Neutral Citation Number: [2013] IEHC 562

THE HIGH COURT

IN THE MATTER OF AN INQUIRY

UNDER ARTICLE 40.4 OF THE CONSTITUTION

[2013 No. 2077 SS]

BETWEEN

SEAN BYRNE (A MINOR)

SUING BY HIS NEXT FRIEND, CLAIRE BYRNE

APPLICANT

AND

DIRECTOR OF OBERSTOWN SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 10th December, 2013

1. The problems posed by juvenile offenders is one which has exercised penologists and social reformers for the best part of 150 years. It is now accepted that a custodial sentence should be one of last resort and that where such is required, these offenders should be kept apart from the general adult prison population. This admirably enlightened philosophy is reflected in the provisions of the Children Act 2001 ("the 2001 Act").

2. The present Article 40.4.2 proceedings, however, raise an intensely practical problem which nonetheless obliges us to some degree to confront and examine the nature of the special custodial regimes for young offenders provided for by the 2001 Act. The problem arises in this way: are young offenders detained at the children's detention school at the Oberstown Boys School ("Oberstown") entitled to remission in respect of their sentences in the same fashion as other prisoners and – perhaps more to the point – young offenders who are detained at St. Patrick's Institution?

3. It is accepted that no explicit provision is made by law for such remission at Oberstown. The applicant maintains, however, that the failure to accord such treatment to such offenders amounts to a form of unconstitutional discrimination contrary to Article 40.1 of the Constitution. To understand this claim it is necessary first to consider the relevant facts.

4. The applicant is presently seventeen years of age, having been born on 10th July, 1996. On 13th December, 2011, he was convicted of the offence of attempted robbery following a plea of guilty in the Circuit Court. This offence had occurred in November 2010 when the applicant was but 14 years of age. Another offence was taken into account and a nolle prosequi was entered in respect of the third offence. Bail had earlier been granted by the District Court and the applicant had then sent forward for trial. However, the applicant spent three months in custody in respect of these charges at various dates and on three different occasions in 2011, 2012 and 2013.

5. The applicant's sentence having being adjourned on a number of occasions, he was subsequently sentenced by His Honour Judge Hunt on 17th June, 2013, to two years detention with the final twelve months suspended on certain conditions. These conditions included requirements that the applicant enter into a bond in the sum of €150, that he enter into twelve months post release probation supervision, comply with all probation directions and reside with his mother at a particular address in Dublin and abide by a curfew between the hours of 7.00pm and 7.00am.

6. It appears that Judge Hunt envisaged that the applicant should be placed in Oberstown rather than St.Patrick's Institution and the activation of the sentence was then deferred until a suitable place had become available for the applicant. On the 9th July 2013 Her Honour Judge Ryan activated the sentence on being informed that a place at Oberstown was now available. She gave the applicant credit for the periods of time in which he already spent in custody.

7. The applicant was accordingly lodged in Oberstown on foot of the committal warrant on 9th July, 2013. The applicant has now been given a release date of 26th February, 2014. However, that release date would have been brought forward to 26th November, 2013, had the applicant been eligible for remission of sentence in the same way as other offenders (including juvenile offenders) who are serving their sentences at places of detention other than Oberstown. It is this fact which is at the heart of the applicant's claim of unconstitutional discrimination, contrary to Article 40(1) of the Constitution.

The Power to Grant Remission

8. The statutory power to grant remission of prison sentences is contained in s. 35 of the Prisons Act 2007 ("the 2007 Act"). Specifically, s. 35(2)(f) of the 2007 Act provides that any rules made by the Minister for the regulation and good government of prisons may provide for "the remission of a portion of a prisoner's sentence". These detailed rules are themselves now set out in Rule 59 of the Prison Rules (S.I. No. 252 of 2007). Rule 59 provides:-

> (1) A prisoner who has been sentenced to:
> (a) a term of imprisonment exceeding one month, or

(b) a term 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 structure 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.

(3) This rule shall not apply to a prisoner who is serving a term of imprisonment ordered under s. 18 of the Enforcement of Court Orders Act 1926, a prisoner sentenced to life imprisonment or to a prisoner engaged to prison for contempt of court.

(4) Nothing in this Rule shall result in a reduction in the period of remission out a sentence on an individual prisoner has been granted prior to the entry into force of these rules."

9. The terms "prison" is defined by s. 2 of the 2007 Act as meaning "a place of custody administered by or on behalf of the Minister for Justice and Defence (other than a Garda Síochána station)" and the term is expressly defined as including St. Patrick's Institution. The term "prisoner" is defined by Rule 2(1) of the 2007 Rules as meaning "a person who is lawfully detained in prison" and includes a person detained "on foot of a sentence of imprisonment or a sentence of detention…"

10. It is quite clear that the remission regime is fundamental to the general operation of the criminal justice system. Thus, for example, in *O'Brien v. Governor of Limerick Prison* [1997] 2 I.L.R.M. 349 the trial judge had imposed a four year sentence without remission. The applicant maintained that he was entitled to remission in respect of that sentence under the Prison Rules and, just as in the present case, he challenged the validity of his continuing detention beyond any period which did not allow for remission in proceedings which had been brought under Article 40.4.2 of the Constitution.

11. Delivering the judgment of the Supreme Court, O'Flaherty J. held that the imposition of such a sentence was contrary to the Prisons Acts and the (then extant) Rules for the Government of Prisons 1947 insofar as it attempted to exclude the operation of the remission regime. The applicant was accordingly entitled to remission in respect of his four year sentence with result that, if allowance was made for remission, his continued detention was not in accordance with law. The Court thus directed the applicant's release from detention.

12. The more recent decision of the Supreme Court in *Callan v. Ireland* [2013] IESC 35 is also in the same vein. Here the Court held that a prisoner whose sentence had been commuted by the President on the advice of the Government to one of forty years was nonetheless entitled to the benefit of remission under the 2007 Rules in respect of that sentence.

The nature of the detention at a Children Detention School

13. There is no doubt but that the regime at Oberstown would appear to be a laudable and enlightened one. The applicant thus attends a structured school environment in a class of three or four students. Every effort is made to address the needs of individual detainees and the evidence is that this applicant has received a full specialist assessment across a range of education, psychological and medical disciplines. Close contact with the applicant's family is also encouraged. Counsel for Mr. Byrne, Mr. Gillane S.C., very properly commended the dedication of the staff and a more caring and humane environment for a youth offender would be difficult to envisage,

14. It would seem that, in certain respects at least, the decision not to provide for remission in the context of detention at a children detention school was a deliberate policy choice on the part of those who had a hand in the drafting of the legislation, even if – as we shall later see – this policy is not consistently repeated throughout the 2001 Act.

15. Yet it cannot be overlooked that Oberstown is primarily a place of detention. After all, the actual warrant of imprisonment of 9th July, 2013 which was produced by the respondent to justify the detention of the applicant on the return to the Article 40.4.2 inquiry application commands the Director to receive "into your custody the body of the above named person convicted and sentenced at the Dublin Circuit Criminal Court" and to cause the "said person so convicted to undergo the sentence as set out above".

16. It should also be noted that the Oireachtas has rejected the notion that children should be detained (whether at Oberstown or elsewhere) for a period longer than otherwise required by standard criminal justice sentencing principles simply because their general and educational welfare would otherwise be served by an extended period of detention at such an institution. Accordingly, s. 96(1)(b) of the 2001 Act requires any court when dealing with children charged with offences to have regard to "the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child."

The power to order the detention of a child

17. Section 142 of the 2001 Act allows a court to impose on a child "a period of detention in a children detention school specified in the order." Section 151(1) gives the court the option of directing that the child should be sentenced to a detention and supervision order. Section 151(2) provides that a detention and supervision order "shall provide for detention in a children detention school followed by supervision in the community." The provisions of s. 151(3) to s. 151(6) are of particular importance and these provide:-

"(3) Subject to subsection (4), half of the period for which a detention and supervision order is in force shall be spent by the child in detention in a children detention centre and half under supervision in the community.

(4) Where the child is released from detention on earning remission of sentence by industry or good conduct or on being given temporary release under section 2 or 3 of the Act of 1960, supervision of the child in the community under the order shall be deemed to commence on the child's release.

(5) The supervision provided for in this section shall be by a probation and welfare officer.

(6) A detention and supervision order, in so far as it relates to detention, shall be deemed for all purposes to be a children detention order."

18. While the actual warrant from the District Court does not so provide in express terms, it would appear from the nature and structure of the sentence actually imposed by the Circuit Court that Judge Hunt did in fact impose a sentence of this nature. In addition to these provisions, the effect of s. 156A (as inserted by s. 143 of the Criminal Justice Act 2006) and s. 156B (as inserted by

s. 144 of the 2006 Act) must also be considered at this juncture.

19. Section 156A is a transitional provision designed, it would appear, to facilitate the detention of young offenders at St. Patrick's Institution pending the designation of children detention schools for the purposes of s. 160 of the 2001 Act and to permit the transfer of such young offenders between St. Patrick's Institution and such detention schools.

> "156A. (1) Notwithstanding anything in Part 9, males aged 16 and 17 years sentenced to detention may be detained in Saint Patrick's Institution or a place of detention until—
>
> (a) places suitable for the admission of children of those ages become available for designation as children detention schools under section 160, or
>
> (b) they have completed their period of detention.
>
> (2) Subject to subsection (3), on or after the making of any such designation, any child serving a period of detention in Saint Patrick's Institution or a place of detention may be transferred to such a designated children detention school.
>
> (3) A male aged 16 or 17 years may be transferred from Saint Patrick's Institution or a place of detention to a children detention school before such a designation is made and may later be transferred back to the Institution or place.
>
> (4) A child who is serving a period of detention in St. Patrick's Institution or place of detention shall not have his or her period of detention varied by reason only of a transfer under subsection (2) or (3).
>
> (5) In this section, "place of detention" means a place of detention provided under section 2 of the Act of 1970.".

20. What is curious is that while Oberstown has been designated since 1st May 2012 as a *remand centre* for the purposes of s. 88 of the 2001 Act (see Article 3(b) of the Children Act 2001 (Designation of Remand Centres) Order 2012 (S.I. No. 136 of 2012)), it does not ever appear to have been formally designated for the purposes of s. 160 as a children detention school as such. Section 156A(3) nevertheless permits the transfer of an offender from St. Patrick's Institution to Oberstown even in advance of such a designation.

21. As has been already noted, the 2007 Rules expressly provide that the remission rules apply to an offender detained in St. Patrick's Institution. If, therefore, a young offender is sentenced to four months imprisonment and commences serving that sentence at St. Patrick's Institution, he will be entitled to the equivalent of one months' remission of sentence. This will not alter if he were then to be transferred (even after a very short period) from St. Patrick's Institution to Oberstown, because s. 156A(4) of the 2001 Act guarantees that the offender's period of detention is not to be altered simply by reason of such an intra-institutional transfer.

22. Section 156B is also of some interest, as it provides:

> "Pending the making of rules under section 179 for the management of children detention schools, the Prisons Acts 1826 to 1980 and any other enactments relating to or applying to St. Patrick's Institution or to persons serving sentences therein shall, except where they may be inconsistent with this Act, apply and have effect, with any necessary modifications, in relation to a children detention school and to persons detained therein as if the school were that Institution."

23. An order commencing s. 156B has yet to be made, so it is not presently in force. In any event, rules have yet to be made under s. 179 for the management of such detention schools. It would nevertheless seem that *if* a ministerial order were ever to be made commencing the operation of s. 156B, then the effect of that section on its coming into force would be that (absent, of course, the making of rules in the interim for the management of children detention schools under s. 179) the Prisons Acts which "relate to or apply to" St. Patrick's Institution would also apply "with any necessary modification" to Oberstown, save where this would be inconsistent with the 2001 Act.

24. In practical terms, this would mean that s. 35 of the 2007 Act (and, by extension, the Prison Rules) would also apply to Oberstown (again, absent the making of new rules under s. 179). The application of s. 35 of the 2007 Act (and, by extension, the Rule 59 of the Prison Rules providing for 25% statutory remission) would not be inconsistent with the 2001 Act because, as matters stand, there are many indications in that latter Act which contemplate this very result. It is sufficient here to refer to the provisions of s. 151(4) which expressly envisages that a young offender may be subject to a supervision order by reason of his earlier release from his detention at a detention school by reason of remission.

The claim under Article 40.1

25. There is little doubt but that the guarantee of equality in Article 40.1 of the Constitution applies to legislation governing the sentencing process. Thus, for example, in *Cox v. Ireland* [1992] 2 I.R. 503 the Supreme Court held that s. 34 of the Offences against the State Act 1939 (which allowed for the forfeiture of the pension rights of public servants convicted of certain offences at the Special Criminal Court) was unconstitutional because it was "impermissibly wide and indiscriminate". A similar approach was expressly adopted by Laffoy J. in *SM v. Ireland (No.2)* [2007] IEHC 280, [2007] 4 I.R. 369 (where legislation which provided for an enhanced penalty if the victim of a sexual offence was greater if the victim was male was held to infringe Article 40.1) and by myself in *BG v. Murphy (No.2)* [2011] IEHC 445, [2011] 3 I.R. 748 (where legislation which inadvertently discriminated unfairly against persons whose fitness to plead was in doubt was held to offend against Article 40.1).

26. It is thus clear that a law which differentiated between offenders so far as eligibility for remission is concerned engages in the first instance the application of Article 40.1. Thus, for example, the Oireachtas could scarcely differentiate so far as a sentence remission regime is concerned as between adult prisoners on the grounds, for example, of prison venue or gender, since, absent special circumstances at least, the objective justification for such differentiation would be difficult to discern.

27. Yet it is also true that a good deal of latitude must be admitted for the purposes of Article 40.1 scrutiny where the Oireachtas differentiates between classes of persons for reasons of social policy, provided always that the differentiation is intrinsically proportionate and reasonable: see, *e.g.,* the comments to this effect of Denham C.J. in *MD v. Ireland* [2012] IESC 12, [2012] 1 I.R. 679, 716 and 719.

28. One might accordingly envisage circumstances in which the non-application of the remission rules to certain categories of young offenders in detention could be objectively justified as a difference of "social function" for the purposes of Article 40.1 on the ground

that their confinement could not realistically be equated with ordinary prison conditions. In these circumstances it might be plausibly contended that the rationale for the operation of remission within the prison regime (namely, a reward for good behaviour) would not necessarily translate into the special context of a compulsory educational regime for young offenders which was fundamentally different from prison itself. This, essentially, is the argument which was put forward by the respondent in the present case as justification for the non-application of a regime otherwise applicable throughout the prison system.

29. While there might well be circumstances in which such a justification might succeed, this cannot be the case here once regard is here had to the actual language of the 2001 Act. To succeed it would have to be shown that the Oireachtas had sought to set Oberstown as a place apart from the rest of the custodial regime, so that young offenders were in effect being sent to a form of compulsory education for a fixed period in a closed non-prison environment.

30. While the Oberstown regime may well be dedicated towards these goals, yet for several reasons this is not reflected in the actual language of the 2001 Act. There are many indications given in the body of the 2001 Act which suggest that detention in Oberstown is not regarded by the Oireachtas as being essentially different from detention elsewhere in the juvenile criminal justice system. Some of these indications may now be enumerated.

31. First, s. 96(1)(b) of the 2001 Act seems to reject the idea that any sentencing court could sentence a young offender on this basis since it requires the court to have regard to "the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child." In the light of this provision, it could scarcely be suggested that a court could sentence a young offender to, say, nine months at Oberstown where this was not otherwise warranted by the circumstances of the offence and the application of proper sentencing policies, even if the court was persuaded that the young man's educational and other needs would be best served by a period of detention of this nature.

32. Second, it is clear from s. 151(4) of the 2001 Act that the Oireachtas contemplated that young offenders serving their sentences at a children detention school could earn remission in the same manner as other young offenders and, for that matter, adult prisoners.

33. Third, the provisions of s. 156A allow for the inter-institutional transfer of young offenders as between St. Patrick's Institutions and children detention schools. Indeed, s. 156A(4) expressly states an offender who commenced to serve his sentence in St. Patrick's cannot be prejudiced in terms of a release date by reason of his transfer to a children detention school such as Oberstown. This means, therefore, that if a young offender commences his sentence at St. Patrick's Institution he will be entitled to the benefit of the 25% remission regime, even if he were to be transferred to Oberstown within days of commencing his sentence. In contrast, no such remission would be applicable if he were to serve the entirety of his sentence at Oberstown.

34. Fourth, while s. 156B is admittedly not yet commenced and is thus not presently in force, it must nonetheless be observed that it expressly envisages that the Prisons Acts will apply to Oberstown, at least on a transitional basis pending the making of the rules governing Oberstown. This provision must accordingly be regarded as a further indicator that the Oireachtas does not regard children detention schools as being essentially different from detention elsewhere within the criminal justice system.

35. It is at these points that any potential justification for the non-application of the remission rules to detention at a children detention school such as Oberstown simply breaks down. It is clear from a consideration of the actual language of the 2001 Act itself that detention at a children detention school is simply another manifestation of detention within the juvenile criminal justice system. Thus, even if the goals of the Oberstown regime are principally educational in nature and are humane and enlightened in character, the fact remains that *so far as the 2001 Act is concerned* there is, adapting the language of Laffoy J. in *McM. v. Manager of Trinity House* [1995] 3 I.R. 595, 602, "no essential difference" between detention in a children detention school and detention in St. Patrick's Institution, even if the differences in practice between the two regimes are significant. Indeed, it is clear that if it were indeed the case that there was in fact such an "essential difference" for this purpose between the two detention regimes, then it would follow that the inter-institutional transfer provisions of s. 156A would be unconstitutional as vesting the Minister with the power effectively to change the nature of a sentence by effecting a transfer of the young offender from Oberstown to St. Patrick's Institution. If that were the case, then such provisions would infringe the exclusive nature of the judicial power in respect of sentencing for the purposes of Article 34.1 by enabling the executive to change the very nature of that sentence: see *The State (Sheerin) v. Kennedy* [1966] I.R. 379, 394-295, per Walsh J. and *McM. v. Manager of Trinity House* [1995] 3 I.R. 595, 601-602, per Laffoy J.

Conclusions on the Article 40.1 issue

36. Summing up, therefore, it can be said that a custodial regime which brings about such a stark difference in terms of the release dates of offenders *simply* because of the location of the place where they serve their period of detention as a result of the application of the remission rules to one place of detention (St. Patrick's Institution), but not to another (Oberstown) immediately engages the application of Article 40.1 with its fundamental command of equality *before the law*. This is especially so given that such sharply different treatment in terms of custodial release dates impacts significantly on the core constitutional right of personal liberty as protected by Article 40.4.1.

37. Such a starkly different treatment of otherwise similarly situated young offenders could be objectively justified if it could be shown that detention at Oberstown was, in the words of Laffoy J. in *McM.*, essentially different and served fundamentally different purposes in terms of criminal justice policy than detention regimes operating elsewhere within the juvenile justice regime. While accepting fully the laudable goals, aims and inspirations of Oberstown and accepting further that the applicant would probably personally benefit from an extended stay in such a controlled environment, nevertheless the language and structure of the 2001 Act itself entirely negatives any argument that Oberstown is essentially different in this respect from other detention centres.

38. The 2001 Act is replete with many examples which illustrate this point, yet here it is sufficient in this respect to point to s. 96(1)(b) which enjoins the sentencing court not to differentiate between offenders in terms of sentence in order "to provide any assistance or service needed to care for or protect a child." This means that the court must sentence the offender by reference to orthodox criminal justice sentencing objectives, which includes taking cognisance of the standard remission rules. Yet if the sentencing court is statutorily precluded from imposing a longer sentence on the young offender simply because a longer stay at Oberstown would serve his educational welfare, then any putative justification on a similar basis for the non-application of the remission rules to offenders detained at Oberstown on the basis that to do otherwise would be to compromise their educational welfare simply melts away.

39. In many ways, the issue of inequality presented here is not dissimilar to that at issue in *Cox*. In *Cox,* it was the fact that the plaintiff was a public servant (as opposed to an employee working in the private sector) who had been convicted of scheduled offences (as opposed to non-scheduled offences) by Special Criminal Court (as distinct from the ordinary courts) which triggered the mandatory loss of pension as a consequence of his conviction by virtue of s. 34 of the Offences against the State Act 1939. It was thus the haphazard, indiscriminate and essentially arbitrary *application* of the section which the Supreme Court found to be

constitutionally offensive.

40. Here it is the fact that the applicant is detained in one venue (Oberstown) rather than in another (St. Patrick's Institution) which precludes him from being released at a significantly earlier date than would otherwise be the case. This differing treatment in relation to a matter as fundamental as personal liberty is, in the words of Finlay C.J. in *Cox*, "impermissibly wide and indiscriminate", not least in circumstances where, at least in the eyes of the 2001 Act, there is no essential difference between detention at Oberstown on the one hand as opposed to St. Patrick's Institution on the other.

41. It follows, therefore, that the failure to provide for the application of the remission rules to Oberstown cannot be objectively justified. In the circumstances, this failure must be adjudged to be a clear breach of the precept of equality before the law in Article 40.1.

Remedy for unconstitutional omission

42. Whatever may have been the position in the past, it is clear now from the Supreme Court's decisions in *District Judge MacMenamin v. Ireland* [1996] 3 I.R. 100 and *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635 that the courts can grant a declaration to remedy a legislative omission: see the discussion of this topic contained in my own judgment in *BG v. Judge Murphy* [2011] IEHC 455, [2011] 3 I.R. 748 at 767-772.

43. The present case might indeed be thought to present a paradigmatical example of why the courts must of necessity enjoy a power to give relief in the case of an unconstitutional omission. Could it be the case that the courts would have the power to invalidate the relevant portion of a law on Article 40.1 grounds which, for example, provided that juvenile offenders were entitled to remission of the sentence if they were detained at institutions A or B, *but not at Oberstown*, while being powerless to provide relief if the statute simply stated that *only* offenders detained at institutions A or B were entitled to remission, while being silent regarding Oberstown? If that were so, then the manner of statutory expression – depending on whether the exclusion was expressed in positive terms or whether it was done by omission – would be dispositive regarding the engagement and application of Article 40.1. It would mean that in the former example the courts could bring about an equality of treatment by invalidating the reference to the positive exclusion of Oberstown, while nothing could be done in the latter example. It could scarcely ever have been intended that the Constitution's command of equality before the law in Article 40.1 – itself, in the words of Kearns P. in *Fleming v. Ireland* [2013] IEHC 2, [2013] 2 I.L.R.M. 9, 47-48, a "normative statement of high moral value" – could have been so easily circumvented – perhaps even compromised - by means of such a simple drafting technique.

44. If cases such as *MacMenamin* and *Carmody* accordingly confirm the existence of such a jurisdiction to remedy unconstitutional omissions, then in some cases the courts have gone slightly further. Thus, in *SM* Laffoy J. granted a declaration that s. 62 of the Offences against the Person Act 1861 was inoperative by reason of the fact that it provided for different penalties depending on whether the victim of an indecent assault was a male or a female. Laffoy J. declared ([2007] 4 I.R. 369,401):-

> "..that if the plaintiff were to be convicted and sentenced for the common law offence of indecent assault in respect of a male person, for the sentencing judge to apply a maximum sentence of more than the equivalent sentence that would have been available at the time of the offence for an indecent assault upon a female would be to breach the plaintiff's constitutional right to equality."

45. In *BG* a similar approach was adopted by me and I accordingly granted a similar declaration which, in order to cure the unconstitutional inequality, had the effect of limiting the maximum sentence which the trial judge might have imposed in that case.

46. In the present case the situation is different again and highlights the particular problems faced once an unconstitutional lacuna is uncovered. In theory, once an unconstitutional omission is judicially identified then the solution generally best lies with the legislative branch. The constitutional command is, after all, equality before the law and, in principle, at any rate, in the wake of such a judicial determination the choice rests with the Oireachtas to decide whether to level up or level down, so that the precepts of Article 40.1 are thereby satisfied.

47. In practice, however, matters may not be quite that simple. In *Carmody*, the Supreme Court sought to address an inequality inherent in the legal aid scheme which by omission deprived the accused of any entitlement to retain the services of a member of the bar in certain types of cases. For a host of practical legal and constitutional reasons, neither the Oireachtas nor the Minister could level down in those circumstances and the Court accordingly granted what amounted to a positive declaration which all but required the Minister to make arrangements to have the existing scheme varied. It is also significant that the Court granted the applicant an order restraining the prosecution pending the resolution of this issue.

48. A similar approach was evident in *SM*. Having found that s. 62 of the Offences against the Person Act 1861 unfairly discriminated by reference to the gender of the victim by fixing a maximum of 10 years' imprisonment in the case of sexual offences against boys, whereas the maximum in the case of similar offences against girls was two years, Laffoy J. then granted a declaration to the effect that were a sentencing court could not constitutionally impose a sentence greater than two years in respect of offences against boys. In effect, therefore, by means of a declaration designed to give effect to the requirements of the equality guarantee Laffoy J. levelled down the maximum punishment which might be constitutionally imposed on any person convicted of the offence.

49. What, then, is the situation in the present case? In theory, perhaps, the Oireachtas and the Minister could bring about equality by abolishing the remission regime for all offenders. In practice, however, this would be all but impossible, certainly insofar as such an equalising measure purported to operate *retroactively* by removing the existing legal entitlements and expectations of serving prisoners to remission. Such a retroactive measure would be open to a host of objections and given that the entire criminal justice system has been heretofore premised on the understanding that (the special cases of murder and persons imprisoned for contempt of court aside) all other prisoners are eligible for and have an entitlement to remission (*cf*. the judgment of O'Flaherty J. in *O'Brien* and the judgments of Hardiman and Clarke JJ. in *Callan)*, one may doubt whether the retroactive removal of remission in this fashion would survive constitutional scrutiny.

50. Just as in *Carmody* and *SM*, therefore, there is no realistic option open other than to find that the failure to provide for the same remission regime at Oberstown as applies to offenders detained at St. Patrick's Institution violates the precept of equality in Article 40.1. This means in turn that the failure to afford the applicant the same remission entitlements as other young offenders violates his constitutional rights.

51. It is accepted that had the applicant been detained at St. Patrick's Institution (or even if, as I have found, he had commenced his detention at St. Patrick's Institution and was later transferred to Oberstown), he would have obtained the benefit of Rule 59 of the 2007 Rules and obtained remission in respect of 25% of his sentence. Had Rule 59 been applied in the present case in respect of

his detention at Oberstown, Mr. Byrne would then have been entitled to be released on 26th November 2013.Given that, as Murray C.J. pointed out in *Carmody,* the express language of Article 40.3 requires the court "to grant such remedy as it considers necessary to vindicate the right concerned" where a constitutional violation has been established, it is plain that the only practical way by which the applicant's constitutional rights can now be vindicated is to treat him as if the provisions of Rule 59 were in fact applicable to him.

Conclusions
52. In summary, therefore, I have found that the language and structure of the 2001 Act entirely negative the argument that detention at a children detention school such as Oberstown is essentially different in law to detention at another juvenile detention facility such as St. Patrick's Institution. In those circumstances, any objective justification for the markedly different treatment of young offenders detained at Oberstown by denying to them the benefit of the remission rules which apply, for example, to offenders detained at St. Patrick's Institution simply falls away. It follows, therefore, that the failure to afford such offenders with the benefit of the remission rules amounts to a plain breach of the constitutional command contained in Article 40.1 of equality before the law.

53. Had Rule 59 of the 2007 Rules been applicable to the applicant he would have been entitled to be released from Oberstown on 26th November 2013. Yet any continuing detention beyond that date amounts to a continuing violation of his constitutional rights by failing to afford him the remission entitlements available to similarly situated juvenile offenders: see here by analogy the judgment of O'Flaherty J. in *O'Brien*.

54. In these circumstances it must be adjudged that by reason of the continued application to him of this unconstitutional legislative omission, the applicant's continued detention at Oberstown is not in accordance with law. In accordance, therefore, with the requirements of Article 40.4.2 of the Constitution, it follows that I must direct his release from that custody.