Neutral Citation [2015] IEHC 578

THE HIGH COURT

[2015 No. 9 SSP]

BETWEEN:

MICHAEL McCORMACK

APPLICANT

AND

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Kearns P. delivered on the 21st day of September, 2015

In these proceedings the applicant seeks an order of certiorari quashing the decision of the respondent to refuse the applicant one third remission of his sentence under Rule 59(2) of the Prison Rules 2007 as amended.

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

> *"(1) A prisoner who has been sentenced to –*
>
> *(a) a term of imprisonment exceeding one month, or*
>
> *(b) terms of imprisonment to be served consecutively the aggregate of which exceeds one month,*
>
> *shall be eligible, by good conduct, to earn a remission of sentence not exceeding one quarter of such term or aggregate.*
>
> *(2) The Minister may grant such greater remission of sentence in excess of one quarter, but not exceeding one third thereof where a prisoner has shown further good conduct by engaging in authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community".*

This rule was amended by the Prison (Amendment) (2) Rules 2014, S.I. No. 384 of 2014, which came into force on the 15th of August 2014, by the substitution of the following rule for sub rule (2):

> *"(2)(a) A Prisoner who has engaged in authorised structured activity may apply to the Minister for enhanced remission.*
>
> *(b) An application shall be made in such form and manner and shall be accompanied by such other information and documentation as may be specified by the Minister.*
>
> *(c) An application under subparagraph (a) shall not be made earlier than 6 months prior to the date on which the prisoner would be released if enhanced remission of one third of the prisoner's sentence were to be granted to him or her.*
>
> *(d) Where the Minister receives an application under subparagraph (a) the Minister shall, as soon as practicable thereafter-*
>
> *(i) if he or she is satisfied that the prisoner, having regard to the matters referred to in subparagraph (f) is less likely to reoffend and better able to re-integrate into the community, notify the prisoner of his or her decision to grant enhanced remission to the prisoner and the period of enhanced remission of sentence which is to apply, or*
>
> *(ii) notify the prisoner of his or her decision to refuse the prisoner's application and the reasons for the refusal.*
>
> *(e) A notification referred to in subparagraph (d) shall be in writing and shall be copied to the Governor of the prison in which the prisoner concerned is serving his or her sentence.*
>
> *(f) The Minister shall, when making a decision in respect of an application under subparagraph (a), have regard to the following matters:*
>
> *(i) the manner and extent to which the prisoner has engaged constructively in authorised structured activity;*
>
> *(ii) the manner and extent to which the prisoner has taken steps to address his or her offending behaviour;*
>
> *(iii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates;*
>
> *(iv) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto;*

(v) the period of the sentence served by the prisoner;

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

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

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

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

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

(II) the Garda Síochána,

(III) a probation officer, or

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

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

The applicant was convicted on 11th November, 2009 of possession of a shotgun with intent to commit an indictable offence contrary to section 27B of the Firearms Act 1964 as amended. On the same date, he was also convicted of a number of counts of false imprisonment contrary to section 15 of the Non-Fatal Offences Against the Person Act 1997. On 12th March, 2010 the applicant was sentenced to 8 years imprisonment in respect of the firearms offence, and 8 years imprisonment in respect of each of the other counts, which sentences were to run concurrently.

By letter dated 24th June, 2015 Ms. Dolores Courtney of the Irish Prison Service Operations Directorate, informed the applicant that his application for enhanced remission under Rule 59 of the 2007 Prison Rules as amended had been refused by the respondent. The letter sets out the various criteria to which the Minister has regard when assessing such applications and states that –

"The Minister, having considered your application for enhanced remission, including all material supplied in support of the application and the matters outlined above has decided to refuse your application. Having regard to the nature and gravity of your offences, the manner and extent to which you have taken steps to address your offending behaviour, the potential threat to the public safety and the report of An Garda Síochána, the Minister is not satisfied that you are less likely to re-offend and better able to re-integrate into the community."

The applicant has filed a lengthy affidavit setting out the reasons he believes his ongoing detention to be unlawful. It is submitted that the decision communicated to him by the Operations Directorate on 24th June, 2015 is not in accordance with fair procedures in a number of respects. The applicant submits that it is clear from the decision that the Minister has not applied her mind to specific aspects of his application.

The applicant further submits that the Operations Directorate should not be involved in the application process for enhanced remission under the Prison Rules as that office, and Ms. Courtney in particular, are not referred to in the Rules as having any role in the process. It is submitted that her role in the process amounts to "*unlawful meddling*" in the statutory scheme.

It is submitted that the reference in the impugned decision to concerns regarding '*public safety*' is inadequate and that, in refusing his application, the Minister was required to identify particular members of the public to whom the applicant posed a threat and, further, there must be evidence to support the suggestion that he remains a 'threat' to such persons.

The applicant has exhibited a lengthy list of educational and training courses he has completed since being committed to prison. A letter from the Head Teacher at the Education Unit, Ms. Margaret Joyce, is exhibited which states that the applicant *"attends classes regularly, completes all work required and is actively planning for future study."* Photographs of the applicant receiving his certifications from various persons, including President Higgins, are also exhibited. The applicant contends that he has taken all steps to engage with the prison authorities and that inadequate reasons for refusing his application have been provided and that he does not know the basis for the refusal.

The correct construction of the Prison Rules and the entitlement to enhanced remission has been considered in a number of decisions of the Superior Courts in recent years and has given rise to some differing judicial opinion. In *Doody -v- Governor of Wheatfield Prison & ors* [2015] IEHC 13 Noonan J. considered the various cases and came to the conclusion, correctly in my view, that the approach of Kelly, Peart and O'Malley JJ. in *McKevitt v. The Minister for Justice and Equality and Others* [2014] IEHC 551, *Keogh v. Governor of Mountjoy Prison* [2014] IEHC 402, and *Ryan -v- Minister for Justice and Equality* [2014] IEHC 513 respectively was the correct one. These decisions all indicate that while participation by prisoners in training and education courses is undoubtedly a positive step, and indeed a commendable one, it does not automatically follow that a person is less likely to re-offend and the Minister must still have regard to other information and the potential risks posed by an applicant when considering applications for enhanced remission.

It is well established that while the Minister's discretion in considering applications for enhanced remission is a broad one, it is nonetheless subject to supervision by the courts. The critical test for assessing the valid exercise of executive powers was outlined by Finlay C.J. in *Murray v. Ireland* [1991] ILRM 465 and it is clear that this Court should only intervene where it is established that the decision arrived at by the respondent was 'arbitrary, capricious or unjust'.

I have carefully considered the applicant's affidavit and supporting documentation, as well as the impugned decision, and am satisfied that the applicant has failed to establish that the decision of the respondent was 'arbitrary, capricious or unjust'. While the Court accepts that the applicant has been actively involved in education and training activities, the reasons for the respondent's decision have been clearly communicated to the applicant and it is evident that factors including the gravity of the offences for which the applicant was convicted, the report of An Garda Síochána, and the potential threat to public safety for the basis of the Minister's

decision.

In light of the foregoing, I would refuse the relief sought.