Neutral Citation [2015] IEHC 499

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 240 JR]

BETWEEN

DALTON McKEVITT

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Kearns P. delivered on the 24th day of July, 2015

In these proceedings the applicant seeks an order of *certiorari* quashing the decision of the respondent to refuse the applicant one third remission of his sentence under Rule 59(2) of the Prison Rules 2007 as amended, and for an order of mandamus directing the reconsideration by the respondent of the applicant's application for one third remission of his sentence.

The applicant was convicted on the 2nd December, 2011 of membership of an unlawful organisation and was sentenced to five years imprisonment by the Special Criminal Court, which said sentence was back-dated to the 19th October, 2011.

These proceedings were heard during a sitting of the High Court in Kilkenny on the 7th July, 2015 at a time when the applicant's release, without the enhanced remission sought in the application, was due to take place on the 18th July, 2015. That has now occurred. In the circumstances there existed no realistic opportunity for the Court to form a considered view of a number of issues sought to be canvassed. That being so, any 'reconsideration' of his application by the respondent (if so ordered by the Court) would, it was agreed, have taken this case outside the applicant's release date. The case therefore has the characteristics of a moot, and submissions to that effect were made on behalf of the respondent at the conclusion of the court hearing. Furthermore, given that the decision to refuse remission was conveyed by letter dated the 27th February, 2015, the present judicial review proceedings, commenced as they were on the 11th June, 2015, were brought outside the time limit provided for by Order 84 of the Superior Court Rules and no exceptional circumstances were invoked to explain or excuse this failure.

In countering this submission, counsel on behalf of the applicant indicated that it was still open to the court to fashion some form of declaratory relief having regard to the contention that one of the reasons provided by the respondent was "irrational and unreasonable" in circumstances where prisoners in the position of the applicant on the E2 Landing of Portlaoise Prison had no access to some of the services relied upon by the respondent as one of the reasons for refusing to grant enhanced remission. It was argued that this rendered the decision as a whole 'irrational' in judicial review terms. It was contended on behalf of the applicant that there was a value both to the applicant (and to other prisoners in his position) in having this issue clarified and ruled upon by the court. All of the other grounds were, at the end of the hearing, effectively treated as moot points and are not further considered in this ruling.

BACKGROUND FACTS

The applicant made a written application to the respondent for enhanced remission in May 2014.

By letter dated the 14th May, 2014 the applicant received a written response from Mr. Paul Mannering of the Operations Directorate of the Irish Prison Service advising that a determination on his application for one third remission would be made closer to the time when he became eligible for same, *i.e.,* in or around February 2015. The letter invited resubmission of the application in December 2014 at which point it would receive "every consideration". The letter continued:-

> *"As you are aware, the principles governing the awarding of remission are contained within Rule 59 of Statutory Instrument No. 252 of 2007 (the Prison Rules). In sum, a prisoner sentenced to a term of imprisonment exceeding one month qualify for one quarter remission on the basis of good behaviour. Further, prisoners may also receive remission of greater than one quarter but not exceeding one third of their sentence if they –*
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> *(i) demonstrate good behaviour by engaging in authorised structured activity, and*
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> *(ii) satisfy the Minister that as a result of (i) they are less likely to re-offend and would be better able to reintegrate into the community.*
>
> *In considering whether a prisoner's engagement in authorised structured activity is likely to lead to the 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 whilst imprisoned or during any periods of temporary release and the views of An Garda Síochána."*

By letter dated the 24th August, 2014 the applicant wrote to the Governor of Portlaoise Prison stating that he wished to reapply for enhanced remission at that point in time rather than in December 2014 so as to avail of a pre-release programme which would commence in November 2014 if he was to be successful in obtaining one third remission resulting in a release date of 18th February, 2015.

For the purpose of his application, the applicant availed of a form provided for that purpose by the respondent.

In completing the application form, the applicant pointed out that whilst in custody he had completed various computer training courses, but pointed out that a significant range of work and training activities specified on the form were not available to prisoners

on E Landing.

By letter dated the 20th October, 2014 the applicant wrote to the respondent to say that he had completed and returned the relevant sections of the application form for enhanced remission. He enclosed with his letter certificates outlining the various courses had had completed, stating that throughout his sentence, he had participated in all the available structured activity in a positive way in anticipation that he would qualify for one third enhanced remission. He stressed in particular the cleaning duties which he performed on E2 Landing, together with his educational attainments.

Representatives on behalf of prisoners on E Landing in Portlaoise Prison wrote to the Governor on the 29th January, 2015 requesting clarification of precisely what criteria required to be met to become eligible for enhanced remission. The letter pointed out that it was *"not at all clear … what one has to do to meet this elusive standard"* and the letter also pointed out that the application form for enhanced remission outlines a number of courses which are considered helpful in the context of applications for enhanced remission, but pointed out that none of these courses were available on E Landing.

Separately, by letter dated the 23rd February, 2015 the Prison Service wrote to the applicant to inform him that he was eligible under the pre-release programme to apply for four periods of temporary release totalling ten days on the last three months of his sentence from the 18th April, 2015. In fact, the applicant was released on temporary release from the 24th December, 2014 to the 29th December, 2014 and was further released on temporary release from the 12th May, 2014 to the 14th May, 2014.

However, by letter dated the 27th February, 2015, Mr. Mannering wrote to the applicant pointing out that his application for enhanced remission was refused. In relevant part that letter stated as follows:-

> *"In considering whether a prisoner's engagement in authorised structured activity is likely to lead to the prisoner being less likely to re-offend or better able to reintegrate into the community the Minister will take into account a number of factors including the following:-*
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> *(i) the manner and extend to which the prisoner has engaged constructively in authorised structured activities;*
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> *(ii) the manner and extent to which the prisoner has taken steps to address his or her offending behaviour;*
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> *(iii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates;*
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> *(iv) the sentence of imprisonment concerned and any recommendations of the court that imposed the sentence;*
>
> *(v) the period of the sentence served by the prisoner;*
>
> *(vi) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the prisoner relates;*
>
> *(vii) any offence of which the prisoner was convicted before being convicted of the offence to which the sentence of imprisonment being served by him or her relates;*
>
> *(viii) the conduct of the prisoner while in custody or during a period of temporary release;*
>
> *(ix) any report or recommendation made by the Governor, the Garda Síochána, Probation Officer, or any other person whom the Minister considers would be of assistance in enabling him or her to make a decision on an application. The Minister having considered all of the above issues has decided to refuse your application as she is not satisfied that as a result of your engagement in authorised structured activity, that you are less likely to re-offend or better able to reintegrate into the community. The reasons for this decision are due to the nature and gravity of your offence, the potential threat to the safety and security of members of the public, limited engagement with authorised structured activity and no engagement with services to address your offending behaviour."*

The matters taken into consideration were thus more elaborately set out than had been the case in the letter dated the 14th May, 2014, though Mr Barron, senior counsel for the respondent, says they effectively say the same thing.

The applicant contends that he was not notified of the necessity to engage with services to address his offending behaviour, nor were such services identified in the application form provided to and completed by him, nor did the letter of the 27th February, 2015 identify what those services might be, or which of them might best assist his case. Further, the applicant had in fact engaged heavily with such authorised structured activities as were available to prisoners in E Landing and to refuse enhanced remission at least in part on the basis of a "limited engagement with authorised structured activity," was irrational and erroneous in circumstances where certain of such activities were not available to prisoners on E Landing at Portlaoise Prison.

The respondent's reasoning in this regard appears from a letter written by the Prison Governor to the representatives of E2 Landing prisoners regarding the application of the Prison Rules. The last paragraph of that letter states the following:-

> *"In relation to the range and type of courses referred to in your correspondence, you are advised that these courses are available in other prisons and that it is open to you to apply to be considered for transfer to locations where such courses and services are available."*

The issue therefore is whether, having regard to the absence of certain services to prisoners in E Landing which would enable them to qualify for proper consideration of enhanced remission, the expectation or requirement that such prisoners should seek transfer to another part of the prison or to other prisons in order to avail of such services is "entirely unrealistic", given, as was stated on behalf of the applicant, that the prison authorities regard persons convicted of membership of proscribed organisations as being high security prisoners who require to be detained in a high security prison of which Portlaoise is the only example in this State.

On this point the statement of opposition contends as follows:-

> *"16. The applicant chose to remain on the E landing in Portlaoise Prison and to continue to associate with subversive prisoners when it was available to him, at all times, to disassociate from other subversive prisoners and to be housed in another location within Portlaoise Prison, or another prison."*

In his affidavit sworn herein on behalf of the respondent on the 25th June, 2015, Mr. Paul Mannering states:-

> *"At any time, since his incarceration, it was an available option to the applicant to disassociate from other subversive prisoners and to be thereafter housed in some other area within the Irish prison, as a number of other subversive prisoners have chosen to do. The applicant has chosen not to avail of this option and has remained on the E Block of Portlaoise Prison."*

His affidavit further contends that an applicant has no right or entitlement to any period of further remission pursuant to Rule 59(2) of the Prison Rules 2007 as amended. On the contrary, the Rules envisage that the respondent "may", in her discretion, grant remission of up to one third of a prisoner's sentence where she is satisfied that the relevant criteria apply. The decision involves an exercise of a discretion as to whether such further remission should be granted and one of the factors to which she must have regard is the nature and gravity of the offence as set out in the Prison (Amendment) (No.2) Rules 2014 (S .I. No. 385 of 2014). In the instant case, the applicant submitted an application for further remission and the decision was made by Mr. Mannering on behalf of and under the authority of the respondent. At para. 9 of his affidavit he deposes:-

> *"In exercising this discretion, I conducted a review of the prisoner's file, including any material advanced by or on behalf of the prisoner, and I also reviewed all relevant information in order to determine whether the applicant is less likely to re-offend and will be better able to reintegrate into the community. A prisoner is required to engage in authorised activities before he can apply for enhanced remission. However, the mere fact that a prisoner has engaged in authorised structured activities does not entitle a prisoner to any period of remission, but is merely a factor to be considered together with the other factors set out in the prison rules. It is not accepted that the mere engagement in authorised activities is an indication in itself of a reduced likelihood of re-offending and/or an increased ability to reintegrate into the community. I say that I refused the application on the grounds that I was not satisfied that the applicant was less likely to re-offend or that he would be better able to reintegrate into the community. I considered all the criteria set out in Rule 59, as is set out in the letter of the 27th February, 2015."*

He concludes his affidavit by stating that his decision was made "fairly, taking into account all the relevant criteria set out in Rule 59(2) and was not capricious, arbitrary or unjust".

He contends therefore that the decision to refuse the applicant further remission was entirely reasonable and in accordance with the relevant statutory criteria.

DISCUSSION

Counsel on behalf of the applicant submitted that there had been engagement on the part of the applicant with the authorised structured activity set out in his application for enhanced remission. The applicant submits that the reasons relied upon by the respondent in refusing the application differentiated the present case from the decision of the Court of Appeal in *McKevitt v. Governor or Portlaoise Prison* [2015] IECA 122 where there were no grounds for concluding that the respondent's decision was 'arbitrary, capricious or unjust', the critical test for assessing the valid exercise of executive powers as outlined by Finlay C.J. in *Murray v. Ireland* [1991] ILRM 465. Here there were such grounds as there was non-access to relevant services and activities and it was no defence to say the applicant should have sought removal to some other prison when there was no access to qualifying activities.

It was argued that while the prison rules make it clear that engagement with authorised structured activities does not create any entitlement to enhanced remission, the Minister in furnishing reasons for refusal cannot rely upon a reason which is incapable of being fulfilled.

On this only surviving issue in the present case, counsel for the respondent argued that this factor was not sufficient to render the respondents decision in this case "capricious, arbitrary or unjust" and the range of activities engaged in, be they multiple or few, was only one of many factors to be considered by the Minister and even if the range of services in Portlaoise E Landing was less than in other locations, this did not per se entitle the applicant to enhanced remission. It was in any event at all stages open to the applicant to request a transfer to some other part of the prison, or indeed another prison, if he was willing to forego his association with other republican prisoners. This he was not prepared to do and in such circumstances could not argue successfully for the contention advanced

DECISION

While the Court is of the view that all but one of the matters the subject of the leave application in this case are, for every practical purpose, now moot, the Court is satisfied that the applicant is entitled in a case brought in a timely manner to argue that one of the reasons offered by the respondent for her decision to refuse enhanced remission was, in judicial review terms, irrational.

However, the Court observed at the hearing and now repeats that this application was brought too late in time and well outside the time limits provided for by Order 84 of the Superior Court Rules. The revised terms of Order 84 (SI 691/2011) state that the court should only extend the period within which an application for judicial review can be made where it is satisfied that there is good and sufficient reason for doing so and the circumstances that resulted in the failure to make the application for leave within the period were either outside the control of the applicant, or could not reasonably have been anticipated by the applicant for such extension. No application for that purpose was made in this case. The respondent's decision to refuse the grant of greater remission was communicated to the applicant on the 27th February, 2015, but leave to bring judicial review proceedings was only sought on the 11th June, 2015, virtually on the eve of the applicant's scheduled release, and the respondents are, in the view of the Court, entitled to take this delay point and rely upon it in this case. This Court has expressed in the strongest terms its intolerance of late applications for judicial review in its recent judgment in *Coton (No.1) v. D.P.P.* (Unreported, High Court, 21st May, 2015). It has been a common occurrence for late applications to be brought outside the time limits with no request for the appropriate extension or the tendering of any excuse or explanation for delay. This is such a case.

Having regard to the nature of the relief being sought in this case it was incumbent upon the applicant and his advisors to move with the greatest degree of promptness which they simply failed to, notwithstanding the well publicised incidence of multiple such applications being unleashed on the High Court following the decisions in *Ryan v. Governor of Midlands Prison* [2014] IEHC 338 and *Farrell v. Governor of Midlands Prison* [2014] IEHC 392. Both of those decisions have been now overturned by the decision of the Court of Appeal in *McKevitt v. Minister for Justice* [2015] IECA 122. On the ground of delay alone the Court would exercise its discretion to refuse to grant relief in this case.

Lest this view be mistaken, the Court will nonetheless briefly address the ground argued at the hearing (the points on mootness and delay having not been advanced at the hearing by the respondent until the case was virtually over).

The applicant in this case is housed with other prisoners convicted of similar type offences and although Mr. Mannering makes the point that some such prisoners have opted to move to different areas in the prison or to different prisons where such services could be availed of, he does not dispute that certain activities which would obviously be reckonable when exercising discretion are not available to those who insist on remaining on the E Landing.

Counsel for the respondent argues that the solution to this difficulty lies in the applicants own hands, in that he can request a transfer to another part of the prison or to another place of detention where the same difficulty does not arise.

There is no evidence in this case that the applicant ever sought such a transfer. Rather he was content to base his application solely on the range of authorised activities which were accessible to those on E Landing.

There is no evidence of a request having been made by the applicant for access to additional services, or of such services being refused, either or both of which factors might have given the applicant's contentions on this point some traction. He was not denied total access to structured activities and it would be absurd to suggest that an applicant for enhanced remission must have available to him every single structured activity mentioned in the application form and have them delivered on site at the location of his choosing when he can easily enlarge his range of engagement by opting to disassociate from prisoners in the same category (as others have done) and thereby strengthen his case. It is difficult to see how any conclusion could be arrived at that the respondent, who had a fair sample of what the applicant had achieved in a range of structured activities in which he had engaged, had fettered her discretion or behaved either irrationally or capriciously to such a degree that the court should intervene to overrule the decision or hold that her discretionary powers had not been exercised fairly.

Ultimately the Court is satisfied that the decision dated the 27th February, 2015 clearly sets out that the Minister considered all of the considerations elaborated in Rule 59(2)(a) of the Prison Rules and the Court has not been persuaded on the facts of the present case that the applicant has established that he sought to engage with authorised structured activities to such a degree that would invalidate the refusal on grounds of irrationality. In short, the threshold set down in *McKevitt v Minister for Justice* for intervention by the Court to interfere with the discretionary exercise of executive power has not been met in this case.

The Court would therefore refuse the relief sought in this application.