Neutral Citation: [2014] IEHC 442

THE HIGH COURT

[2014 No.1352 SS]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40 OF BUNREACHT NA hEIREANN

BETWEEN

MICHAEL McKEVITT

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

JUDGMENT of Mr. Justice Bernard Barton delivered the 1st day of September 2014

1. This is an application brought by the applicant pursuant to Article 40.4.2 of the Constitution and on foot of which he seeks an order of the court directing that he be released from custody, he being incarcerated at present in Portlaoise Prison.

2. The issue of whether the applicant's continued incarceration is lawful was said by the applicant to be dependant upon the determination by this Court of the question as to whether or not the applicant was entitled to be granted enhanced remission of his sentence by the Minister for Justice having regard to the provisions of Rule 59(2) of the Prison Rules 2007, (hereinafter referred to as the "Rules of 2007"). The respondent, whilst contending that the decision of the Minister was valid, made rationally, and in jurisdiction, also contended that an application under Article 40.4.2 of the constitution was both unwarranted and inappropriate.

Constitutional and Statutory basis of the Minister's power to grant remission

3. Article 13.6 of the Constitution provides:-

> "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may also be conferred by law on other authorities."

4. Having regard to this provision of the Constitution, the Oireachtas conferred the power of remission on the Government with power to delegate to the Minister for Justice and Equality by virtue of the provisions of ss. 23 and 23A of the Criminal Justice Act 1951, as amended and more specifically by s. 35 of the Prisons Act 2007, whereby the Minister for Justice and Equality was empowered to make rules for the regulation and good government of prisons, including, *inter alia*, for the remission of part of a prisoner's sentence.

5. Section 35(1) and (2) of the Prisons Act 2007, provides:-

> (1) The Minister may make rules for the regulation and good government of prisons.
>
> (2) Without prejudice to the generality of subsection (1) and to Part 3, such rules may provide for
>
> (a) the duties and conduct of the Governor and officers of a prison,
>
> (b) the classification of prisoners,
>
> (c) the treatment of prisoners, including their diet, clothing, maintenance, employment, instruction, discipline and correction,
>
> (d) the provision of facilities and services to prisoners, including educational facilities, medical services and services relating to their general moral and physical welfare,
>
> (e) the acts which constitute breaches of prison discipline committed by prisoners while inside a prison or outside it in the custody of a prison officer or prison custody officer,
>
> **(f) the remission of portion of a prisoner's sentence.**
>
> (g) the manner of publication of decisions of an appeal tribunal,
>
> (h) the entry to a prison of a member of An Garda Síochana in the performance of his or her functions,
>
> (i) photographing and measuring prisoners and taking finger prints and palm prints from them,
>
> (j) testing prisoners for intoxicants, including alcohol and other drugs."

6. Rule 59 of the Prison Rules 2007, provides:

> "(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 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 an authorised structured activity and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community."

7. As to what constitutes authorised structured activity, Rule 27 of the Prison Rules 2007, provides:-

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

8. The exercise of this executive power has the effect of terminating a sentence lawfully imposed by a court. The executive cannot in law determine what sentence should be served by a prisoner. That is the sole function of the courts established under the Constitution. Primacy rests with the sentence imposed by the court and any diminution of that sentence must be in accordance with the statutorily proscribed exception under the jurisdiction to grant remission.

9. It is not the function of the court to substitute its own view for that of the Minister on an application such as that before the court. The power to grant remission is one reserved to the executive.

10. The following facts pertinent to this application and these proceedings are not in dispute.

11. On or about the 6th August, 2003, the applicant was sentenced to a term of 20 years imprisonment for directing an unlawful organisation contrary to s. 6 of the Offences Against the State Act 1998. The sentence was back dated to the 29th March, 2001, being the date when the applicant was first taken into custody.

12. Pursuant to the provisions of Rule 59(2) the applicant qualifies for a quarter remission of his sentence with the effect that his expected date of release is the 26th March, 2016.

13. If the applicant had been granted a full one third remission of his sentence, he would have been due to be released on the 26th July, 2014.

14. Apart from two incidences involving disciplinary action in 2001 and 2004 respectively, the applicant has been of good behaviour while serving his sentence and he currently enjoys what is described as enhanced status.

15. The applicant has spent the entirety of his sentence in what is sometimes referred to as the republican wing or block at Portlaoise Prison and otherwise referred to as the E2 landing where republican prisoners are habitually incarcerated, a situation which has been extant for the best part of half a century.

16. The applicant has described himself as a political hostage and has always maintained his innocence. He has no known addictions nor has he any issues of a psychiatric or psychological nature.

17. The daily routine of prisoners, presently thirteen in number on the E2 landing, involves six of these being rostered each day for work duties which include amongst other things maintenance of the landing, recreation, education, cleaning, library and maintenance of the laundry. The applicant has always participated in these activities and has also taken on responsibilities for the management of food hygiene and safety.

18. In addition the applicant has, while serving his sentence, engaged in a number of academic courses covering art, speech and drama, English, creative writing, digital imaging, web design, photoshop, computer, home economics, French, music and yoga. In some of these areas, he sought and received academic qualifications, including merit awards through FETAC in computing literacy, French and digital imaging. In addition he obtained merit awards from the Leinster School of Communications and the London Guild Hall in spoken English and speaking skills and also studied creative writing with the Open University.

19. As to the applicant's personal demeanour and relationships with his teachers whilst engaging in these educational activities, the head of the Education Unit in Portlaoise Prison, Mark Kavanagh, described the applicant as dependable, reliable, hardworking, conscientious, honest and courteous.

20. While serving his sentence the applicant has been afforded temporary release on two occasions for two days on each occasion; once in April 2004 and once in January 2012, without, it appears, any issues arising.

21. On the 14th July, 2014, the applicant formally applied to the respondent for one third remission of his sentence pursuant to Rule 59(2) of the 2007 Rules. Following an exchange of correspondence between his solicitor and the Prison Service, which included the provision of further information for consideration by the Minister in connection with his application, the Minister, by a decision made on the 11th August, 2014, refused the application.

22. During the course of the hearing the court was informed that on the same date that the Minister refused the applicants application she promulgated an amendment to the prison rules by S.I. 385/2014 known as the Prison (Amendment) (2) Rules 2014. It was agreed by the parties that these rules had no application to the issues now before the Court as they came into effect on the 15th August, 2014 and therefore post dated the decision by the Minister to refuse the application for enhanced remission of sentence.

23. Detailed written submissions, supplemented by oral submissions at the hearing, where made on behalf of both parties and have been considered by the Court.

The position of the applicant.

24. The position of the applicant simply put, was that having regard to his having been of good behaviour and having successfully completed and participated in authorised structured activities while serving his sentence, he qualified for and ought to have been

granted a one third remission of his sentence. By definition it was contended that his participation in those structured activities comprised in the rule presupposed that by participation in such activities the applicant was less likely tore offend and be better able to reintegrate in the community upon his release and that the Minister was thereby obliged to have been satisfied that the applicant met the requirements of the rule. Had the Minister acceded to his application and granted him a full one third remission of his sentence, the applicant would have been released from custody on the 26th July, 2014, accordingly, his continued detention in Portlaoise Prison was unlawful.

The position of the respondent
25. It was clear from affidavit of Brian Murphy, Director of Operations of the Irish Prison Service and sworn on behalf of the respondent, that the process of collating information for the purposes of considering the application included all available information pertinent to the applicant's conduct and engagement with the authorised structured activities whilst serving his sentence as well as the nature of the offence with which he had been convicted, a detailed recommendation of the Prison Service which included the view of An Garda Síochána and all with the expressed objective of enabling the Minister to determine the application and in particular enabling the Minister to form a view as to whether or not she could be satisfied that the applicant was less likely to re-offend and be better able to reintegrate with the community upon his release.

26. It was also clear from this affidavit that amongst the matters considered relevant to the application were the seriousness of the offence with which the applicant had been convicted, his continued assertion of his innocence, his absence of remorse for the criminality of his actions, or any indication of an intention to end his involvement or association with an unlawful organisation, and his failure to engage with the probation service or with the psychology service.

27. While it was acknowledged by the respondent that the intended purpose of the authorised structured activities was to make it less likely that on release the prisoner would re-offend or would be better able to reintegrate with the community it was also asserted that this would depend entirely on the prisoner engaged in the activities and the nexus between those activities and the offending behaviour of the prisoner. Moreover, it was submitted that a careful analysis of the prisoner's circumstances, conduct, character and engagement in the structured activities, the object of which are designed to address the particular offending behaviour and said by the Prison Service to be a strong indication of a genuine intention to reduce the risk of re-offending, fall to be considered.

28. Each prisoner has to be individually assessed. In exercising her power, the Minister has a discretion to determine whether she is satisfied that the prisoner is as a result of structured activity less likely to re-offend and better integrate with the community. In order to properly consider the application, the Minister must be permitted to have regard to all relevant information if she is to be in a position to assess or ascertain the risk of a person re-offending and whether the effect of participating in authorised structural activities has had the effect of reducing the risk that the prisoner might re-offend. Amongst matters material to this particular prisoner, it was asserted that the failure of the applicant to disassociate himself from an unlawful organisation which he was convicted of directing, maintaining his innocence, and describing himself as a political hostage, were amongst the matters required to be considered by the Minister and that having taken all such matters into consideration, it was contended that she was entitled to come to the decision she did. Moreover, it was said that it would be an absurdity if, having regard to what was involved in such an application, the Minister could not have had regard to all such information as was relevant to that decision.

29. The applicant relied upon two recent decisions of this Court in support of his case and in which Rule 59(2) and Rule 27(2) and (3) fell to be considered. These are *Ryan v. The Governor of Midlands Prison* [2014] IEHC 338 and *Farrell v. The Governor of Portlaoise Prison and Others* (Unreported, High Court, 5th August, 2014).

30. Of these decisions, the facts in *Farrell*, bear a striking resemblance to those in this case. Farrell was also a prisoner on E landing in Portlaoise, he having been convicted of the offence of membership of an unlawful organisation contrary to s. 21 of the Offences Against the State Act 1939, as amended, and sentenced by the Special Criminal Court to a term of five years imprisonment in December, 2011.

31. In that case Hogan J. approved of and followed the judgment of Barrett J. in *Ryan* as to what it was that the Minister was legitimately entitled to take into account when considering an application for enhanced remission pursuant to Rule 59(2).

32. Having referred to Article 13.6 of the Constitution and the statutory provisions relating to the power to remit sentences and having considered the essential elements of Rules 59(2), Hogan J. held that the only matters which the Minister could legitimately take into account for the purposes of a Rule 59(2) application were those which arose from the rules themselves and in answer to a single question, namely whether she was satisfied by reason only of a prisoner's participation in authorised structured activities that the prisoner was less likely as a result to re-offend and reintegrate into the community. As the purpose and object of the authorised structured activities are those which are likely to reduce the risk of re-offending, it followed that where a prisoner participated successfully in such activities for the requisite period of time in the manner ordained by Rule 27(3), the Minister would be obliged to conclude that the prisoner was less likely to re-offend and to reintegrate on his release with the result that the enhanced remission provision of Rule 59(2) would be triggered.

33. The power to remit a sentence conferred on the Minister by statute is required by law to be exercised in accordance with rules which had been promulgated by the Minister by virtue of the provisions of Prison Act 2007. That being so a central issue or question which the applicant contended fell to be determined here, having regard to the nature of the application, was whether or not that power had been exercised in a manner compatible with the rule under and by virtue of which the Minister made her decision. In short the contention of the applicant was that the exercise of the executive power in question is confined to and constrained by what is provided for in Rule 59(2) of the 2007 Rules.

34. In *Farrell*, the applicant had participated successfully in structured activities and by definition given that the rule presupposes that by participation in such activities, that the applicant was less likely to re-offend and to reintegrate, Hogan J. held that the Minister would be obliged to conclude that the applicant was less likely tore-offend, thereby qualifying and entitling him to enhanced remission under Rule 59(2).

35. This rule was also considered by Peart J. in his judgment in *Keogh v. Governor of Mountjoy Prison* delivered on the same day as the judgment in *Farrell* ie. the 5th August, 2014. In that case, the court was referred to and had the benefit of the judgment of Barrett J. in the *Ryan* decision. Peart J. distinguished *Ryan* on the grounds that the facts were different or at least sufficiently so as to warrant the court in not following the decision in Ryan. In *Keogh*, the court refused the application, there having been a lack of candour and material non disclosure of relevant facts by the applicant. Whilst not to be taken as stating or holding that in all such cases the appropriate procedure was to bring judicial review proceedings, Peart J. held that in the case before him an Article 40.4.2 application was inappropriate and that had all material facts been made known by the applicant to his solicitor it was likely that the advice which the applicant would have received was that an application under Article 40.4.2 was unlikely to have been successful and

that the appropriate and proper course was to make an urgent application to the Court for leave to seek judicial review.

36. In his judgment Peart J. made reference to what he considered to be a number of deficiencies in rule 59 and made a number of recommendations or suggestions as to how the rule might be improved with a view to establishing clarity both in relation to procedures concerning such applications, the criteria to be applied in relation thereto as well as the basis upon which decisions on such applications are made. Such lacuna were also identified, albeit in a different way, in the judgments of Barrett J. and Hogan J. however, it would now seem that the State has moved to address these by virtue of the Prison (amendment) (No.2) Rules of 2014, but which it is agreed have no bearing on this application

37. The essence of the applicant's case was that, as in *Farrell*, the undisputed evidence was that the applicant had successfully completed authorised structured activities during his sentence and that as his participation by definition in the rule presupposes that by doing so he was less likely tore-offend and to reintegrate with the community, the Minister was obliged to conclude that the applicant was less likely to re-offend in the sense understood by Rule 59(2) and that accordingly, the Minister was obliged to be satisfied that the applicant had met the necessary requirements of the rule thereby qualifying and entitling him to have the Minister exercise her power in favour of granting his application for one third remission of his sentence.

38. The court was referred to the case of *Irish Trust Bank v. Central Bank of Ireland* [1976 -77] I.L.R.M. 50, in support of the submission that this Court should follow the decisions in *Ryan* and *Farrell* which were on point in relation to the same issue and which arose from the exercise of the same power conferred by Rule 59(2) on the Minister.

39. In reply the respondent referred to a number of other authorities these being *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, *Kinehan v. Minister for Justice* [2001] 4 I.R. 454, *Murray and Murray v. Ireland* [1991] I.L.R.M. 465, *The State (Royal) v. Kelly* [1974] I.R. 259, *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76, *The State (McDonagh) v. Frawley* [1978] 1 I.R. 131, *Byrne v. Governor of Castlerea Prison* [2007] 3 I.R. 451 and *Callan v. Ireland* [2013] IESC 35, as well as the decisions in the *Irish Trust Bank*, *Ryan* and *Farrell* cases.

40. The respondent submitted that there was no basis for impugning the decision of the Minister to refuse to grant the applicant enhanced remission much less any basis for calling into question the lawfulness of his detention. The application had preceded on two false premises firstly that the applicant had an absolute right to enhanced remission and secondly that the Minister was bound to afford the applicant the greatest amount of remission permitted pursuant to the rule.

41. It was further submitted that, as a matter of law, the power to grant remission of sentence being conferred on the Minister and that, subject to the question of the Minister acting *mala fides* or without any rational basis, the role of the Court was to review by way of judicial review proceedings the procedure by which the Minister came to her decision. As to that it was contended that the decision was reasonable, made within jurisdiction, and based on sound rationale. It was submitted that there were no grounds for contending that the detention of the applicant was unlawful, moreover, it was submitted that save in exceptional cases such as an abuse of power in the rejection of an application for enhanced remission, no application such as the present should be considered under Article 40.4.2 of the constitution. No such evidence or circumstances sufficient to satisfy the "fundamental legal attributes" test enunciated in the judgment of Henchy J. in *The State (Royle) v. Kelly* (1974) 259 had been established by the applicant.

42. At the conclusion of the hearing in this case it became apparent that the Supreme Court was, as a matter of urgency, going to hear and determine the appeal in the case of *Ryan v. The Governor of Midlands Prison*. Having regard to the issues before this Court and the reliance which the applicant had placed on the decisions of this Court in *Ryan* and in *Farrell* which followed it and on foot of which, having regard to the decision of the Supreme Court in the *Irish Trust Bank v. The Central Bank of Ireland* case it had been submitted that this Court was required to follow those two decisions on the law there being no legal or evidential circumstances such as would warrant the Court distinguishing and departing from those decisions, I decided to reserve my judgment in this case to abide the decision of the Supreme Court in the *Ryan* appeal.

43. The Supreme Court delivered an ex tempore judgment on the 22nd August, 2014 and which this Court has now had an opportunity to consider. It is clear from the judgment of the Court, delivered by the Chief Justice, that the same questions or issues which are required to be determined by this Court fell to be considered by the Supreme Court.

Decision
44. As in *Ryan* there was no challenge by the applicant in this case to the validity of the warrant to the Governor of Portlaoise Prison dated the 7th August, 2003 and on foot of which he is detained.

45. The Supreme Court decided in *Ryan* that having received certification from the appellant exhibiting a valid warrant of detention that that order was sufficient to establish the validity of the detention, however, as in *Ryan*, the applicant in this case collaterally attacked his continued detention by arguing that the minister's decision of the 11th August, 2014 was legally flawed.

46. The question which fell to be considered by the Supreme Court was whether the challenge to the decision of the Minister was within Article 40 of the Constitution. Following and applying the statement of the law as to appropriate procedures and remedies and the applicability or otherwise of Article 40.4.2 of the *Constitution in FX v. Clinical Director of Central Mental Hospital* (2014) IESC 01, *Roche v. Governor of Cloverhill* (2014) IESC 53, *McDonagh v. Frawley* (1978) 1 I.R. 131 at 136 and *The State (Royle) v. Kelly* (1974) I.R. 259 Denham C.J., delivering the judgment of the Court, enunciated the law in the following terms:

"*Thus the general principle of law is that if an order of a court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw.* "

47. Whilst the law requires the Courts to enquire immediately into the grounds of any person's detention, when called upon to do so, the Supreme Court held that this does not translate into a right to have every complaint a person may have examined under what was described as the same extraordinary procedure.

48. On the undisputed facts of this case and having regard to the absence of any challenge to the validity of the detention of the applicant under the committal warrant of the 7th August, 2003 this Court is satisfied that the decision of the Minister of the 11th August, 2014 refusing the application for enhanced remission under Rule 59 (2) is *prima facie* valid, furthermore, having regard to the nature of the applicants complaint in relation to the decision by the Minister and applying the law as enunciated in *Ryan*, it is clear that the appropriate procedure by which his complaint may be considered is in or by way of judicial review proceedings and not by

way of an application under Article 40.4.2 of the Constitution.

49. Before the delivery of this judgment the Court was advised by Counsel for the applicant that accepting the inevitability that this Court would most likely follow the decision of the Supreme Court in *Ryan* and that in the event of this Court so doing it was the intention of the applicant to apply for leave to seek judicial review of the decision of the Minister, I will make no further observation, comment or finding in relation to the evidence adduced in this case in relation to the application for and the decision of the Minister to refuse the applicant enhanced remission of sentence under Rule 59 (2) of the 2007 rules, however, the Court will make an order dismissing these proceedings.