negligence on the part of members of An Garda Síochána. This time, the documents sought were documents in the possession of the Garda Síochána Complaints Board. Keane J. again held that if there is a claim of privilege which is opposed, the matter must be decided by a court having seisin of the proceedings. He also said that "documents furnished in confidence to the party against whom the order of discovery is sought does not of itself make them privileged," citing *In re Kevin O'Kelly* (1974) 108 I.L.T.R. 97, *Burke v. Central Independent Television plc* [1994] 2 I.R. 61 and *Attorney General v. Mulholland* [1963] 2 QB 477.

41. I note also the decision of Keane J. in *DPP (Hanley) v. Holly* [1984] I.L.R.M. 149, in which a case had been stated from a District Judge as to whether he was correct in law in upholding the State's claim, made in bald terms, that a Garda Inspector's written report of an incident in criminal proceedings was privileged. Answering the question in the negative, Keane J. said that "a claim that communications between one member of the Gardaí and another in the course of their duties are inadmissible in evidence because as a class their admission would be against the public interest is no longer sustainable." Keane J. referred to the claim for privilege in the case as "made in bald terms" by the Superintendent, and noted that "he did not advance any specific ground of possible damage to the public interest which might result from the disclosure of the document in question." He said "a claim couched in such general terms must be rejected" but that "had specific grounds been advanced, it would have been necessary for the learned District Justice himself to read the document privately and determine its admissibility in accordance with the principles to which I have already referred […]."

42. The question arises as to whether and to what extent the principles identified in the above authorities apply to a judicial review application of the present kind, which I have characterised as judicial review of the exercise of an executive power of commutation or remission to which a restricted standard of review applies (the *Murray-Kinahan* standard referred to above). In this regard, the Court was referred to the decision of Noonan J. in *Doody v. Governor of Wheatfield Prison & Ors* [2015] IEHC 137. The decision in *Doody* relied to a considerable extent upon comments made by the Court of Appeal of England and Wales in the case of *Tucker v. Director General of the National Crime Squad* [2003] EWCA Civ 57. I therefore address the *Tucker* case in the first instance.

43. In *Tucker*, the context was a challenge by a Detective Inspector to a decision by his superiors transferring him from a position to which he had been seconded in the National Crime Squad, back to his local force. The bulk of the judgment concerns whether or not the decision in question was amenable to judicial review proceedings or not. The Court concluded that it was not, and this appears to have been the *ratio decidendi* of the case. The Court nonetheless went on to make comments on the 'fairness' grounds of the detective inspector's challenge and concluded that it was not unfair or contrary to the 'reasons' principle that he had not been given fuller information as to the reasons for his transfer. In the course of its comments on this aspect of the case, which appear to have been *obiter*, the Court said that the respondent had gone as far as he could in informing the officer why his secondment was being terminated having regard to the sensitive nature of the work and the degree to which confidential intelligence information was involved. The Court said, *inter alia*, that "[t]he very nature of the work to which he was seconded is such as to be likely to involve sensitive intelligence information," and that in "this type of case the duty of fairness requires no more than that the decision maker acts honestly and without bias or caprice." I think it is important to note the context in which these comments were made. The Court described the work of the National Crime Squad (N.C.S.), to which the applicant had been seconded, as "frequently of a sensitive nature." Further, the particular events at the time of the termination of the appellant's secondment and his engagement with the N.C.S. following the decision to return him to his home force arose out of a covert operation by the N.C.S. into drug related crime. In the course of the operation, ten people, some of whom were seconded officers, were arrested on suspicion of drug related offences. Two officers had their secondments terminated with immediate effect and were returned to their home force for disciplinary investigation. The appellant too had his secondment terminated, but without any disciplinary implications. The appellant was given some written information at a meeting with the Deputy Director General of the N.C.S. but he was aggrieved by the manner in which his secondment had been terminated and the association in the eyes of others with the serious allegations against the other officers. Correspondence ensued during which he pressed for further information but he was told, *inter alia*, that particulars of specific allegations or their source would be protected by public interest immunity and could not be given and that the reason for the decision related to the operational and confidential integrity of the N.C.S. and its operations. There was a further review by the Director General and another letter was written to the appellant stating that he had been advised that the appellant needed to develop his "skill areas of informant handling and decision making, bearing in mind the difficulties surrounding the source of the intelligence." He also said that fuller details might be given if and when the reasons for not doing so ceased to apply. I think this context is relevant because (1) it was absolutely clear from the context (a N.C.S. investigation into drug supply which led to disciplinary and criminal investigations into a number of police officers) that there was likely to be informant-sourced and other sensitive intelligence in issue; indeed the court itself said "[t]he very nature of the work to which he was seconded is such as to be likely to involve sensitive intelligence information"; (2) it was clear from what the appellant was told by management that sensitive intelligence was the reason he could not be told more; and (3) the N.C.S. management had gone as far as they possibly could in explaining matters to the appellant, given outstanding investigations and possible criminal proceedings, and had not only reviewed the matter on several occasions but indicated that they would give fuller explanations in the future if they could do so. This appears to me to involve a very different context to that in the present proceedings.

44. In *Doody v. Governor of Wheatfield Prison & Ors* [2015] IEHC 137, an application for enhanced remission was refused by a Department official acting on behalf of the Minister, on the basis of the nature and gravity of the offence and the potential threat to the safety and security of members of the public. The applicant had been convicted of the offence of false imprisonment and sentenced to seven years imprisonment with the last three years suspended. He participated in a number of courses in prison and attended 43 sessions with the psychology service which consisted of "personal and offence-focussed therapeutic work." Mr. Hickey, the actual decision-maker in the Department, swore an affidavit which described in detail the circumstances of the offence in respect of which the applicant had been sentenced. The applicant had 14 previous convictions for a variety of offences. Mr. Hickey had received a confidential report from the Gardaí who said that they were "not of the view that he was unlikely to re-offend." In his affidavit, Mr. Hickey said the following about the Garda report:

> "I cannot make any comment on the information provided by An Garda Siochana in this case as it was specifically provided and received on the basis that it is confidential. I have specifically taken instructions again from An Garda Síochána to see if any of this information can be divulged and I am instructed that all such information is to remain confidential in the public interest. However, as a general matter, some confidential information provided by An Garda

> Síochána may relate to ongoing investigations, which the Gardaí would not wish to be known by any prisoners and some might relate to other individuals who could be placed in danger if it became known. It is necessary to preserve the confidentiality of this information so as to preserve the candid channels of communication between the Irish Prison Service and An Garda Síochána. If the Irish Prison Service is hindered in its ability to receive confidential information from the Gardaí or if the Gardaí are forced to become circumspect in what information they provide, it could have serious safety issues both within the prison and the community."

In the course of his judgment, Noonan J. referred to the *Tucker* case as follows:

> "32. The question of the disclosure of sensitive information in a reasons based judicial review challenge to a decision does not appear to have directly arisen in this jurisdiction but was considered by the Court of Appeal for England and Wales in *Tucker v. Director General of the National Crime Squad* [2003] EWCA Civ 57 . The appellant was a detective inspector whose employment with the National Crime Squad was terminated summarily. No reasons were given other than a statement that the Director General of the National Crime Squad was acting on information which could not be disclosed. In dealing with this issue, Lord Justice Scott Baker delivering the court's judgment said:
>
> '43. It is clearly established that where there are real concerns about national security, the obligations of fairness may have to be modified or excluded…but as Mr. Westgate points out this case does not involve any issue of national security. It does however involve, using the expression broadly, 'sensitive intelligence information.' There is no reason in principle why the ordinary obligations of fairness should not be modified in this class of case just as they are in cases where issues of national security are involved. Certainly there is no authority that limits any modification or exclusion of the latter category […]
>
> 47. All this, it seems to me, adds up to the fact that this is a case that falls into the 'sensitive intelligence information' category. In this type of case the duty of fairness requires no more than the decision maker acts honestly and without bias or caprice.'"

45. It seems clear that Noonan J. was of the view that the *Tucker* approach was correct and that it applied to the case before him. He went on to hold that the applicant had failed to discharge the onus of showing that the decision was arbitrary, capricious or unjust, saying:

> "Reasons were given and the applicant seeks to go behind those. The Minister has declined to divulge the information underlying her conclusion that there is a threat to the safety and security of members of the public. She has explained why […] In my opinion the Minister was as a matter of policy entitled to take the view that the disclosure of information relied upon would not be in the public interest. It was within her competence to so decide and in the absence of any evidence of bad faith, it is not a matter in which the court can intervene."

46. The issue of the Garda report was also briefly addressed in *McKevitt v. Minister for Justice and Equality and Ors* [2015] IECA 122, concerning enhanced remission. The High Court (Kelly P.) took the view that it was unnecessary to express a view as to whether or not the Minister was entitled to take into account the Garda report, stating that even without that report, there was sufficient material to support the validity of the Minister's decision. The Court of Appeal, however, went somewhat further in this regard and said as follows (at para. 55):

> "The Court is satisfied that the Minister, in light of the fact that the applicant had been sentenced for directing a terrorist organisation, had failed to engage with offence focussed structured activities and had chosen to continue to associate with this organisation throughout his sentence, was entitled not to close her mind to other relevant and possibly more dominant and objective material concerning the prisoner's likelihood of re-offending, such as that which was available in this case from an Garda Siochana and the Prison Authorities."

47. There seem to me to be several important points of distinction between *McKevitt* and the present case. First, the offence of directing an unlawful organisation such as the IRA is one which, of its nature, suggests that the person holds a deep-seated ideology which is unlikely to be easily altered or addressed by programmes within the prison. Secondly, and perhaps for that reason, there was no connection at all between the authorised structured activities undertaken by Mr. McKevitt and his offending behaviour. For example, taking a course in yoga was hardly likely to inspire confidence that he was addressing the root causes of his offending by way of directing the IRA. Thirdly, there was clear evidence that he was continuing to associate with the unlawful organisation while in prison, and that he was still a spokesperson for 'Oglaigh na hEireann,' as well as correspondence showing that he considered himself a "political hostage." Fourthly, he had chosen not to avail of an eight-week programme offered by the Probation Service to which he could have gained access, which programme was considered a strong indicator of a genuine effort on the part of a prisoner to reduce their risk of re-offending. Fifthly, there was no apparent inconsistency regarding the Garda views concerning Mr. McKevitt at different points in time, such as there appears to be in the present case.

Discussion and Conclusion in respect of the Garda report/privilege issue

48. In the present case, it is noteworthy that not only was there no claim of privilege made on affidavit, but there was no averment even of a general nature, such as that which was put forward by Mr. Hickey in *Doody*, as described above. The respondent relied upon one paragraph in the Statement of Opposition which claimed that it was in the public interest that the respondents do not disclose "internal discussions" concerning prisoners. In my view, the State in the present case did not put forward a claim of privilege properly so-called, but rather a generic claim that all documents falling within a particular class, namely Garda reports furnished to the Minister in the context of an enhanced remission application (or perhaps even Garda reports furnished to the prison authorities/Department of Justice more generally), were protected by "confidentiality." In my view, there is an important legal distinction, identified in the authorities referred to, between a claim of confidentiality (which is not a recognised form of privilege) and a claim of privilege, which may fall into a number of types: legal professional privilege; statutory privilege; informer privilege; or public interest privilege, which encompasses matters such as sensitive intelligence or Garda methods of conducting investigations. Informer privilege may overlap with intelligence, but has long been recognised as a self-standing privilege also. I accept of course that there are some situations in which it is not even necessary for a Court to inspect a document or group of documents because of the indication that has been given as to their contents (as stated in *Ambiorix Ltd. and Ors v Minister for the Environment and Ors (No.1)* [1992] 1 I.R. 277, and in *Breathnach v. Ireland and Ors (No.3)* [1993] 2 I.R. 458), but it does seem to me that before the Court even reaches that decision, there should be in place a claim of privilege and an indication as to the type of privilege being claimed.

49. The question then is whether, notwithstanding the Irish authorities concerning claims of privilege and the role of the courts under the Constitution in adjudicating such claims, there is a zone of non-adjudication in respect of communications between the Gardaí and

the prison authorities/Minister which arises from or is somehow connected with the limited nature of the review standard applicable to decisions in enhanced remission cases, and covers all Garda reports given to the Prison Service in this context. Although I can readily understand the desire of the prison authorities and the Garda Síochána to protect the confidentiality of their lines of communication, I find myself respectfully unable to follow the conclusion of Noonan J. if and insofar as he held that there is a zone of complete immunity of Garda reports from court scrutiny in cases such as a the present one which is based on a general claim of confidentiality. Having regard to the repeated emphasis of the Irish courts in the authorities referred to on the role of the court in adjudicating claims of privilege on a case-by-case basis and the non-existence of a blanket category of non-reviewable documents, it is my view that, if necessary to the resolution of the case, it may be that privilege should be claimed in respect of a Garda report which was one of the reasons for refusal of enhanced remission, and the issue determined by the Court if necessary.

50. I hasten to add that the fact that there may be *some* limited role for the court in this area in a particular case does *not* mean:

> (a) That every time a prisoner makes an application for enhanced remission, he is automatically entitled to see the Garda report;
>
> (b) That every time there is a challenge to a refusal of enhanced remission by way of judicial review, there must necessarily be an inspection by the Court of any Garda report over which privilege is claimed; or
>
> (c) That the existence of a valid claim of privilege necessarily leads to a conclusion one way or another as to whether a Minister's refusal of enhanced remission was arbitrary, capricious or unjust.

51. Rather, bearing in mind that each case must be decided within its own evidential context, it seems to me that the issue of the Garda report is sufficiently important in the present case to have warranted the invocation of the necessary procedures concerning an adjudication on privilege. In the present case, an unusual evidential context arose from an apparent conflict between the Garda view as expressed on oath in open court at the time of the sentence hearing, and the Garda view as apparently expressed to the decision-maker in a 2016 report which formed part of the reason for the refusal of enhanced remission.

52. I should also say that I have considered the question of whether the fact that enhanced remission is a privilege as distinct from a right in any way alters the application of the *Murphy* principles. I do not think so. The grant of enhanced remission is the exercise of a discretionary power, but it is a power which is subject to the review of the Court on the "arbitrary, capricious or unjust" test. This appears to me to mean that while a prisoner has no right to enhanced remission *per se*, he or she does have a right to a decision on enhanced remission which is not arbitrary, capricious or unjust. I cannot see how the Court can exercise the (limited) review power properly unless it has before it either the materials upon which the decision was based or a valid claim of privilege in respect of such of those materials as are privileged.

53. What are the consequences of the above for the present case? This is the second judicial review application in respect of the applicant's request for enhanced remission. He is on bail pending the determination of these proceedings. An application by him some months ago for relaxation of the bail conditions was opposed by the Gardaí. If the Court were to quash the decision *on the basis that on the evidence laid before the Court and in the absence of a claim of privilege*, the decision appears to be arbitrary, capricious or unjust, this will not end the matter. The applicant would undoubtedly re-apply for enhanced remission, there is likely to be a further refusal of it, and it seems likely that a third set of judicial review proceedings would be initiated, in which fuller evidence might be laid before the Court and a formal claim of privilege made over the Garda report. Meanwhile, the issue of whether the applicant should remain on bail would arise. From the point of view of time and costs, all of this seems to me most undesirable. Accordingly, I have decided that the best course of action is to permit the respondent, if she wishes to do so, to file such further affidavits as are necessary: (a) to make a formal claim of privilege in respect any Garda report, or part thereof, relied upon by the decision-maker in reaching the decision; and (b) setting out any further information that was before the decision-maker concerning the applicant's criminal history prior to his conviction for the offence of conspiracy to commit theft, and/or the circumstances of that offence and the role of the applicant in it. If a claim of privilege is made, it may be that the applicant will wish to cross-examine the deponent and/or request the Court to view the Garda report itself. In the first instance, however, the respondent should indicate whether or not it is intended to file any affidavits dealing with the above matters.

54. I appreciate that the applicant might see this decision as allowing for the mending of the respondent's hand. However, in reality, he cannot get what he ultimately wants from the Court in any event, namely a grant of enhanced remission. At best, he can have the existing decision quashed and the matter remitted for decision again. The same issues will inevitably arise. It is, in my view, better to have the matter dealt with thoroughly and properly and brought to a conclusion without a third set of proceedings having to be brought. I will take into account the history and development of this case when the issue of costs arises in due course, but for the present, I will adjourn the case to enable the respondent to decide whether or not she wishes to file further affidavits within the parameters identified at paragraph 52 above.