Neutral Citation: [2014] IEHC 657

THE HIGH COURT

2014/1025/SS

IN THE MATTER OF AN ENQUIRY UNDER ARTICLE 40.4.r OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN

EDWARD RYAN

APPLICANT

AND

GOVERNOR OF MIDLANDS PRISON RESPONDENT

JUDGMENT of Mr Justice Barrett delivered on the 2nd day of July, 2014

1. The central issues in these proceedings are whether Mr. Ryan, a prisoner, continues lawfully to be detained by the State and whether an order directing his release ought to be made at this time. Having had full regard to the arguments of the parties to these proceedings and the evidence adduced by each of them, the court concludes in its judgment that:

(1) under Rule 59(2) of the Prison Rules 2007, the Minister for Justice and Equality is empowered to grant additional remission to prisoners when a prisoner has shown 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 following release;

(2) the Minister is required to use that power in a manner consistent with the purpose of the statutorily grounded remission regime;

(3) the policy behind Rule 59(2) appears to be one of seeking to incentivise and reward engagement by prisoners in a pro-active manner in authorised, structured, voluntary activity, with a view to ensuring that they are less likely tore-offend and better able to reintegrate into the community following release;

(4) the information put to the Minister for Justice and Equality prior to his determining, pursuant to Rule 59(2), whether or not to grant additional remission to Mr. Ryan, was largely deficient;

(5) Mr. Ryan has engaged in various authorised, structured, in-prison activities;

(6) Mr. Ryan has not engaged in certain authorised, structured, in-prison activities because they coincide in time with, or are less attractive to him as an individual than, others;

(7) all authorised structured activities, it is clear from Rule 27(2) of the Prison Rules, have as their equal object making a prisoner "*when released from prison, less likely to re offend or better able to re-integrate into the community*";

(8) despite this equality of object, it appears from the argument and evidence in these proceedings that some authorised structured activities are viewed by the authorities as better than others when it comes to ensuring that a prisoner is less likely to re-offend and better able to reintegrate into the community following release;

(9) the fact that some authorised structured activities are apparently so preferred was never advised to Mr. Ryan, nor does it appear that this fact has ever been advised to the general prison population;

(10) there is no suggestion that any one of the many authorised structured activities offered by the Prison Service is in any way deficient as regards ensuring that a prisoner is both less likely to re-offend and so better able to re-integrate into the community following release;

(11) the exercise of a jurisdiction to commute or remit sentence is a constitutionally reserved function which, by virtue of statute, rests with the Minister for Justice and Equality, and the Minister's views as to the status and merits of a prisoner will typically determine the issue of whether a prisoner should be granted remission and also the extent of any such remission;

(12) the control and management of the nation's prison system, and of prisoners within that system, has been entrusted by the Oireachtas to the Executive and is an area in which the Executive enjoys a wide discretion, subject of course to the Constitution and the law;

(13) the Minister in reaching his decision on Mr. Ryan's application for additional remission had before him deficient information to which he ought not to have had regard, and also did not have regard to certain information (the full truth as to Mr. Ryan's participation in authorised, structured, in-prison activities) to which he should have had regard;

(14) the Minister, in stating, as he did, that he would only exercise his power under Rule 59(2) "*sparingly and in the most exceptional cases*", has imposed a pre-condition to, or fetter on, the exercise of his discretion that is irrational in circumstances where the purpose of Rule 59(2) is to encourage as many prisoners as possible to avail of the opportunities provided by authorised structured activities so that they may rehabilitate themselves and so lessen the chance of their re-offending, and better their prospects of reintegration, post-release;

(15) by viewing the application of the Rule 59(2) discretion as something to be exercised exceptionally, the Minister has in

effect re-written Rule 59(2) so that the facility of up to one-third remission thereunder is now reserved for an undefined class of prisoners who meet some vague standard of exceptionality; this 're-writing' distorts, and may largely obviate, the availability of remission under Rule 59(2) notwithstanding that a prisoner satisfies the various requirements of same;

(16) to the extent that the Minister has (i) acted irrationally or (ii) fettered his role or (iii) preferred one form of authorised structured activity over another when such preference was never previously advised to Mr. Ryan or, it appears, the general prison population, the court considers that this case presents with that capriciousness, arbitrariness or, at the very least, unjustness, to which McCarthy J. refers in *Murray v. Ireland* [1991] I.L.R.M. 465 at p.473, his judgment in this regard later being referred to with approval by Hardiman J. in *Kinahan v. Minister for Justice* [2001] 4 I.R. 454 at p.459;

(17) a decision-maker in its actions can achieve such capriciousness, arbitrariness or unjustness aforesaid, notwithstanding that somewhere in the spray of reasons offered by a decision-maker there are drops of rationality;

(18) if one winnows away any deficient information on which the Minister relied and has regard to such correct information on which he ought to have relied, there is only one possible logical conclusion that the Minister could have reached pursuant to Rule 59(2), namely that Mr. Ryan had participated in various authorised, structured, in-prison activities, which activities have the aim and, it appears not to be disputed, the effect of reducing recidivism or facilitating post-imprisonment reintegration into the community; thus through his participation in those courses it could only be that Mr. Ryan was less likely tore-offend and so better able to reintegrate into the community;

(19) in this last regard the court is not substituting its opinion for the opinion of the Minister; rather it is recognising the logical reality that if the Minister had regard to the correct information that ought to have been before him and did not have regard to the deficient information that was in fact before him, he could only have arrived at the above-stated conclusion;

(20) the fact that there is a discretionary element under Rule 59(2) as to the extent of the remission to be applied (being up to one-third of the total sentence) does not alter the conclusion that a degree of remission earned but irrationally and unjustly refused taints the balance of the term of imprisonment with illegality; certainly the entirety of the balance of sentence remaining cannot be lawful;

(21) the fact that Mr. Ryan elected to avail of the broadness and flexibility of the Article 40.4.2° jurisdiction, rather than seek adjudication on his complaint by way of judicial review proceedings, is not a matter with which the court finds fault;

(22) there is no legal or other pre-requisite to habeas corpus applications that a party who considers that he is being unlawfully detained, or his advisors, should engage in potentially protracted correspondence with the Executive during the period of that alleged illegal detention so that he can gauge more accurately whether his suspicions as to the legality of his continuing detention are in fact correct;

(23) as the remainder of Mr. Ryan's continued detention at Midlands Prison cannot be said to be in accordance with law, the court must in accordance with the requirements of Article 40.4.2° of the Constitution, direct his release from custody.

Having recited above the various conclusions that it has reached in these proceedings, the court sets out below the main substance of its judgment.

2. Mr. Ryan was sentenced by the Circuit Criminal Court on 30th July, 2010, to two concurrent sentences of six years' imprisonment, each to run from 26th May, 2010. This followed his conviction of two serious offences, in each instance the possession of a firearm with intent to cause injury to another, a statutory offence under s.27A(1) of the Firearms Act 1964, as amended. Mr. Ryan's release date, based on the calculation of a remission rate of one-quarter, in accordance with Rule 59(1) of the Prison Rules 2007, is 24th November next. By a letter dated 3rd December, 2013, Mr. Ryan's solicitor made an application that Mr. Ryan be granted one-third remission under Rule 59(2) of the Prison Rules. This application was refused and this refusal has led ultimately to the instant proceedings which, following an *ex parte* application on 17th June last, were heard by the court on 1st July, 2014.

3. As a prisoner, Mr. Ryan is subject both to the provisions and entitlements set out in the Prisons Act 2007 and also to the Prison Rules 2007. Section 35 of the Act of 2007 provides that the Minister for Justice and Equality may make rules for the regulation and good government of prisons. Section 35(2)(f) of the Act provides that such rules may provide for remission of a portion of a prisoner's sentence. Rule 59 of the Prison Rules deals with remission, transfer and release. So far as relevant to the instant proceedings, it provides that:

"(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."

The court notes in passing that, in the submissions to it, reference is frequently made to the availability of one-quarter remission or, by way of alternative, one-third remission. So, for example, at one point in the respondent's submissions mention is made of the power of the Minister for Justice and Equality to determine "*whether the prisoner should be granted remission and the extent of same; whether it will be one-quarter or one-third*". Thus when it comes to the application of Rules 59(1) and 59(2) it would appear that in practice the choice is perhaps perceived as being between one-quarter remission or one-third remission, notwithstanding that Rule 59(2) itself expressly contemplates the granting of remission that is somewhere along the spectrum of being greater than one-quarter but not greater than one third.

4. The Minister's power under Rule 59(2) falls to be exercised in a manner consistent with the defined purpose of the statutorily

grounded remission regime. What is this purpose? The operation of a remission regime was described by Hogan J. in *Byrne (a minor) v. Director of Oberstown School* [2014] 1 I.L.R.M. 346 at 350, as "*fundamental to the general operation of the criminal justice system*". Hogan J. referred to the decisions of the Supreme Court in *O'Brien v. Governor of Limerick Prison* [1997] 2 I.L.R.M. 349 and *Callan v. Ireland* [2013] 2 I.L.R.M. 257 in support of this assertion. The objects and merits of a remission-style regime have also been touched upon by Lord Phillips in his dissenting judgment in the House of Lords' decision in *R. (Black) v. Secretary of State for Justice* [2009] 1 A.C. 949 at p.966, where he states that:

> *"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 nor 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."*

5. It appears to the court that the above observations of Lord Phillips might equally be made in the context of the Irish sentencing and remission regimes. Having regard to the foregoing and to the wording of the relevant rules and the statutory provision on which they are grounded, it appears to the court that the policy behind Rule 59(1) is one of ensuring good behaviour on the part of a prisoner, something that is necessary for the proper government of a prison. The policy behind Rule 59(2) appears to be one of seeking 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.

6. On 3rd December, 2013, as mentioned, the solicitor for Mr. Ryan wrote a comprehensive letter to the Irish Prison Service seeking a one-third remission of Mr. Ryan's sentence of imprisonment, setting out the grounds on which such remission was perceived to be merited, and making certain legal arguments in support of the application. On 11th April, 2014, the solicitor for Mr. Ryan wrote again to the Irish Prison Service, noting that Mr. Ryan's application was under consideration, that the earliest date when he could be released, if successful, was 24th May, 2014, and seeking a decision on Mr. Ryan's application before that date. On 16th April, 2014, a brief letter issued from the Irish Prison Service to Mr. Ryan's solicitor, the key segment of which reads:

> *"I can confirm that a decision has been made on this application. The Minister is not satisfied that your client has met the criteria for increased remission and therefore the application is refused."*

7. A more detailed letter of the same date issued to the Governor of Midlands Prison and Mr. Ryan, the key segments of which read:

> *"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 re-integrate 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."*

8. Mr Ryan in effect contends in these proceedings that he has successfully availed to the fullest extent humanly possible of various authorised structured activities that take place in Midlands Prison. This has been disputed by the respondent. It is necessary to quote at some length from the affidavit of 2ih June, 2014, of the Deputy Director of Operations of the Irish Prison Service, in order to convey the respondent's view of matters:

> *"4. On the day after the Applicant's committal to the Midlands Prison I say and believe that he was met by the Assistant Governor ...for the purpose of carrying out the formal Committal Interview that is conducted with new prisoners ...*
>
> *5. I say that there were numerous and various 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 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 ...*
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> *15. Insofar as the correspondence ...might suggest that the Applicant is someone who has made one mistake in his life and has had an event free time in custody ...[t}he Applicant was in fact the subject of four disciplinary reports in respect of transgressions by him since he commenced the sentence he is now serving ...*
>
> *16. In relation to his offending ... [t]he Applicant has ten previous convictions and has been committed to prison on four previous occasions."*

9. The court has of course had the most careful regard to the evidence put before it by the respondent and to the arguments of respondent's counsel. However, if one also has regard, and the court has had regard, to the affidavit evidence put before the court for Mr. Ryan, and which the court largely accepts, a number of significant points emerge:

> (1) it appears that Mr. Ryan's initial meeting with the assistant governor of the Midlands Prison was formal, if not formalistic, and there was no mention of remission or the pre conditions to same; even if there was some mention of remission during what the respondent indicates in its affidavit evidence was a "*formal Committal Interview*", it beggars belief that, to the extent that this or some semblance of this is claimed, the Assistant Governor of Midlands Prison, during an initial interview at which Mr. Ryan was being briefed on all aspects of prison life, paused to enter into a comprehensive

discussion as to the availability of additional remission under Rule 59(2) and the criteria applicable to same.

(2) it appears that Mr Ryan was never apprised of the integrated sentence management service and hence, presumably, was unaware of the significance of same. There is suggestion in the affidavit of the Deputy Director of Operations that information leaflets as to the availability of this service were made available at Midlands Prison in May 2013, and that other prisoners have availed of this service. However, the fact that leaflets were available does not mean that Mr. Ryan received or read one. Moreover, the fact that, as appears to be the case, other prisoners have availed of the integrated sentence management service does not seem to the court to make Mr. Ryan's lack of awareness of that service or the significance of engagement with same any less credible or more unlikely. In any event, the Irish Prison Service in its own publication of February 2012, "*Incentivised Regimes Policy*" indicates that the standards of behaviour of prisoners who enjoy 'enhanced' prisoner status, of whom Mr. Ryan is one, include "*constructive participation in sentence planning, whether as part of Integrated Sentence Management or otherwise*" (emphasis added), thus indicating that the Prison Service does not itself view participation in the integrated sentence management service as the only means of constructive participation in sentence planning. Even were the court to accept that, despite the foregoing, particular significance is attached by the prison authorities to participation in the integrated sentence management service to the exclusion of, or at the least in preference to, other authorised, structured, in-prison activities, there is no suggestion before the court that, prior to these proceedings, this ranking of structured activities was ever advised to Mr. Ryan, whether directly or otherwise.

(3) with regard to lack of contact with the probation service, to which reference is made in the affidavit of the Deputy Director of Operations of the Prison Service, three points arise: (i) the probation service prioritises dealings with those prisoners of whom a court has made an order directing their engagement with the probation service; (ii) the engagement of probation officers with a prisoner serving a sentence, if any, is normally instigated by the prison authorities, particularly when it comes to community return work, and (iii) while a prisoner can self-refer to the probation service, this is normally with a view to seeking a referral to other services.

(4) Mr. Ryan does not suffer from addiction problems, so he can hardly be criticised, as he effectively is in the affidavit of the Deputy Director of Operations of the Prison Service, for a failure to engage with addiction counselling; as to psychological or other such services there is no indication that Mr. Ryan is or was any more in need of these than the general prison population.

(5) insofar as mention is made of the fact that Mr. Ryan has not engaged in the metal shop, laundry, building schemes or computer workshop or other services, this does not take account of the fact that Mr. Ryan works and has for some time worked full-time in the woodwork workshop, *i.e.* five days a week from 9.45 a.m. to 12 noon and again from 2.30 p.m. to 4 p.m. Notably, Mr. Ryan has been commended for his performance in this regard in a letter of 27th June, 2014, that was written by an Industrial Manager at Midlands Prison and adduced before the court in evidence. His full-time engagement at the woodwork workshop has the practical effect that he does not have the time to avail of any other of the work-shops or services mentioned, so he can hardly be criticised for not availing of them. His preference for the woodwork workshop also explains Mr. Ryan's general absence from prison school to which reference is made in the affidavit of the Deputy Director of Operations of the Prison Service, albeit that it appears from the evidence adduced for Mr. Ryan that he has in fact attended certain classes in the past that are classified as prison school work.

(6) thanks to his usually positive behaviour as a prisoner, Mr. Ryan has, as mentioned above, been awarded 'enhanced' prisoner status, he enjoys certain privileges as a result and appears generally to have had a positive disciplinary record since at least 2011 and there is some suggestion that he may have been recognised informally as not having in fact been culpable in respect of the disciplinary matter that arose in December 2010. The respondent in its affidavit evidence has referred to the behaviour of Mr. Ryan before he was granted his 'enhanced' status. It is not clear whether the Minister had regard to same before arriving at his decision in respect of Mr. Ryan's application for additional remission under Rule 59(2). To the extent that the Minister did so, and to the extent that Mr. Ryan's behaviour before he attained his 'enhanced' status was held against him, if at all, it appears to the court that a question-mark at least potentially arises as to the relevance or rationality of having regard to past transgressions of a prisoner who is presently deemed to be of 'enhanced' status in proceedings that are concerned with the issue of whether he ought now to be granted remission under Rule 59(2). There would seem to be little, certainly less, point in striving for enhanced prisoner status if, notwithstanding the achievement of same, all of a prisoner's past transgressions are nonetheless to be relied upon at some later stage, not to show that his behaviour has improved but to trumpet the fact that before it improved and before 'enhanced' prisoner status was granted it was sometimes less than good.

(7) all but one of the previous convictions of Mr. Ryan relate to the non-payment of fines, something that is not to be countenanced but in truth a failing that is not perhaps of the same moral or other gravity as other offences or transgressions of which a prisoner might be guilty.

10. The court notes that in reaching its conclusions on the above points it has had regard to some hearsay evidence that has been adduced on behalf of Mr. Ryan in his bid to ensure that his constitutional right to liberty is duly observed. More particularly, the court has had regard to a last-minute affidavit sworn by Mr. Ryan's solicitor on Tuesday 1st July, the day on which this application was heard, following receipt by her, at 17:19 on the previous Friday, of the comprehensive replying affidavit by the Deputy Director of Operations of the Irish Prison Service, to which reference was made above. Mr. Ryan's solicitor was precluded by prison rules from meeting with Mr. Ryan on the following Saturday or Sunday and was facilitated by the staff of Midlands Prison in having a lengthy telephone conversation with her client on Monday, 30th June, which was her first available opportunity to speak with her client following the receipt of the fax on Friday. Mr. Ryan's solicitor avers in her affidavit that she swears it "*on foot of what I was instructed in that consultation as well as certain facts within my own knowledge*". In a habeas corpus application it is for the court to order its procedures in accordance with the constitutional requirements as to fairness of procedures. In this case the court considers the aforementioned affidavit to be a bona fide statement of instructions properly recorded by Mr. Ryan's solicitor and admissible in evidence.

11. It would appear that, as a matter of fact, Mr. Ryan has shown good conduct by engaging in authorised structured activities, all of which activities, it is clear from Rule 27(2) of the Prison Rules, have as their equal aim making a prisoner "*less likely to re-offend or better able to re-integrate into the community.*" He has not engaged in certain activities because they coincide in time with, or are less attractive to him than, others. However, he has never been told that some activities are viewed as being better than others when it comes to satisfying Rule 59(2). Nor does it appear from the evidence before the court that some activities have been generally advised to prisoners as being so preferred when it comes to remission applications under Rule 59(2). Even so there is a suggestion in the respondent's evidence that, unbeknown it seems to prisoners, some authorised structured activities may in fact be

considered preferable to others despite the fact that, if one has regard to Rule 27(2), all such activities have the same aim.

12. Unless the various activities offered by the Prison Service are deficient as regards reducing recidivism and thus facilitating post-imprisonment re-integration into society, and there has been no suggestion in these proceedings that this is so, nor does the court mean to suggest this and neither does it conclude that this is so, how could the Minister for Justice and Equality conclude, as he did in his letter to Mr. Ryan of 16th April, 2014, that Mr. Ryan, who has engaged to the fullest extent that is humanly possible in authorised, structured, in-prison activities, did not demonstrate in his application that he had reduced his risk of re-offending? If the Minister had regard to any of the points referred to in the extract from the affidavit of the Deputy Director of Operations of the Irish Prison Service quoted above then, as has been shown, the Minister was relying on largely deficient information. There is also among the evidence before the court, documentation indicating that the Minister may have had regard to a newspaper report suggesting that Mr. Ryan is an individual who has been involved in a criminal feud in Limerick, a suggestion apparently based on Mr. Ryan's alleged involvement in a onetime feud-related prison disturbance. This involvement is denied by Mr. Ryan, he has never been questioned by the Gardaí in relation to same, and no 'P19' disciplinary notice has ever issued against him. So again, to the extent that this information was relied upon by the Minister, it would appear to have involved reliance by him on deficient information.

13. By law, the exercise of a jurisdiction to commute or remit sentence is a constitutionally reserved function which, by virtue of statute, rests with the Minister for Justice and Equality. His or her views as to the status and merits of a prisoner will typically determine the issue of whether a prisoner should be granted remission and also the extent of any such remission. Moreover, the court is acutely conscious of the fact that the control and management of our nation's prison system, and of prisoners within that system, has been entrusted by the Oireachtas to the Executive and is an area in which the Executive enjoys a wide discretion, subject of course to the Constitution and the law. In this last regard it is acknowledged by the State in its written submissions to the court that, for example, the Minister's decisions on remission are amenable to review or replacement by this Court in certain circumstances. Some prominent cases of relevance in this regard to which the court has been referred include *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, and *Kinahan v. The Minister for Justice and Law Reform and Others.*

14. In *The State (Keegan) v. Stardust Compensation Tribunal*, Henchy J. states, at p.658, that:

> *"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*

15. A similar point was differently expressed by Finlay C.J. in *O'Keeffe v. An Bord Pleanála*, the Chief Justice stating, at p.72, that:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."*

16. In *Kinahan v. The Minister for Justice and Law Reform and Others*, the Supreme Court considered the powers of the executive branch of government when dealing with applications for temporary release, it being contended that any rational application of the appropriate criteria arising in that case could only have led to a decision to release. Hardiman J., giving judgment for the Supreme Court, referred with approval to the judgment of McCarthy J. in *Murray v. Ireland* [1991] I.L.R.M. 465, indicating, at p.459, that the exercise by the Executive of its powers of temporary release in a capricious, arbitrary or unjust way offered the sole bases on which the courts, having due regard to the constitutional separation of powers, would be justified in interfering with a decision in relation to temporary release. As Hardiman J. observes, at para. 6 of his judgment, the power to grant temporary release is distinct from the general executive power of remission. Even so, the two appear to the court to be sufficiently analogous that the same basic principles should apply in both contexts. It appears also to the court that a decision-maker could achieve that capriciousness, arbitrariness or unjustness to which Hardiman J. refers in *Kinahan*, notwithstanding that somewhere in the spray of reasons offered by such decision-maker there may be some drops of rationality. In other words it appears to the court that the existence of some degree of rationality does not necessarily preclude a court from finding, although it may and likely will make it more difficult for a court to find, that one or more of the deficiencies referred to by Hardiman J. nonetheless presents itself in respect of a particular decision.

17. The decisions in *Keegan*, *O'Keeffe* and *Kinahan* arose in judicial review proceedings. Even so, they give firm pointers as to when the courts consider themselves justified in reviewing or replacing or taking some other action in respect of ministerial decisions. Is there in this case that flagrant rejection of, or disregard for, fundamental reason or common-sense to which Henchy J. refers in *Keegan*? Or has the Minister acted irrationally in the manner contemplated by Finlay C.J. in *O'Keeffe* in that he had before him no relevant material that would support his decision? Or is there in this case any of that capriciousness, arbitrariness or unjustness to which Hardiman J. refers in *Kinahan*?

18. Having had the benefit of oral argument and having had regard also to the affidavit evidence before it, the court considers that the Minister in reaching his decision in this case had before him largely deficient information to which he ought not to have regard, and also did not have regard to certain information to which he ought to have had regard (namely the true state of affairs as to Mr. Ryan's participation in structured prison activities). Moreover, it appears from the Minister's letter of 16th April last to Mr. Ryan that the Minister imposed a pre-condition to, or fetter on, the exercise of his discretion under Rule 59(2) that rendered the exercise of same irrational. It will be recalled that in the letter to Mr. Ryan it was stated that "*The Minister has made it clear that this concession [the power under Rule 59(2)] will only be used sparingly and in the most exceptional cases*." There is nothing in the Rules to indicate that the discretion under Rule 59(2) is a concession to be exercised sparingly and in the most exceptional cases. It appears to the court that the imposition of such a pre-condition or fetter is irrational in circumstances where the purpose of Rule 59(2) is to encourage as many prisoners as possible to avail of the opportunities provided by authorised structured activities so that they may rehabilitate themselves and so lessen the chance to society of their re-offending and better their prospects of re-integration following release. Moreover, the court considers that by viewing the application of the Rule 59(2) discretion as something to be exercised exceptionally, the Minister has in effect re-written Rule 59(2) so that the facility of one-third remission is now reserved for an undefined class of prisoners who meet some vague standard of exceptionality, a 're-writing' that distorts, and the court suspects may largely obviate, the availability of remission under Rule 59(2) as the natural consequence where a person satisfies in full the various requirements of that Rule.

19. In the respondent's submissions, the argument is advanced that although the Minister's letter of 16th April stated that "*The Minister has made it clear that this concession [the power under Rule 59(2)] will only be used sparingly and in the most exceptional*

cases", this ought to 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*". It appears to the court that this contention suffers from the fatal deficiency that the offered interpretation simply is not what the letter to Mr. Ryan states. Indeed, insofar as the respondent offers this suggested interpretation as the correct reading of the letter to Mr. Ryan, the court is reminded of the famous dissenting judgment of Lord Atkin in *Liversidge v. Anderson* [1942] A.C. 206 in which, at p.245, Lord Atkin criticised the majority for adopting an interpretation of impugned legislation whereby "*a word means just what I choose it to mean, neither more nor less*". The strained construction that it is sought by the respondent to place on the above-quoted extract from the Minister's letter to Mr. Ryan seems vulnerable to similar criticism. It certainly involves an interpretation of the letter that this Court does not accept as correct.

20. To the extent that the Minister has acted irrationally or fettered his role or distorted or largely suspended the contemplated application of Rule 59(2), the court considers that this case presents with that very capriciousness, arbitrariness or, at the very least, unjustness to which Hardiman J. makes reference in *Kinahan*. It appears also to the court that if one winnows away any deficient information on which the Minister relied and has regard to such correct information on which he ought to have relied, there is only one logical conclusion that the Minister could have reached in the context of the application made by Mr. Ryan pursuant to Rule 59(2), namely that it has been demonstrated that Mr. Ryan, through his participation in authorised, structured, in-prison activities, was less likely to re-offend and so would be better able to re-integrate into the community post-release, which conclusion yields the consequence that the Minister's denial of additional remission to Mr. Ryan was unjust. The foregoing does not involve the substitution by the court of its opinion for the opinion of the Minister. It is merely a recognition by the court of the reality that if the Minister had regard to the correct information that ought to have been before him and did not have regard to the deficient information that was in fact before him, he could only have arrived at one possible logical conclusion. It is true that Mr. Ryan has not availed of all of the many authorised structured activities that are currently available at Midlands Prison. However, this is because: (1) he cannot humanly avail of all structured activities that are available within the prison system when he is working full-time at one (the woodwork workshop, at which his performance has been commended); (2) some of those activities such as addiction counselling are completely irrelevant to him; (3) he has opted to go with one particular authorised structured activity, participation in the woodwork workshop, that for whatever reason appeals to him as an individual; and (4) in this last regard he was never advised, nor does it appear from the evidence before the court that prisoners are generally advised, that despite the fact that, pursuant to Rule 27(2) of the Prison Rules, all authorised, structured, in-prison activities have as their equal aim making a prisoner "*less likely to re-offend or better able to re-integrate into the community*", some such activities are considered preferable to others. No party before the court has contended that any of the structured prison activities offered by the Irish Prison Service are, in and of themselves, in any way deficient in achieving their stated aim and thus it follows logically that, by participating in the authorised structured activities in which he did, Mr. Ryan must have rendered himself less likely to re-offend and so better able to re-integrate into the community. The court has no view of its own to offer or substitute in this regard; it is merely acknowledging a factual paradigm that logic dictates to arise.

21. The detention of a convicted prisoner, even during the course of a term of imprisonment handed down by the courts, may become unlawful if, for example, the conditions of imprisonment constitute a serious breach of the prisoner's constitutional rights (cf. the judgments of Edwards J. in *Devoy v. Governor of Portlaoise Prison* [2009] IEHC 288 and Hogan J. in *Kinsella v. Governor of Mountjoy Prison* [2012] 1 I.R. 467). It seems inexorably to follow that this is also the case where a prisoner is entitled to remission and no such remission has been granted. This is the situation that arose in *O'Brien v. Governor of Limerick Prison* [1997] 2 I.L.R.M. 349. That case was concerned with Rule 38(1) of the Rules for the Government of Prisons 1947. Rule 38(1) provided, *inter alia*, that a convicted prisoner sentenced to a period of imprisonment exceeding one month should be eligible to earn remission not exceeding one-quarter of the whole sentence. On 18th June, 1993, Mr. O'Brien was sentenced to a period of imprisonment for ten years, the final six years of which were conditionally suspended. The trial judge anticipated that Mr. O'Brien would not be released prior to 17th June, 1997. However, in June 1996, Mr. O'Brien applied for remission pursuant to Rule 38(1). He claimed that he was entitled to be released after three-quarters of the custodial sentence had been served, viz. after three years. The Supreme Court concluded that the order of the trial judge should be considered valid insofar as it imposed a four-year period of imprisonment, and remission should be calculated on that period, it being conceded m that case that the full one-quarter remission should apply. The fact that there is a discretionary element under Rule 59(2) as to the duration of the remission to be granted thereunder does not appear to this Court to alter the conclusion that remission earned but irrationally and unjustly refused taints the balance of the term of imprisonment with illegality. Certainly the entirety of the balance of sentence remaining cannot be lawful.

22. The respondent has contended that the instant proceedings ought more properly to have proceeded by way of judicial review proceedings. However, Mr. Ryan has elected to proceed by way of application under Article 40 of the Constitution and there is good reason for his so proceeding. Judicial review would not be of real avail to him as any decision to remit the decision for reconsideration by the Minister would not necessarily lead to any change in the continuance of Mr. Ryan's detention. Moreover, the burden of proof would be on Mr. Ryan in any judicial review proceedings whereas in these proceedings it is for the respondent to demonstrate the lawfulness of Mr. Ryan's detention, thereby affording a significant procedural advantage to Mr. Ryan. Finally, judicial review proceedings are discretionary whereas an inquiry under Article 40 of the Constitution requires the court to determine the lawfulness of Mr. Ryan's detention simpliciter. If these points seem familiar, it is because a variant of them previously featured in *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76, in which Hogan J. stated, *inter alia*, that:

> *"6. In the end the issue in the instant proceedings comes down to whether the applicant should have proceeded by way of judicial review to apply to quash the conviction or whether he was entitled to apply to this Court pursuant to Article 40.4.2 for an order of release. Counsel for the applicant ...maintained that the applicant was entitled to choose the remedy which best vindicated his rights. He pointed to the safeguards provided for in Article 40.4. 2 itself, including the judicial obligation to inquire "forthwith" into the legality of the applicant's detention, the fact that the onus rests on the detainer to establish the legality of that detention, the right to apply to any judge of the High Court of one's choosing for an order to directing an inquiry and the right (in principle, at least) to go from judge to judge to seek such an inquiry. The remedy provided for under Article 40.4.2 is, of course, not a discretionary remedy. Judicial review was, by contrast, inevitably slower and was a discretionary remedy.*
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> *7. [Counsel for the respondent]...contended that in light of the decision of the Supreme Court in FX Clinical Director of the Central Mental Hospital [2014] IESC 1 an applicant who had been convicted by a lower court could normally only proceed by way of an Article 40.4.2 [application] ...in cases where the warrant was not good on its face. In the light of these latter submissions, it seems necessary once again to examine the text, history and tradition of Article 40.4.2...*
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> *26. It follows...from a consideration of..case-law that the Article 40.4.2 jurisdiction remains a broad and flexible one...Article 40.4.2 shines as a beacon of liberty which will never deny refuge to an applicant who can show a fundamental breach of constitutional rights or the existence of some other significant defect attaching to the warrant or order providing for his or her detention. It is for these reasons that I accordingly reject the interpretation of FX ... urged on this Court."*

23. That Mr. Ryan has chosen to avail of the broadness and flexibility of the Article 40.4.2° jurisdiction is not a matter with which this Court finds fault.

24. The respondent has contended that notwithstanding that Mr. Ryan, following his application for remission under Rule 59(2), found himself in a position in which he considered his continuing detention to be tainted by illegality, he ought, instead of commencing the instant proceedings, to have engaged further with the Department of Justice and Equality as to the reasons for the Minister's decision in respect of Mr. Ryan's application so that there could have been "*meaningful development of [his] ...complaints*", all at a time of course when Mr. Ryan considered that he was being unlawfully detained. In point of fact, from the correspondence adduced in evidence, it appears that, following the refusal of the remission application made under Rule 59(2), Mr. Ryan's solicitor actively sought a comprehensive explanation of that refusal. However, even were that not the case, there is no legal or other pre-requisite that a party who considers that he is being unlawfully detained should engage in potentially protracted correspondence with the Executive during the period of that alleged illegal detention so that he can gauge more accurately whether his suspicions as to the legality of his continuing detention are in fact correct. The Constitution includes no such constraint, the law applies no such constraint, and common-sense suggests that any such constraint would be unwise.

25. The court finds that Mr. Ryan's continued detention at Midlands Prison 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 custody.