THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 122

Ryan P.
Irvine J.
Edwards J.

[Appeal No. 1457/14]

Michael McKevitt

Appellant

- And-

Minister For Justice & Equality, Irish Prison Service, Ireland and Attorney General

Respondent

Judgment of the Court delivered on the 18th day of day of June 2015 by Ms. Justice Irvine

1. This is an appeal against the judgment and order of the High Court (Kelly J.) of the 9th December, 2014, whereby the trial judge refused the applicant an order of *Certiorari* quashing a decision of the first named respondent ("the Minister") refusing him what is described as "enhanced remission" under Rule 59 of the Irish Prison Rules 2007 ("the Rules"). Thus, the issue for consideration on this appeal is the correct interpretation of the Minister's discretion under Rule 59 (2) and the matters to which she may have regard when making a decision on any such application.

Factual Background
2. The background to these judicial review proceedings is fully set out in the judgment of Kelly J. but, for the purposes of clarity, are briefly summarised here again.

3. The applicant was 65 years of age at the time he initiated these proceedings and is currently detained in Portlaoise Prison. He was convicted on 6th August, 2003, on one count of membership of an unlawful organisation contrary to s.21 of the Offences Against the State Act 1939, as amended, and one count of directing the activities of an organisation in respect of which a suppression order had been made contrary to s.6 of the Offences Against the State Act 1998. The applicant was sentenced to 6 years imprisonment on the first count and to 20 years imprisonment on the latter count. Both sentences were set to run concurrently from the 29th March, 2001, the date upon which he first went into custody. Assuming that the applicant will benefit from a one quarter remission of his sentence for good conduct, as envisaged in Rule 59 (1), his prospective release date is 26th March, 2016.

4. The applicant has been serving his sentence on what is known as the E2 "Republican" Landing of the prison. This area has been reserved for housing republican prisoners and was in existence for over 20 years prior to the introduction of the Prison Rules of 2007. At the times relevant to these proceedings, there were 13 prisoners on the landing who operated quasi-military structures reflecting their membership or relationships to the proscribed organisation. Those prisoners look after their own living area and roster the work to be done in relation to health and safety, food management and cleaning duties. This is not an official arrangement and is not overseen by the Governor. It is accepted that prisoners in this area have less contact with prison staff as such communications are conducted through "Officers in Command".

5. When the Rules were introduced in 2007, these were notified to prisoners by means of a notice placed on a notice board. The text of this letter is referred to later in this judgment.

6. While serving his sentence, the applicant has been disciplined on two occasions: the first in 2001 and the second in 2004. He maintains that both were the result of collective action taken by the Prison Service against the general population of prisoners on the E2 landing. Regardless of these events, the applicant says that his conduct has been good and that his positive influence on the prisoners on E2 landing has been such that he has been categorised as having "enhanced" status within the prison. Apart from engaging in work on the E2 landing, he has also participated in numerous educational activities, including courses in Computers, Web Design, Photoshop, Digital Imaging, French, English, Creative Writing, Speech and Drama, Music, Art, Home Economics and Yoga. The applicant has also been granted temporary release without incident in April, 2004 and January, 2012.

7. On 14th July, 2014, the applicant forwarded to the Governor of the Prison an application seeking a one third remission of his sentence pursuant to Rule 59 (2). Had his application been successful, his date for release would have been 26th July, 2014. In response, Mr. Paul Mannering of the Operations Directorate of the Irish Prison Service, wrote a letter dated 15th July, 2014, in which, after describing the discretionary nature of Rule 59. (2), he requested the applicant to submit evidence of offence focused work in which he had engaged, together with supporting documentation, in order that his application could be considered. The applicant replied on 21st July, 2014. In that letter he referred to his good conduct and disciplinary record as well as his educational achievements. Further, he enclosed a number of certificates relevant to his participation in certain authorised structured activities. He stated that he believed he had satisfied the criteria for enhanced remission under Rule 59 (2) and that, as a result, his release date should be 26th July, 2014. Accordingly, he requested that his application be considered before that date.

The Proceedings
8. On 14th August, 2014, no decision having been notified to the applicant, his solicitor sent a letter to Mr. Mannering drawing his attention to the then recent decisions of the High Court in the cases *of Edward Ryan v. Governor of Midlands Prison* [2014] IEHC 338 and *Niall Farrell v. Governor of Midlands Prison* [2014] IEHC 392, in which successful applications had been made to the High Court, under Article 40.4.2 of the Constitution, for the release of prisoners who were in an allegedly identical position to that of the applicant. He drew attention to the conclusions of the court in those cases in support of his assertion that the Minister was not entitled "to rely on anything other than information relevant to Mr. McKevitt's work history while on the E2 wing and his educational attainment there" when making her decision. In such circumstances, he urged an immediate consideration of his client's position and advised that in default an application would be made seeking his release using the mechanism of Article 40.4.2 of the Constitution.

9. Such an application was made to the High Court on 8th August, 2014, and on that date the application was adjourned for hearing until the 11th August, 2014. On that date Mr. Brian Murphy, the Governor of Portlaoise Prison, swore a replying affidavit in which he referred in some detail to the Minister's decision to refuse the applicant's request for enhanced remission.

10. On 1st September, 2014, Barton J. refused the application under Article 40.4.2 of the Constitution, whereupon the applicant immediately applied to Cross J. for leave to commence these judicial review proceedings seeking to challenge the decision of the Minister. A Statement of Opposition was filed on 22nd September, 2014. This was supported by another affidavit sworn by Mr. Murphy, the content whereof is very fully set out in the judgment of the trial judge.

11. The judicial review proceedings were heard by Kelly J. in the High Court and, as already mentioned, he delivered his judgment dismissing the applicant's claim on 9th December, 2014. For the purpose of considering his conclusions, and indeed those of his colleagues in Ryan and Farrell, the Court thinks it would be helpful to set out the Rules that were, at that time, material to the decision of a minister when faced with an application for enhanced remission.

Rules Governing Applications for Enhanced Remission
12. The Irish Prison Rules 2007 provide as follows:-

> "27(1) Subject to any restrictions imposed under and in accordance with part 3 of the Prisons Act 2007 and Part 4 of these rules, each prisoner shall be allowed to spend as much time each day out of his or her cell or room as is practicable and, at the discretion of the Governor, to associate with other prisoners in the prison.
>
> (2) Subject to Rule 72 (Authorised structured activity), each prisoner may, while in prison, engage or participate in such structured activity as may be authorised by the Governor (in these Rules referred to as "authorised structured activity"), including work, vocational training, education, or programmes intended to ensure that a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community.
>
> …
>
> 59(1) A prisoner who has been sentenced to:
>
> (a) a term of imprisonment exceeding one month, or
>
> (b) terms of imprisonment to be served consecutively the aggregate of which exceeds one month,
>
> shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate.
>
> (2) The Minister may grant such greater remission of sentence in excess of one quarter, but not exceeding one third thereof where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to re-integrate into the community. "

13. Since the delivery of the judgments of the High Court in *Ryan, Farrell* and that of Kelly J. in these proceedings, the Irish Prison Rules of 2007 have been amended by Statutory Instrument. As these new rules were relied upon in the submissions made on the applicant's behalf on the present appeal, the Court will set out the relevant provisions for ease of reference.

14. By Statutory Instrument No. 385 of 2014 the Rule 59 (2) has been substituted by the following provision:-

> "4. Rule 59 of the Principal Rules is amended by substituting the following for paragraph (2):
>
> "(2)(a) "A prisoner who has engaged in authorised structured activity may apply to the Minister for enhanced remission.
>
> (a) 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.
>
> (b) An application under subparagraph (a) shall not be made earlier than 6 months prior to the date on which the prisoner would be released if enhanced remission of one third of the prisoner's sentence were to be granted to him or her.
>
> (c) 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.
>
> (d) 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.
>
> (e) 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).

(f) 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."

5(1) These Rules shall apply to a pending application subject to the modification that subparagraph (c) of Rule 59(2) (amended by Rule 4) of the Principal Rules is deleted.

(2) A prisoner who has made a pending application may submit further information or documentation in support of his or her application.

(3) In this Rule "pending application" means an application for remission under Rule 59(2) of the Principal Rules—

(a) made at any time before the date of the coming into operation of these Rules, and

(b) in respect of which the Minister had not, before that date, made a decision."

The Impugned Decision

15. In the course of considering the validity of the applicant's claim for the relief claimed, Kelly J. appears to have concluded that the Minister's decision to refuse him enhanced remission was based on the following matters which had been made known to her:

(a) First, there was no evidence to demonstrate that the applicant had accepted responsibility for the offence for which he had been convicted let alone expressed any regret/remorse for the criminality of his actions;

(b) Second, the applicant was still a spokesperson for the group styling itself Óglaigh na hÉireann and that, on account of his continued involvement with the group, the Prison Service was of the view that the applicant would continue to engage with that organisation on his release.

(c) Third, there was evidence of correspondence in which the applicant referred to himself as a "political hostage" in addition to which representations had been made on his behalf by the "spokesperson for Republican prisoners";

(d) Fourth, that in the view of An Garda Síochána, the applicant would likely re-engage in offending on release on account of, inter alia, his seniority within the unlawful organisation. This being so his release would be a boost to that organisation;

(e) Fifth, although on the "enhanced" regime since 20th October, 2012, the Incentivised Regimes policy did not apply to prisoners such as the applicant given that the policy was based on the personal relationship between Class Officers and individual prisoners and no such relationships were present in the E-block. Hence, those prisoners were classified as enhanced for the purposes of gratuity payments only;

(f) Sixth, although the applicant had carried out some duties on the E2 landing, including work related to food safety and cleaning duties, there were no records as to the extent of that work as it was unsupervised by prison staff and conducted by the inmates themselves. For this reason, the work could not count as an authorised structured activity within the context of Rule 59(2);

(g) Seventh, the applicant had not availed of an eight week "Choice and Challenge Programme" offered by the Probation Service to which he could have obtained access via the Governor of the prison. Voluntary engagement with such a programme was to be considered a strong indicator of a genuine effort on the part of a prisoner to reduce the likelihood of their re-offending and one which would increase the likelihood of their successful re-integration into society on release and that, conversely, a failure to engage with the Probation Service, as in this case, was "in the experience of the Prison Service, a strong indication to the contrary".

16. In the High Court, the applicant relied on a multiplicity of grounds to challenge the decision of the Minister. The Court will now

refer solely to those which remain material to this appeal. First, he claimed that the Minister had erred in giving preference to one type of structured activity over another, given that his application was refused notwithstanding the fact that he had participated in many of the "authorised structured activities" defined in Rule 27. In addition, he claimed it was unfair that the Governor had not advised him that engagement with the Probation Service was a weighty factor to be taken into account on the consideration of any application for enhanced remission made by prisoners on the E2 landing. The next ground of complaint was that the Minister had erred in not confining the exercise of her discretion to a consideration of how the applicant had engaged in authorised structured activity; she had impermissibly taken extraneous material into account, including the fact the applicant supported republicanism, the fact that he had been disciplined twice and the view of An Garda Síochána that he would likely re-offend on release. Finally, the applicant claimed that there had been a breach of fair procedures on the part of the second named respondent in failing to engage adequately with him as to the approach he might best deploy in relation to the authorised structured activities, having regard to his intention to apply for enhanced remission.

17. As previously mentioned, Kelly J. rejected the applicant's claim for an order of *Certiorari* quashing the decision of the Minister. He commenced his detailed judgement with an analysis of the origin of the Minister's power to remit prison sentences. Thereafter, he considered in significant detail a number of the recent decisions of the High Court concerning the proper construction of Rule 59 (2). For this purpose, he set out the material facts in the cases of *Ryan* and *Farrell* and quoted extensively from the judgments of Barrett J. and Hogan J. in those cases. He also considered the somewhat different approach taken to the same provision by Peart J. in *Keogh v. Governor of Mountjoy Prison* [2014] IEHC 402 before concluding that, on the correct interpretation of Rule 59 (2), there was ample material to justify the Minister's decision to refuse the applicant the enhanced remission which he had sought, even if the views of An Garda Síochána were excluded as impermissible.

18. Core to the decision of the High Court judge was a comparative analysis of the language used in Rule 59 (1) and Rule 59 (2). He was satisfied that use of the permissive word "may" in Rule 59 (2), as opposed to the mandatory word "shall" in Rule 59 (1) demonstrated that a discretion had been conferred on the Minister whereby she was entitled to refuse enhanced remission even if a prisoner had satisfactorily engaged in one or more authorised structured activities. He concluded that the Minister had to be satisfied that, as a result of that participation, the prisoner was less likely to re-offend and would be able to better re-integrate into the community. The fact that Rule 27 (2) makes clear that the objective of authorised structured activity is to reduce the prisoner's likelihood of re-offending did not, he was satisfied, mean that this objective was achieved in every case. He pointed to the fact that to make an automatic assumption that engagement in authorised structured activity necessarily reduced a prisoner's likelihood of re-offending could lead to absurd results. At para. 72 of his judgement, he instanced the fragility of such an assumption by reference to the convicted child pornographer who would be entitled to maintain an automatic right to be assumed less likely to re-offend and better re-integrate into society on the basis that he had completed a computer course. This could not, the High Court judge concluded, have been the intention of Rule 59 (2). For this reason, he was satisfied that the Minister had a discretion to grant or refuse enhanced remission depending upon whether she was satisfied, on the facts of the individual case, that the prisoner's participation in authorised structured activity had rendered them less likely to re-offend and better able to re-integrate into society.

19. As to the approach to be adopted by the court when asked to interfere with a decision concerning the refusal of remission, he adopted that line of jurisprudence which emphasises the importance of the constitutional separation of powers when dealing with the implementation by the executive of a judicially imposed sentence before concluding that such decisions should not be interfered with unless the evidence established that the power concerned had been exercised in a capricious, arbitrary or unjust manner.

20. Finally, it should be noted that the High Court judge did not determine whether or not it was lawful for the Minister, when considering an application for enhanced remission, to take into account the views of An Garda Síochána as to whether they considered the prisoner likely to re-offend on release, as had happened in the present case. Neither did he specifically direct his judgement to a consideration of whether or not the decision of the Minister should be quashed on the grounds that it was made against a backdrop of procedures which were unfair.

The Submissions of the Parties on this Appeal.

The appellant's submissions

21. At the heart of this appeal is the submission that the trial judge, Kelly J., incorrectly construed Rule 59 (2) in that he concluded that the Minister's discretion was not confined solely to a consideration of the inmate's level of involvement in available authorised structured activity and in holding it lawful for the Minister to weight different forms of authorised structured activity differently. The applicant also contends that the trial judge erred in holding that the Minister had discretion to consider material extraneous to the participation of the prisoner in authorised structured activities.

22. Mr. O'Higgins S.C., counsel for the applicant, submitted that the use of the word "may" in Rule 59 (2) as opposed to "shall" meant that when the conditions precedent in that provision had been satisfied, the minister "must" decide in favour of the applicant as the discretion provided under that rule was very narrow. According to counsel, the relevant test was not whether, as a result of the authorised structured activity, the applicant was not going to re-offend, but rather whether he was "less likely to re-offend". He emphasised that the authorised structured activities were designed to promote rehabilitation. That being so, it had to be assumed that once a prisoner could demonstrate fulsome participation in such activities they were to be considered less likely, by reason of such additional education, to re-offend.

23. Accordingly, it was submitted that, on the correct interpretation of Rule 59 (2), once a prisoner engaged in, and completed to the satisfaction of its convenor, a course designated as an authorised structured activity, the Minister had no discretion but to grant the enhanced remission sought.

24. Counsel went to great length to submit that this was the correct interpretation of the Rules as they stood at the time before the minister chose to amend them. He argued that there was no legitimate basis upon which the respondents were entitled to draw up a list of allegedly relevant criteria which were not explicitly advised in the rule itself. Counsel submitted that it would be highly anomalous to the constitutional order if the decision-maker was the party entitled to decide what the relevant criteria were for the purpose of exercising their own decision making power.

25. Finally, counsel submitted that even if he was wrong as to the proper construction of Rule 59 (2), the Minister's decision was in any event unlawful as it had been made in breach of the applicant's right to fair procedures. In that regard, he relied upon the evidence that the applicant had sought formal guidance as to how best to obtain enhanced remission but had not received any specific direction in this regard from either the Governor of the Prison or the relevant official of the Prison Service. Counsel submitted that it was unfair that, after attending numerous courses and attempting to obtain enhanced remission, *i.e.* "going down a certain path in good faith", the applicant should be informed at that stage that the relevant criteria were other than what he argued was a straight forward interpretation of the Irish Prison Rules 2007.

The respondent's submissions
26. Mr. McGuiness, S.C., counsel for the respondent, submitted that the applicant was attempting to rewrite Rule 59 (2) with words that were not there. He highlighted that, unlike Rule 59 (1), Rule 59 (2) used the word "may" as opposed to "shall". Counsel argued that the interpretation sought to be advanced by the applicant, *i.e.* that the Minister was compelled to grant the full one third remission on being satisfied that the applicant had successfully completed some authorised structured activity, was one that would have the effect of obliterating the discretion given to the Minister by Rule 59 (2). In particular, he argued that the interpretation advanced by the applicant was one which, if correct, would give the prisoner, as opposed to the Minister, the power to grant himself enhanced remission simply by partaking in authorised structured activity. In this regard, he emphasised that the statutory and constitutional regime placed the Minister in charge of the delegated power to grant remission.

27. Counsel submitted that the correct interpretation of Rule 59 (2) was that the Minister, having satisfied herself as to the good conduct of the prisoner by reason of their satisfactory participation in authorised structured activity, had to decide, on the basis of the personal circumstances of the prisoner, what their base line risk of re-offending was and then proceed to consider whether by reason of their participation in such activity there was a lessening of that risk. In this regard, it was submitted that the Minister was entitled to consider all materials necessary to that enquiry.

28. Finally, in relation to the fair procedures argument, counsel submitted that the applicant had been made aware, by virtue of the notice on the prison notice board, that for the purposes of an application for enhanced remission the structured activities in which they might participate had to be both authorised and relevant to their offending behaviour. Thus, it was submitted that the applicant had not been "led down the garden path" in relation to which activities were eligible for consideration in the scheme. He ought to have been aware that his work on the E2 landing would not qualify as those duties were unofficial and predated the scheme. Further, it was argued that the applicant could not have expected that his simple participation in the courses which he had undertaken would automatically result in enhanced remission having regard to his personal circumstances.

Decision
29. A good starting point from which to consider the judgement of the High Court and, hence, the proper construction of the relevant Rules is a consideration of the type of function which is performed by the Minister when deciding whether or not to grant enhanced remission further to an application made under Rule 59 (2).

30. It is clear that, given the relevant constitutional and legislative provisions, when the Minister embarks upon a consideration of any such application, she is exercising an executive rather than an administrative function. This is so because the power to remit any prison sentence emanates from Article 13.6 of the Constitution which provides as follows:–

> "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."

31. The legislature, in its enactment of the Prisons Act 2007, conferred on the Minister for Justice and Equality, by virtue of s. 35 (2) (f), the power to make rules providing for the remission of a portion of a prison sentence, and these are the Rules under consideration on this appeal.

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."

33. In each of the judgments relied upon by the parties to this appeal, it has been repeatedly acknowledged that the responsibility conferred upon the Minister to grant enhanced remission is one which carries with it very significant responsibility given that remission, if granted, brings to a premature end a sentence earlier imposed by the court. Accordingly, the exercise of this power has very serious consequences not only for the prisoner but for the community at large.

34. This being so, it seems to the Court quite a radical argument to propose, as is done on this appeal, that the proper construction of Rule 59 (2) requires the Minister, once satisfied that a prisoner has successfully engaged with some "authorised structured activity" during the period of their incarceration, to grant them enhanced remission on the supposition that they are thereby less likely to re-offend, even though there may be no apparent correlation between those activities and the prisoner's history of offending. That construction, to the Court's mind, is even more difficult to accommodate if, as was accepted by Hogan J. in *Farrell*, the Minister, at the time of making her decision, was in possession of and entitled to consider the advice of An Garda Síochána to the effect that the prisoner, in their view, was likely to re-offend and, further, that they were to be presumed to be correct in that opinion.

35. In *Farrell*, a republican prisoner from the E block sought enhanced remission on the basis of continued good conduct and participation in authorised structured activity. His application was refused on the grounds that he had not engaged with the Probation Service, a matter considered to be material to his risk of re-offending. Further, the Minister had been furnished with a report from An Garda Síochána which advised that the prisoner would be likely to re-offend if released. In the course of his judgement, Hogan J. stated as follows :-

> "21. The Gardaí may well be correct in their assessment, but it is not a factor which the Minister can legitimately take into account for the purposes of a Rule 59 (2) application. The single question permitted by Rule 59 (2) is whether the Minister is satisfied that by reason only of a prisoner's participation in authorised structured activities, that prisoner is less likely as a result to re-offend and to re-integrate into the community."

36. In circumstances where the applicant criticises the High Court judge for failing to follow *Ryan* and *Farrell* and asserts that these decisions correctly construe the relevant rules, it is material to refer to what Hogan J. considered to be the proper construction of Rule 59 (2), a construction clearly influenced by what he considered to be the definition of "authorised structured activity" in Rule 27

(2). His consideration of Rule 27 (2) commences at paras. 22-29 of his judgement where he stated as follows: –

> 22. It must also be recalled that the definition of "authorised structured activity" in Rule 27 (2) envisages participation in work, education, vocation training and other programmes sanctioned by the Governor which are in themselves intended to ensure that "a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community". Rule 27 (3) further envisages that "insofar as is practicable" each convicted prisoner "should be engaged in authorised structured activity for a period of not less than five hours on each of five days in each week".
>
> 23. The scheme of the Prison Rules, therefore, ordains that prisoners should generally engage in regular authorised structured activity for twenty five hours each week. Such activities are, however, by definition, designed to ensure that participants "will be less likely to re-offend and to re-integrate into the community". (Rule 27 (2) uses the disjunctive "or" rather than the conjunctive "and" which appears in Rule 59 (2), but I do not see that this difference is material so far as the assessment of the present legal issues is concerned.) The entire relationship between Rule 27 (2) and Rule 59 (2) is accordingly somewhat circular. The permitted structured activities are those which are likely to reduce the risk of re-offending. It follows that where a prisoner participates successfully in such activities [for the requisite periods of time in the manner ordained by Rule 27 (3)], the Minister would be obliged to conclude that he was less likely to re-offend, so that the enhanced remission provisions of Rule 59 (2) would accordingly be triggered.
>
> 29. …As rule 27 (2) makes clear, the very definition of authorised structured activities contained in that sub rule presupposes that by participation in such activities the applicant was less likely to re-offend as a result. Just as in *Ryan*, therefore, the very fact that the applicant successfully participated in these activities must by definition have rendered him less likely to reoffend [in the sense understood by rule 59 (2)]"

37. In reaching this conclusion, he endorsed the views of Barrett J. in *Ryan* who had considered very similar issues. Without wishing to oversimplify the facts in *Ryan*, it is common case that Mr. Ryan had been convicted of two serious offences, each involving possession of a firearm with intent to cause injury to others contrary to certain provisions of the Firearms Act 1964. He was incarcerated in the Midlands prison where he had demonstrated good conduct by participation in a number of authorised structured activities and, in particular, by his engagement with a carpentry programme. However, Mr. Ryan was ultimately refused enhanced remission on the grounds that he had not engaged in other structured activities which were deemed to be material to his risk of re-offending. The High Court judge, before concluding that the Minister acted unlawfully in failing to grant enhanced remission, construed Rule 59 (2) against the backdrop of Rule 27 (2) which he referred to in the following fashion at para. 20 of his judgment.

> "….pursuant to Rule 27 (2) of the Prison Rules, all authorised, structured, in prison activities have as their equal aim making a prisoner "less likely to re-offend or better able to re-integrate into the community", some such activities are considered preferable to others. No party before the court has contended that any of the structured prison activities offered by the Irish prison service are, in and of themselves, in any way deficient in achieving their stated aim and thus it follows logically that, by participating in the authorised structured activities in which he did, Mr. Ryan must have rendered himself less likely to re-offend and so better able to re-integrate into the community."

38. Barrett J. went on to conclude, *inter alia*, that the respondent, in refusing the applicant enhanced remission when he had engaged upon a number of authorised structured activities, on the basis that he had not engaged with certain offence focused activities organised by the Probation Service and the Psychology Service, had created a hierarchy amongst authorised structured activities, something which was not permissible having regard to the objectives for which each had been designed.

39. Having considered all of the reasoning and analysis of Hogan and Barrett JJ. concerning the construction and inferences to be drawn from Rule 27 (2), the Court regrets to say that it does not share their conclusions. The Court much prefers the analysis of this provision as advised by Kelly J. at paras. 71-72 of his judgment.

40. In those paragraphs he states, and the Court fully agrees with him, that it is undoubtedly the case that "authorised structured activity" is designed by the prison authorities, as the rule makes clear, with the objective of ensuring that prisoners who engage therewith will be less likely to re-offend and better able to re-integrate into the community as a result. This is clear from the rule itself, which provides that the programmes are "intended to ensure that a prisoner, when released from prison, will be less likely to re-offend or better able to re-integrate into the community." However, while this is obviously the intention underlying the provision of such activities, it does not necessarily follow *ipso facto* that the desired objective will be achieved in every case such that all prisoners who participate in such activities must be considered less likely to re-offend and better able to re-integrate into the community. Even if each and every authorised structured activity is fit for purpose and may achieve its intended objective in respect of a substantial number of prisoners who participate therein, whether it succeeds in achieving it's objective for any particular participant must surely depend upon the individual circumstances of that offender.

41. Take, by way of example, a prisoner convicted of sexual offences in relation to a child. Let us assume he has a particular interest in woodwork. Is it to be stated that because he successfully participates in an approved woodwork programme that the Minister must assume he is less likely to re-offend and will, as a result, be better able to re-integrate into the community such that he must automatically be granted enhanced remission? On the basis of the decisions in *Ryan* and *Farrell*, the answer is yes. However, the Court prefers the construction of the relevant rule as detailed by the High Court judge in this case which affords the Minister the discretion to answer that question in the negative.

42. The difficulty with the approach as proposed on the applicant's behalf based upon the decisions in *Ryan* and *Farrell* is perhaps better demonstrated by the addition of some further facts to the case study last referred to. Let us assume that the offender has served three separate periods of imprisonment for offences concerning child sexual abuse; has refused to engage with all available programmes for the rehabilitation of sex offenders; has repeatedly been found in possession of child pornography and has expressed himself desirous of early release so that he can re-engage in such illegal activities. To the Court's mind, it is neither practical nor logical to contend for the proposition that because the authorised structured activity advised in Rule 27 (2), in this case the woodwork programme, was designed to ensure that prisoners who participate therein will be less likely to re-offend, the Minister, once satisfied that the prisoner has satisfactorily completed that programme, must assume they are "as a result" less likely to re-offend and must grant them enhanced remission. Of course, it goes without saying that for many prisoners, such as those who may be considered to have become involved in crime through lack of education or vocational training, that participation in a woodwork programme might well be expected to achieve, at a minimum, some reduction in their risk of re-offending but whether it does or not, in the Court's view, must depend on the circumstances of the prisoner concerned.

43. The Court also rejects the submission that Kelly J. incorrectly construed Rule 59 (2) when he concluded that the Minister's discretion was not confined solely to a consideration of the inmate's level of involvement in available authorised structured activity

and in holding it lawful for the Minister to weight different forms of authorised structured activity differently depending on the individual circumstances of the offender and the activity with which they had engaged. On a proper construction of Rule 59 (2), the Minister is not, in the Court's view, obliged to treat all structured activities as of equal value to each and every prisoner who applies for enhanced remission.

44. The Court is satisfied that the High Court judge correctly construed the nature and extent of the Minister's discretion as provided for in Rule 59 (2) and that a comparison of the specific wording of this rule to that contained in Rule 59 (1) supports his conclusion.

45. Rule 59, read in its totality, provides for two different regimes of remission. The first, under rule 59 (1), is one which provides that a prisoner "shall" be eligible for remission to the extent of one quarter of their sentence for good conduct. Here, once good conduct is established, remission becomes an entitlement. This being so, it is not surprising that the Minister is not involved in that process.

46. In sharp contrast, the wording of Rule 59 (2) provides as follows: –

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

47. If the true construction of this wording is as submitted on the applicant's behalf, the Court would have to conclude that the Minister, in providing for these Rules, intended to reduce her control over the right to remit a prison sentence, the preserve of the executive under Article 13.6 of the Constitution, to that which Kelly J. described as a "cipher" in his judgment. If the only concern of the Minister is to be satisfied that a prisoner of good conduct has meaningfully engaged in an authorised structured activity, something the Court would describe as a type of "box ticking" administrative function, it is hard to see why the Minister concerned would have provided for their own involvement in such a process. Such a role is one that hardly justifies ministerial involvement and is one which might be dealt with more efficiently by the relevant prison governor. Further, this type of nominal discretion appears to the Court to be a far cry from the type of discretion that one would have expected the Minister, to whom this power had been delegated by statute, to seek to retain when designing rules whereby all prisoners, including those convicted of very significant crimes such as rape, manslaughter and possession of explosives, to mention but a few, might seek to have their sentence reduced by one third, a matter of very substantial significance not only for the prisoner but perhaps even more so for society as a whole.

48. The illogicality and potential for injustice as would arise from the construction of Rule 59 (2) in the manner advanced on the applicant's behalf is again best demonstrated by reference to an artificial set of circumstances. Take two prisoners each with a similar pattern of violent crime, all committed in circumstances where excessive alcohol consumption was considered to be the triggering factor. Both of these prisoners apply for enhanced remission. One has spent his time in custody coming to terms with his addiction to alcohol. He has given up alcohol, has written letters of remorse to his victim, has become a member of AA and has further successfully completed an anger management programme. His counterpart has refused, notwithstanding encouragement from the prison authorities, to participate in any such offence focused structured activities. He does, however, successfully participate in a creative writing programme and an arts and crafts workshop, both authorised structured activities.

49. On the applicant's construction of Rule 59 (2), the Minister, on being satisfied that both prisoners were of good behaviour, has no option but to treat them equally and grant them both remission to the extent of one third of their sentences even though in respect of the second prisoner there is nothing to demonstrate that "as a result" of his engagement in his chosen authorised structured activities he is any less likely to re-offend; whereas, in the case of the first prisoner, it would be reasonable to infer that "as a result" of his participation in his offence focused authorised structured activities he should be considered, absent any other relevant material, to be at least somewhat less likely to re-offend than his counterpart. In the Court's view, to construe this Rule in the manner contended for by the applicant would in fact undermine the policy behind Rule 59 (2) which is succinctly advised by Barrett J. in *Ryan* where he stated at para. 5:-

> "The policy behind rule 59 (2) appears to be one of seeking 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"

50. It is also noteworthy that Rule 59 (2) gives discretion to the Minister to grant enhanced remission beyond the one quarter provided for in Rule 59 (1), once she does not exceed remission to the extent of one third of the prisoner's sentence. If, on the correct construction of Rule 59 (2), the Minister's discretion was limited to an evaluation of the engagement of the prisoner with the authorised activity, it is difficult to see why she is afforded this additional discretion. Surely, this discretion could only be relevant to an evaluation of the extent to which a prisoner's risk of re-offending and/or their likely better re-integration into the community has been beneficially enhanced by their participation in one or more particular authorised structured activities? It could hardly relate to the extent to which the prisoner had engaged with the authorised structured activity as that question has to be resolved in the prisoner's favour in order for them to qualify for enhanced remission. Assuming they so qualify, in what circumstances would the Minister, on the applicant's interpretation of the rule, engage with this discretion?

51. Accordingly, the Court fully agrees with Kelly J. that the proper construction of Rule 59 (2) is one which obliges the Minister, once satisfied that a prisoner has shown good conduct by engaging in authorised structured activity, to then consider whether or not as a result of such participation the prisoner is less likely to re-offend and better able to re-integrate into the community. Depending upon the Minister's conclusion on this latter consideration, she "may" grant enhanced remission.

52. There is no doubt that, on the facts of the present case, the applicant was well placed to state, as he did in his letter to the Governor of the 21st July, 2014, that during the period of his detention in Portlaoise he had displayed good conduct and that he had a good disciplinary record. He was also well capable of establishing that he had fully and successfully participated in a significant number of authorised structured activities. However, having established his good conduct and his entitlement to be considered for enhanced remission on that basis, he still had to satisfy the Minister that, "as a result of" such participation, he was less likely to re-offend and would be better able to re-integrate into society.

53. The only lawful and meaningful way for the Minister to make that decision was, as advised by the Governor in his affidavit, not to conduct an analysis of the studies and activities in which the applicant had participated in a vacuum but to make that decision in light of all of the relevant facts known at the time of his application, a view that was shared by the trial judge. In his judgment he expressed himself satisfied that the boundaries for the Minister's decision could not be the structured activities in which the applicant had participated but that she was also obliged to have regard to his history of offending and his personal characteristics.

54. This Court would go somewhat further than what the trial judge considered was necessary in his judgment. He did not express a view as to whether or not the Minister was entitled to take into account the report of An Garda Síochána but stated that, even absent that report, there was sufficient other material to support the validity of the Minister's decision. That being so, there was no evidence from which it could be concluded that she had acted in an arbitrary, capricious or unjust manner.

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 focused 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 Síochána and the Prison Authorities. Indeed, as was submitted by counsel on behalf of the respondent that if, following upon a decision of the Minister refusing enhanced remission, it was later discovered that she had received a report advising that the prisoner was extremely unlikely to re-offend and she had not taken that into account, one could well anticipate a challenge to the validity of her decision on the grounds that she had impermissibly excluded from her consideration matters material thereto.

56. It is also, in the Court's view, relevant to note that there are no words in Rule 59 (2) which expressly or by implication limit or restrict the Minister, when making her decision, to a consideration of the applicant's participation in authorised structured activities, or which preclude her from taking into account other relevant material. In this regard, the Court should state that fundamental, in its view, to the exercise by the Minister of the discretion provided for in Rule 59 (2) is a consideration of the criminal record of the prisoner concerned. It is only with knowledge of that history that a reasoned decision can be made as to whether or not, as a result of their involvement with structured activities, they are less likely to re-offend and would be better able to re-integrate into society.

57. While counsel for the applicant sought to support his argument as to the Minister's limited discretion on an application for enhanced remission by reference to Statutory Instrument No. 385 of 2014 which amends Rule 59 (2) and now sets out with particularity the criteria which the Minister is entitled to consider on such an application, the fact that these were not so specified in the original rule does not, the Court believes, add any weight to the applicant's submissions. It is wholly understandable, in light of the decisions of the High Court in *Ryan* and *Farrell*, that the legislature moved quickly to more clearly identify the extent of the Minister's discretion when dealing with applications for enhanced remission, i.e. to have regard to the consequences of those decisions for the prison population at large and corresponding concerns for the public at large.

Fair Procedures

58. The applicant maintains that the trial judge failed to consider a submission made on his behalf to the effect that he had not been afforded fair procedures in the process which led up the Minister's refusal. He complains that he was not advised by the second named respondent as to which of the authorised structured activities would be preferred by the Minister on an application for enhanced remission. Neither had he been advised that certain activities were not worth engaging with for that purpose nor was he advised of the fact that his participation in work on the E2 landing would not be considered as authorised structured activity. This lack of fair procedures, it was submitted, entitled him to an Order quashing the decision made by the minister.

59. The Court is not satisfied that there is any merit in this argument. Firstly, there is nothing in the Irish Prison Rules 2007 that requires the second named respondent to issue any guidance to prisoners as to the value that might be attached to a prisoner's participation in any structured activities. As already stated in the course of this judgment, the value, if any, to be attached to a prisoner's participation in one or more such activities will be multi-factorial and will likely depend on their history of offending, their personal circumstances and the extent to which the activities in which they participated were offence focused or directed to assisting with their ultimate re-integration into the community.

60. In this regard, it is worth noting the content of the Notice posted within the prison which advises prisoners of their right to enhanced remission. It reads as follows:

1/3 Remission

> "Section 59 (2) of the Prison Rules, 2007 allows for the discretionary granting of an additional remission, up to one third as opposed to the standard rate of one quarter, where a prisoner has shown further good conduct through his engagement in authorised structured activity and where, as a result, the prisoner is less likely to re-offend and will be better able to re-integrate into the community. Successful prisoners must be able to demonstrate a high level of engagement with the therapeutic services including the completion of specific programmes or activities tailored to address their needs and offending behaviour.
>
> Applications for extra remission should be made through the prison Governor providing as much supporting documentation as possible. The result of the application will be communicated through the Governor. Reasons for the decision will be provided in each case when so requested." (Court's emphasis)

61. Apart from the fact that the Court sees no legal basis for the assertion that the applicant was entitled to receive guidance from the second named respondent as to the matters earlier referred to, the Court cannot as a matter of fact understand how the applicant can legitimately seek to contend that he needed any such guidance, having regard to the content of Rule 59 (2), which makes clear the requirement that the prisoner demonstrate, by reference to the authorised structured activities undertaken, their (i) reduced likelihood of re-offending and (ii) increased ability to better integrate with the community.

62. The Notice posted on the prison landing makes the position even clearer for the prisoner. A "high level of engagement with the therapeutic services" is required, as is completion of "programmes or activities tailored to address their needs and offending behaviour".

63. It seems to the Court that the applicant, regardless of the failure of the second named respondent to engage with him on these matters, should well have known which authorised structured activities might be deemed relevant to his application for enhanced remission having regard to the offences of which he had been convicted and his personal circumstances. Is the Court expected to accept that the applicant did not know, for example, that a goal of the Probation Service is to help offenders reduce their prospects of re-offending or that he was unaware of the fact that it provides support and assistance to prisoners to help them resettle into the community, and that, in default of these facts being formally brought to his attention, he would not know that a failure to engage with that service might prove relevant to his application? Likewise, is it credible to believe that a prisoner serving a 20 year sentence for directing a terrorist organisation was likely to believe, unless otherwise advised, that his participation in a rota of cleaning and other domestic duties, regardless of whether these were conducted in the course of the E2 landing regime or otherwise, might satisfy the Minister that he was, as a result, less likely to re-offend such that she would grant him a one third remission in his sentence?

64. The Court is satisfied that the decision of the Minister refusing the enhanced remission sought was not made in the absence of fair procedures and that, for this reason, the fact that the trial judge did not determine this issue in the High Court did not in any way undermine his conclusions that her decision could not be invalidated.

Conclusion

65. Having regard to all that has been said in the course of this decision, the Court can find no fault with the judgment of Kelly J. in the High Court whereby he rejected the applicant's claim for judicial review. The Court fully endorses his construction Rules 27 (2) and 59 (2) of the Irish Prison Rules 2007, and is satisfied that he had good reason to depart from the construction placed on those rules by his colleagues in *Ryan* and *Farrell*. The Court also agrees with his conclusion that the decision made by the Minister in this case is not one that can be considered to have been made by her in an arbitrary, capricious or unjust way. Neither was it made following a consideration by her of materials or information which ought to have been excluded. Finally, the Court is satisfied that there is no valid basis for the claim made that the conduct of the second named respondent, when dealing with the applicant in relation to his intended application for enhanced remission, was such as to undermine in any way the lawfulness of the Minister's decision to refuse his application.

66. For these reasons, the Court would dismiss the appeal.