Neutral Citation: [2014] IEHC 513

HIGH COURT

JUDICIAL REVIEW

Record No. 2014/551 JR

Between/

EDWARD RYAN

Applicant

AND

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent

Judgment of Ms Justice Iseult O'Malley delivered the 4th November, 2014.

1. Introduction

1.1 This is one of a recent sequence of cases concerning Rule 59 of the Prison Rules, 2007, which governs the remission available to sentenced prisoners. The Rule provides, in summary, that every prisoner is entitled to remission of one quarter on his or her sentence for good behaviour. Under the Rule as it stood at the time relevant to these proceedings, the respondent was empowered to grant greater remission, not to exceed one third of the sentence, in certain circumstances. The applicant claims that he has fulfilled the required conditions for enhanced remission and that the respondent's refusal to grant it to him was unlawful.

1.2 On the 30th July, 2010 the applicant was sentenced to two concurrent sentences of six years imprisonment, to date from the 26th May, 2010, in respect of the offences of possession of a firearm and rounds of ammunition in suspicious circumstances. The standard remission applicable to his case is one quarter of the sentence, eighteen months, giving him a release date of the 24th November, 2014. If he is entitled to enhanced remission he could have been released at any time from the 24th May, 2014.

1.3 On the 3rd December, 2013, the applicant applied to be considered for one third remission. By letter dated the 16th April, 2014 the respondent notified the applicant that his application was refused.

1.4 In June, 2014 the applicant sought his release from custody pursuant to the provisions of Article 40.4 of the Constitution. On the 2nd July, 2014 the High Court (Barrett J.) ordered the release of the applicant on the basis of various findings as to the proper interpretation of the Prison Rules (hereafter "the Rules") and the manner in which the respondent dealt with the applicant's application for enhanced remission.

1.5 On appeal, the Supreme Court held that Article 40.4 was not the appropriate remedy for complaints of this nature, which ought instead be ventilated by way of judicial review. It quashed the order made by Barrett J. and ordered the re-arrest of the applicant. He duly handed himself in to the Gardaí and was returned to the custody of the prison service.

1.6 Leave to seek orders of *certiorari* and *mandamus* by way of judicial review was granted on the 24th September, 2014 (Barr J.) and the application was heard by this court on the 30th and 31st October, 2014.

2. Rule 59 of the Prison Rules. 2007

2.1 This rule has recently been amended but at the material time sub-rules (1) and (2) read 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.*

2.2 It seems to be common case that Rule 59(1) is treated as meaning, in effect, that a prisoner starts a sentence with the entitlement to the full one quarter remission, but that some or all of it may be lost through misbehaviour.

2.3 It is also necessary to refer to Rule 27(2), the relevant part of which is as follows:

> *"...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."*

3. The evidence in the Article 40.4 application

3.1 The grounding affidavit in the application was sworn by the applicant's solicitor, who set out the facts of the applicant's convictions and sentences and the correspondence with the respondent. She deposed that, on her instructions, the applicant had fully engaged with all such structured activity as had been made available to him. She also exhibited the correspondence with the respondent.

3.2 On the 3rd December, 2013 the applicant's solicitor wrote to the Prison Service seeking his inclusion in the programme for one third remission. It was stated in the letter that the applicant had an offer of employment should he be released (although the letter of offer was not actually enclosed). The applicant's conduct in prison was described in the following terms:

> *"Edward instructs that he has availed of all services on offer and activities taking place within the prison. The purpose of the engagement by our client with these services and activities was to develop himself and his skills prior to his return to society. Edward instructs that he is a diligent worker and attendee at the workshop.*
>
> *Our client instructs that he attends at the gym and has developed a level of fitness that was alien to him prior to his incarceration.*
>
> *Our client instructs that the work that he is engaged in at the woodwork workshop involves the making of items for a charity in the Portlaoise area. We are instructed further that our client's attendance at the workshop and the diligence he applies to the task he takes on is to be recognised with a certificate of attendance to be granted to him.*
>
> *Our client instructs that the most recent disciplinary matter against him occurred approximately 2 ½ years ago and he has therefore been trouble-free within the Prison in that time...*
>
> *You will note from the instructions set out earlier that this is the first custodial sentence that our client has been required to serve and the first time that he has put himself in a position where a custodial sentence had to be imposed on him. Our client instructs that he had difficulty adjusting to prison life initially, something that he had not previously been used to, but he has now learned the coping skills necessary for his development within the Prison system. Our client instructs that he does not cause difficulty to the Prison Authorities."*

3.3 It was stated that the applicant intended to return to the family home, where his mother resided. As far as his future plans were concerned, the solicitor wrote:

> *"Our client instructs that there need not be any concern on the part of the Prison Authorities that he is at risk of re-offending as he has learned lessons from the period that he has spent in custody...Our client instructs that, while the conditions within the Midlands Prison do not cause any complaint on his part, does not wish to return to a custodial setting again. You will note that our client has put arrangements in place for his future outside the prison."*

3.4 The letter also set out extensive legal submissions as to the manner in which the application should be determined. It is perhaps relevant to quote the following paragraph:

> *"We note that Rule 59(2) does not set out the precise criteria to be considered by the Minister, confining itself to the Minister's decision 'where a prisoner has shown further good conduct by engaging in authorised structured activity' and further requires that the Minister be satisfied that such authorised structured activity results in the prisoner being 'less likely to re-offend and will be better able tore integrate into the community'. The Rule therefore does not inform our client as to what precisely the Minister will take into consideration in deciding whether to admit him to 1/3 remission on his sentence, and the weight to be attached to any individual elements within the decision making process. This leaves our client at a very significant disadvantage in the within process, not knowing what exactly it is he is required to establish so as to satisfy the Minister that he is not likely to re offend on his release into the community, and that he will be able to integrate within his community again ...In those circumstances it seems therefore that the Minister's decision might be confined to establishing that our client has engaged in authorised structured activity within the prison setting, such as to be unlikely to re offend."*

3.5 Reference was made to the definition of "authorised structured activity," set out in Rule 27(2). It was submitted that, since the object of the activity in which the applicant had been engaged was to ensure that he would be less likely to re-offend and better able to re-integrate into the community, a refusal of his application would be tantamount to a declaration that the Prison Service had failed to provide an appropriate programme of activity.

3.6 The respondent's decision was communicated to the applicant by letter dated the 16th April, 2014, addressed to the Prison Governor. The letter was signed by Ms Dolores Courtney of the Operations Directorate of the Prison Service and reads in full as follows:

> *"I am directed by the Minister for Justice & Equality, Mr. Alan Shatter, T.D. to reply to your application for one third remission.*
>
> *Section 59(2) of the Prison Rules, 2007 allows for the discretionary granting of 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 reintegrate into the community.*
>
> *The Minister has made it clear that this concession will only be used sparingly and in the most exceptional cases.*
>
> *Having considered the individual circumstances of your case, the Minister does not propose to use his discretion to grant you any additional remission on the basis that it is not demonstrated within your application that you have reduced your risk of re-offending."*

3.7 The replying affidavit in the Article 40.4 proceedings was sworn by Mr. Martin Smyth, the Deputy Director of Operations in the Prison Service. He identified two assertions as being the foundation of the applicant's case- that the respondent had fettered his discretion by having a policy that one third remission would only be granted in the most exceptional cases; and that the applicant had done everything possible to become eligible for extended remission. He went on to aver that neither of these assertions was correct. As far as the first assertion was concerned, he commented as follows:

> *"Whilst it is true that when read in isolation, one sentence taken from the letter to the Prison Governor from Operations Directorate of 16th April 2014 exhibited at 'SR2' of the Affidavit of Sarah Ryan, might suggest that the Minister only grants one third remission in the most exceptional cases, that understanding is incorrect."*

3.8 Mr Smyth averred that if the applicant's solicitor had made enquiries before moving the Article 40 application, this would have been clarified. No clarification of the sentence in question was in fact offered in the affidavit. However, it was asserted that the decision had been made in accordance with Rule 59(2) and that all relevant material had been considered. The recommendation of the Operations Directorate was exhibited, including the documentation upon which the recommendation was based.

3.9 In relation to the applicant's contention that he had done everything possible to become eligible, Mr Smyth averred that on the day after the applicant's committal to the Midlands Prison he was met by an Assistant Governor, Ms Teresa McCormack, for the purpose of a formal committal interview. It is said that at that meeting the new prisoner would have been advised of, amongst other matters, the services available to him. These included the Probation Service and the psychology, medical, chaplaincy and education services, as well as the workshops.

3.10 According to Mr Smyth,

> *"[T]here were numerous and varied authorised structured activities made available to the applicant during his period of committal. Each of these activities and programmes are provided on the basis of voluntary participation, in circumstances where engagement demands a willingness on the part of the prisoner. In the Midlands prison in which the applicant is incarcerated he has been afforded, and failed to take, the opportunity to engage with the Integrated Sentence Management service, Probation Services and the Psychology services. He has had extremely limited engagement with the Educational Services and has attended the carpentry workshop. He has not attended or engaged in other training and employment courses, anger management courses, stress management courses, any pre-release course, Addiction Counselling Service, the A.A. or the Red Cross. I say that there is no record of the applicant engaging with the Metal Shop, Laundry, Building Skills or the Computer Workshop."*

3.11 The documentation exhibited by Mr Smyth as having been put before the respondent consists of a report by Ms Dolores Courtney of the Operations Directorate, together with the comments thereon of the Deputy Director (Mr Smyth) and the Director of the Operations Directorate.

3.12 Ms Courtney referred to a review of the applicant's case in April, 2013, when it was recorded that he was working in the carpentry shop and that he did not present an issue to prison management.

3.13 A further review in March, 2014 is summarised as follows:

> *"At the review meeting, it was stated that he has no Probation Service supervision on release and that at no stage were the Probation Service involved with him on previous sentences or while he was in the community. He is not attending the school- there are two records of attendance which go way back. He is not involved with the Integrated Management Service. The Industrial Manager stated that he is attending the carpentry shop on a full-time basis.*
>
> *Prison management said that he is high up the chain with the Limerick feud. They said that he was involved in an incident on D2 Division on 26 January 2014 where the prisoners started to riot- they damaged alarm sounders, fired bins onto the mesh and at officers and they broke windows and doors in the recreation area. Prison management said that they had difficulty trying to move Mr Ryan but there is no P19 [i.e. disciplinary process] associated with this on the Prisoner Management Information System (PIMS). I checked this with the Chief Officer who was on duty at the time. He said that in hindsight Mr Ryan should have received a P19 though his antics that evening were on the lesser end of the scale when compared to the antics of the others involved. Prison management further stated that Mr Ryan can be very vocal.*
>
> *No concessions were recommended for Mr Ryan at the review meeting."*

3.14 Ms Courtney noted that the applicant was working in the carpentry shop. She also noted that he was not engaging with the Probation Service, the Integrated Management Service or the Psychology Service.

3.15 The report quoted a newspaper report on the offences for which the applicant had been sentenced. It then referred briefly to what appears to be a communication of some sort from Henry Street Garda Station. This has been redacted in its entirety.

3.16 Finally, it is recorded that the applicant had had four P19s while in custody, the most recent of which was in August 2011.

3.17 The conclusion was that the Operations Directorate did not recommend the application:

> *"Although the prisoner has engaged with some authorised structured activity in custody, the Operations Directorate is not convinced that as a result the prisoner is less likely tore-offend and is better able to reintegrate into the community."*

3.18 Mr Smyth forwarded the report to the Director of Operations, expressing his agreement with its conclusion.

> *"While it is true that the prisoner has relatively few P19s, I am concerned by his lack of engagement with the ISM, the Probation Service or the psychology service. I am also concerned by the recent garda view..."*

3.19 The Director of Operations agreed, and submitted the matter for consideration and decision by the Minister, resulting in the decision set out above.

3.20 In his affidavit, Mr Smyth averred that in assessing the application particular regard was had to the applicant's failure to engage with the Integrated Sentence Management ("I.S.M.") service, Probation Service and the psychology service.

> *"The I.S.M. service was introduced in the Midlands prison in May 2013 and is a service that allows prisoners to take a greater personal responsibility for their own development through active engagement with services in the prisons. I.S.M. involves initial assessment, goal setting and periodic review to measure progress. A personal plan for the prisoner to complete during his/her time in prison is then drawn up. The plan is reviewed regularly....Approximately one year prior to*

release, the ISM Co-ordinator meets the prisoner to establish his/her needs on release and a plan is put in place to assist his/her re-integration into the community. The applicant did not engage with this activity and regard was had to this failure and the effect of same on the likelihood of his reoffending. When the service was introduced in May 2013, information leaflets were made available in the Committal Unit, Governor's Parade, Education Unit and throughout the prison. On the 25th June 2014, 519 prisoners out of 813 prisoners are engaged with I.S.M. despite it being available to only those prisoners who received a sentence in excess of 12 months...

The applicant furthermore did not engage with the Probation Service, despite opportunity to do so, and weight was placed in arriving at the impugned decision on his failure to do so...

The applicant attended the Prison school on only two occasions, since his incarceration in 2010, despite opportunity to do so on a frequent basis and in respect of any number of different courses and programmes...

3.21 In a supplemental affidavit, the applicant's solicitor deposed that the applicant had instructed her that he had no recollection of being given information by the Assistant Governor as to the services available to him and that he was certain that nothing had been said about the requirements and expectations in respect of remission. She believed that the Committal Interview had been a formal, and formalistic, procedure. She further averred that the applicant had instructed her that he had never been informed about the ISM service; that prisoners seeking assistance from the Probation Service usually did so to get a referral to other services; that the applicant had no alcohol or substance addiction issues, and that he worked full-time in the woodwork workshop and could not, therefore, engage in other forms of work or with the school.

3.22 The solicitor also noted that the applicant had the status of "enhanced" prisoner since late in the previous year, meaning that he had extra privileges including increased family visits and telephone calls.

3.23 The statement in the Operations Directorate report that the applicant was *"high up the chain with the Limerick feud"* was criticised as being, apparently, based solely on the applicant's alleged involvement in the events of the 26th January and was stated, on the basis of instructions, to be factually incorrect. It was asserted that, on the contrary, the applicant had pleaded guilty at the earliest opportunity in his case with a view to getting a transfer away from the factions in Limerick Prison. The applicant had not been questioned or disciplined in relation to the 26th January and had not lost any privileges.

3.24 It was asserted that the respondent could not properly have had regard to the newspaper clipping attached to the report. It was further submitted that the High Court should not have regard to the contents of the material supplied by Henry Street Garda Station since privilege was being claimed and the applicant could therefore not respond to it.

3.25 It is important to note that it was submitted on behalf of the respondent that the sentence

"The Minister has made it clear that this concession will only be used sparingly and in the most exceptional cases"

should be construed as

"no more than a confirmation of the fact that the Minister would only grant the additional remission where there was strong and objectively verifiable evidence that a prisoner was less likely to offend."

4. The findings of Barrett J.

4.1 The core findings of Barrett J. were that

(i) the respondent had had regard to deficient information to which he ought not have had regard;

(ii) the respondent had not had regard to certain information to which he ought to have had regard, and

(iii) the respondent had imposed a pre-condition to, or fetter on, the exercise of his discretion under the Rule by stating that he would exercise it "*sparingly and in the most exceptional circumstances*." In effect, this amounted to a rewriting of the Rule and rendered the decision-making process irrational.

(iv) the respondent had preferred one form of authorised structured activity over others, without informing the general prison population or the applicant, which amounted to capriciousness, arbitrariness or injustice.

4.2 It was held that, on the evidence, it had been established that the applicant had worked full-time in the woodwork workshop. He should not therefore have been criticised for not engaging in other authorised structured activities, when in fact he had "*engaged to the fullest extent that is humanly possible*". The respondent, in deciding the application, was wrongly given the impression that the applicant had failed to avail of activities on offer to him.

4.3 The information was also deficient in that it included the newspaper report suggesting that the applicant had been involved in a criminal feud in Limerick, which suggestion appeared to be based on his alleged involvement in a feud-related prison disturbance.

4.4 It was not clear whether or not the respondent had had regard to the fact that the applicant enjoyed "enhanced" prisoner status- if he had, there was a question mark over the relevance of his behaviour before attaining that status.

4.5 The averment that the remission criteria would have been explained to the applicant at his committal interview was dismissed as beggaring belief', while the applicant's averment that he was never aware of the ISM was accepted as credible.

4.6 Barrett J. considered that the interpretation offered on behalf of the respondent of the statement in the respondent's letter suffered from "*the fatal deficiency*" that it was simply not what the letter said.

4.7 It was held that, in circumstances where

- the objective of the authorised structured activities (as described in Rule 27(2)) was to make prisoners, on their release, less likely tore-offend or better able to re-integrate into the community, and

- there was no evidence that any of the activities offered were deficient in achieving this objective, and

- the applicant had engaged in such activity to the fullest extent possible,

then the only possible logical conclusion that the respondent could have reached was that the applicant was less likely to re-offend and better able to reintegrate into the community.

4.8 Barrett J. sought to place the exercise of the Minister's power under the Rule into its proper context by considering the purpose of the statutorily grounded remission regime. In this regard he referred to the judgment of Hogan J. in *Byrne (A Minor) v. Director of Oberstown* [2014] 1 ILRM 346, where remission was described as *'fundamental to the general operation of the criminal justice system."* He also approved as being appropriate to the Irish sentencing and remission regimes the following passage from the judgment of Lord Phillips in the House of Lords decision in *R. (Black) v. Secretary of State for justice* [2009] 1A.C. 949 at p. 966:

> *"It has long been part of the English sentencing regime that when a judge sentences a defendant to a determinate sentence of imprisonment there neither is not is intended to be any expectation on the part of the sentencing judge or the prisoner that the prisoner will serve in prison the whole of the sentence imposed. It is part of our penal policy that, in normal circumstances, prisoners should be released on licence before they have served the full term of their sentences. This implication of our sentencing regime is something that the judge is required to explain when he imposes a sentence of imprisonment. Furthermore, when a judge imposes a determinate sentence he does not do so on the basis that the seriousness of the offences requires that the prisoner should be detained for the full period of the sentence. Rather he has regard to the penal effect of the sentence as a whole, having regard to the fact that part of it is likely to be served under release on licence".*

4.9 Having regard to these principles and to the wording of the rule, he found that the policy behind Rule 59(1) was to ensure good behaviour on the part of prisoners. This was necessary in the interest of the proper government of prisons. The policy behind sub-rule (2) was to seek

> *"...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."*

5. The Supreme Court ruling

5.1 The judgment of the Court is confined to a consideration of whether or not an order under Article 40.4 is the proper remedy for complaints as to decisions about remission.

5.2 The Court referred to its own jurisprudence on the criteria to be applied to *habeas corpus* cases where a person is in custody on foot of a court order, holding that an order under Article 40.4 was not appropriate unless it was demonstrated that there was an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw attaching to the detention. As far as this applicant's case was concerned, the Court said:

> *"The validity of Mr. Ryan's detention under the order of the Circuit Court has not been challenged in these proceedings. But it is said that the failure to grant him enhanced remission of sentence is itself flawed. But the Minister's decision in this regard is prima facie valid.*
>
> *Mr. Ryan's complaint about the procedures leading to the Minister's decision may be examined by judicial review, and not under Article 40, for the reasons explained earlier in this judgment. The special and extraordinary features of the Article 40 procedure are not required for the examination of this complaint."*

6. The evidence in the judicial review application

6.1 For the purposes of this application the applicant has sworn an affidavit in which he confirms the contents of his solicitor's affidavits in the Article 40.4 proceedings and, for the most part, repeats them. He makes the further point that when the Supreme Court ordered his re-arrest, he contacted the Gardaí in Limerick and arranged to hand himself in on the following day. He states that he had not come to adverse Garda attention in the intervening period.

6.2 The affidavits on behalf of the respondent have been sworn by Ms Dolores Courtney, Mr Daniel Robbins (Governor of the Midlands Prison) and Ms Teresa McCormack (Assistant Governor of the Midlands Prison up to July 2014).

6.3 Ms Courtney, in large part, repeats the evidence given in Mr Smyth's affidavit. There is the same assertion that the applicant is wrong in thinking that his case was decided by reference to the criterion of "*most exceptional circumstances*", but, again, no light is thrown on the use of this concept in the letter.

6.4 Ms McCormack was the Assistant Governor who met the applicant for his committal interview. She says that she always explains to new prisoners the rules and regulations of the prison and the services available in the prison. She accepts that it is likely that the interview was short, especially as the applicant had transferred from another prison and would not therefore have required matters to be explained to the same degree as a person who had not been in prison before.

6.5 Mr Robbins is a relatively recent appointment to the Midlands Prison and did not have dealings with the applicant before his appointment. He makes a number of general observations on the topic of prison life, the availability of authorised structured activities and the steps to be expected of a prisoner attempting to rehabilitate himself.

6.6 Mr Robbins states, as a general proposition, that there are many prisoners who are anxious to address their offending behaviour and many who are not. The former tend to seek out assistance from the available prison services, whether by asking the Governor or other prison staff or approaching the service providers directly.

> *"What I can say without fear of contradiction from anyone who has worked for any appreciable time in the prison service is that had Mr Ryan been interested in addressing his offending behaviour he would have sought out the appropriate services himself or sought guidance on what those services might be at Governor's parade."*

6.7 Mr Robbins says that the issue of "enhanced" status may be given undue importance. Most prisoners seek to gain the benefits of such status and engage in positive behaviour in the prison setting to that end. Attainment of the status is apparently not

incompatible with the continuation of criminal associations and "*very probably in some cases*" the continuation of criminal behaviour. On the 17th October, 2014 (three days before the swearing of his affidavit), 563 of the 791 prisoners in the Midlands Prison had enhanced status.

6.8 As far as the authorised structured activities are concerned, Mr Robbins says that

> *"nobody who has worked in the prison service for any appreciable period of time would mistake participation in structured activities, per se, as any sort of proof that the prisoner was less likely to reoffend and better able to reintegrate into society upon release."*

6.9 With particular reference to the applicant, Mr Robbins attaches significance to the fact that no concessions were recommended for him at the last review meeting. This outcome was determined on the basis of information provided by prison officers and management, who would have detailed knowledge of how a prisoner was serving his sentence. They would also know the difference between someone who is behaving well in order to secure the advantages from so doing, and a prisoner who is making an attempt at rehabilitation.

6.10 The fact that the applicant did not attend the ISM service or the Probation Service, in Mr Robbins's eyes, meant that

> *"it would seem objectively very unlikely that he was someone who was seeking to rehabilitate himself and was less likely to re-offend post release.'*

6.11 Mr Robbins says that the applicant's statement that he did not know about the ISM service "*lacks all credibility*", given the manner in which information is freely exchanged in the prison setting and the fact that prisoners with whom the applicant associated were involved with the service.

6.12 In conclusion, Mr Robbins says

> *"...whilst the Irish Prison Service does provide information to prisoners concerning the services available to them, in the context of rehabilitation and whether a prisoner is more or less likely to reoffend on being released from prison, there is no substitute for a prisoner seeking out the available services. Many prisoners do so and they are very proactive in identifying the appropriate services and attending the appropriate courses. The fact that a prisoner may have an interest in participating in a workshop and [is] doing so on a regular or even daily basis, does not preclude that prisoner from taking the initiative to address his offending behaviour and taking the time out from his workshop on occasion to pursue the appropriate services."*

7. Status of the findings of Barrett J.

7.1 It has been submitted on behalf of the applicant that, in circumstances where the order of the High Court in his case was overturned only on the basis of the inappropriateness of the remedy, this Court should regard the findings of fact and the analysis thereof by Barrett J. as binding in accordance with the principles of *Irish Trust Bank v. The Central Bank of Ireland [1976-1977]* ILRM 50 and *World port Ireland Ltd. (In Liquidation) v. Companies Acts* [2005] IEHC 189.

7.2 The respondent submits that there is new evidence in the case that was not before Barrett J. and that, in any event, he fell into error in some of his findings.

7.3 For my own part, while accepting that the Supreme Court did not embark at all on a consideration of the facts and merits of the case, I feel that it is difficult, as a matter of law, to attribute binding force to a decision that has been overturned. This is particularly so when the court is engaged upon a fresh hearing of the issues, with a certain amount of new evidence. I therefore propose to treat the findings of Barrett J., by way of analogy with reasoned but *obiter* comments, as persuasive but not binding.

8. Relevant authorities

8.1 Two judgments dealing with Rule 59(2) were delivered on the 5th August, 2014. Both concerned Article 40.4 applications where the applicants claimed to be entitled to one third remission on the basis of participation in authorised structured activities.

8.2 In *Farrell v. Governor of Portlaoise Prison* 2014 [IEHC] 392, the applicant had carried out work in the areas of food management and cleaning. He had also completed a series of classes of varying types. He would have been entitled to release on the 14th February, 2014 if the one third rate applied. The following portion of a letter to the applicant, dated the 14th February, 2014, is quoted in the judgment:

> *'"An essential part of the criteria for rewarding [sic] one third remission is that applicants engage in offence focussed work which in turn should lead to a reduced risk of reoffending. The Minister considers committed and concrete engagement with the therapeutic services within the prison, in the context of offence focussed work, [to be] an essential requirement for the granting of one third remission.* "

8.3 The applicant was invited to forward any documentation in relation to his participation in such work. After further correspondence a letter from the respondent (dated the 17th June, 2014) communicated his decision to refuse the application for extended remission. The judgment quotes the following passage from the letter:

> *"In considering whether a prisoner's engagement in authorised structured activity is likely to lead to a prisoner being less likely to re-offend, the Minister will take into account a number of factors including public safety, the views of local prison management and the services with which the prisoner has engaged, the prisoner's behaviour/conduct while imprisoned or during any period of temporary release and the views of An Garda Síochána.* "

8.4 The contrast between this letter and the terms of the respondent's communication to the applicant in the instant case will be apparent.

8.5 In *Farrell*, the respondent argued that the applicant had not engaged with the Probation Service, which ran a specific eight-week course in that prison dealing with offending behaviour, and that he continued to associate with other members of an illegal association. The Operations Directorate had, in his case, stated that it was for that reason not satisfied that he was less likely to re-offend and be better able to reintegrate into the community.

8.6 Hogan J. held that the single question permitted by Rule 59(2) was

> *"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."[Emphasis in the original.]*

8.7 He noted that Rule 27 of the Prison Rules ordain that prisoners should generally engage in regular authorised structured activity for twenty-five hours each week. Since that Rule envisages that the permitted activities will have the effect of ensuring that prisoners will be less likely to re-offend or be better able to re-integrate into the community, it followed that where a prisoner participated successfully in such activities, the Minister would be obliged to conclude that he was less likely to re-offend.

8.8 Hogan J. referred to and approved the analysis of Barrett J. in the current applicant's case, holding that it effectively compelled the same conclusion in the case before him. He therefore concluded that the very fact the applicant had successfully participated in activities of the sort envisaged by Rule 27 must by definition have rendered him less likely to re-offend, and therefore that the Minister was bound to find that he had satisfied the requirements of Rule 59(2). There was, in the circumstances, no real discretion on the part of the Minister.

8.9 This court has been informed that the decision in *Farrell* is under appeal, but may have become moot.

8.10 The other decision delivered on the 5th August, 2014 was a judgment of Peart J. in the case of *Keogh v. Governor of Mountjoy Prison* [2014] IEHC 402, another Article 40.4 enquiry. On the facts of the case, Peart J. distinguished Barrett J.'s decision because the applicant had failed to disclose to his solicitor and to the Court certain relevant information about events said to have occurred while he was on temporary release. However, it should be noted that, in response to a letter written by the applicant in November 2013, an official of the Irish Prison Service had advised the applicant that he should link in with the support services in the Training Unit (where he was then detained) and request a letter supporting his application.

> *"The letter should outline all relevant information relating to the programmes, courses and offence related work you have undertaken and completed with those services. This letter should also clearly describe how in their opinion your engagement with them has contributed to a reduced risk of you offending."*

8.11 It should also be noted that Peart J. obviously took the view that the Minister would have been entitled to conclude that his conduct on temporary release meant that she was not satisfied that as a result of his participation in authorised structured activities he was less likely to re-offend. The application for release under Article 40.4 was refused.

8.12 Having ruled as he did, Peart J. went on to examine the operation of Rule 59(2), and expressed concern as to the lack of guidance offered by the Rule to the Minister. He made, *inter alia*, the following observation:

> *"On one reading, and this is touched upon by Barrett]. in his decision in Ryan, the rule is indicating that it is by virtue of having engaged satisfactorily in such structured activities that enables the Minister to be so satisfied. On the other hand that may be an over-simplification, as simply because one signs up for a number of courses is no guarantee that any benefit has been derived. A prisoner might just go through the motions of attending the course and be no better for it. If that is correct then some form of subjective examination of the success of the prisoner's attendance should be required. Yet there is no visible and transparent procedure or process in place to achieve this."*

8.13 It would appear that many of the concerns expressed by Peart J. as to the lack of clarity, from a prisoner's point of view, have been addressed in the amended version of Rules 27(2) and 59(2), introduced by S.I. 385/2014 on the 14th August, 2014. The amended Rule makes it clear what is to be taken into account by the Minister in making a decision on an application by a prisoner.

9. Discussion and conclusions

9.1 I find, with regret, that I am unable to agree fully with the interpretation of Rule 59(2) approved by Barrett J. and Hogan J. Insofar as there is a conflict with the views of Peart J., I respectfully adopt the latter. It seems to me that what the rule required was, firstly, that the prisoner should have engaged in activities of the type described. However, I do not accept that proof of this necessarily compelled the Minister to accept that the prisoner was, as a result, less likely to re-offend and better able to reintegrate into the community.

9.2 As Peart J. points out, attendance at a course does not guarantee such a result. It is a matter of ordinary life experience that in any setting, whether in prison or otherwise, individuals engaged in any particular course will bring differing attitudes to it, and may or may not derive benefit from it. It may, for example, be the objective of a language teacher to bring every member of the class to a particular standard of fluency- the question whether any particular member of the class has attained the status is something that can only be determined by objective assessment and not merely by reason of participation. In my view the rule reserved to the respondent the task of considering, based on the information provided to him, whether or not the applicant had in fact become less likely to re-offend as a result of engaging in the relevant activity. In making this determination he was entitled to have regard to other, relevant information tending to show whether or not the applicant did indeed intend to avoid criminal behaviour in the future.

9.3 I also have some difficulty with the adoption of the passage from Lord Phillips's judgement cited at paragraph 4.8 above. Lest it should be taken to mean that prisoners have, to some extent, a legitimate expectation of extended remission, I think it is important to point out that Lord Phillips was discussing the radically changed landscape brought about by legislation in the United Kingdom which, *inter alia*, introduced the concept of release on licence at a defined point of a determinate sentence as a significant feature of that country's penal policy. There is no equivalent in this jurisdiction, except in the very limited circumstances pertaining to prisoners serving life sentences. It remains the practice in Irish courts, as it was in the United Kingdom prior to 1992, that a sentencing judge does not advert to the prospect of remission in assessing the sentence to be imposed.

9.4 However, I do fully agree with Barrett J. as to the policy behind Rule 59(2), quoted at paragraph 4.9 above. I also agree (as, indeed does the respondent) that a prisoner who seeks extended remission is entitled to have his or her application considered in a fair and rational manner.

9.5 In particular, I agree entirely with the characterisation by Barrett J. of the letter sent by the respondent to the applicant. This letter has not been properly explained to the court in either the Article 40 proceedings or this judicial review application. There is nothing in the reports from the Operations Directorate to indicate that the officials considered that the test was whether or not the applicant had shown "exceptional circumstances" and, indeed, nothing like that concept appears in the letters sent by officials to the applicants in *Farrell* and *Keogh*. I do not consider it likely that Ms Courtney decided to include it in the letter of her own accord. It appears, rather, to have been a criterion adopted by the decision-maker, and one which, I am satisfied, did indeed involve a rewriting

of the Rule for the reasons identified by Barrett J.

9.6 In these circumstances, it cannot be said with any confidence that the decision was made on the basis of the material put before the respondent. Instead, the court is compelled to the view that it was made on the basis of an impermissibly narrow construction of a rule that was intended to incentivise the broad prison population.

9.7 I will hear the parties as to the appropriate order.