Neutral Citation: [2014] IEHC 402

THE HIGH COURT

Record Number: 2014 No.1267 SS

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937

BETWEEN:

ERIC KEOGH

APPLICANT

AND

GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 5th DAY OF AUGUST 2014:

1. The applicant is nearing the end of a six year sentence being served by him at Mountjoy Prison. While he will be entitled by good conduct to one quarter remission under Order 59(1) of the Prison Rules 2007 which would see him released around 3rd October 2014, he believes that he is eligible for an enhanced remission of up to one third under Order 59(2) of the Orders which, if applied to him in full, would mean that he would already be released. He has made application to the Minister in this regard but has received no decision. As a result, and in reliance upon a recent judgment of Mr Justice Barrett in *Ryan v. Governor of Midlands Prison*, unreported, High Court, 2nd July 2014, he submits that his present detention is not in accordance with law, and he applies to be released by order of this Court.

2. Order 59(2) provides:

> *"The Minister may grant such greater remission of sentence in excess of one quarter, but not exceeding one third 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".*

3. He instructed his solicitor at the beginning of July 2014 that he considered that he fulfilled the criteria under Order 59(2) for up to one third remission, since he has engaged fully in authorised structured activities, and that as a result he is at a reduced risk of re-offending upon release, and better able to integrate into society. He has exhibited certificates indicating that in 2011 and January 2012 he completed seven courses.

4. His solicitor wrote to the Governor on the 11th July 2014 stating that his client was an enhanced prisoner entitled to one third remission, and that in the light of the judgment of Barrett J. in the *Ryan* case his client may be in unlawful detention, and warning that court proceedings may need to be commenced in order to vindicate the applicant's rights. There appears to have been no response to this letter either from the Governor or from anybody to whom it may have been forwarded for attention. I note that in a replying affidavit from Mr Keith Lynn, an Assistant Principal Officer in the Irish Prison Service, he refers to this letter, and states:

> *"No reference was made to the applicants prior application nor was there an actual renewed application made on his behalf at this juncture, nor any detail as to the particular criteria relevant to the Ministers decision pursuant to Order 59(2) of the Prison Rules 2007".*

5. That averment suggests that the Minister considers that the onus is upon the prisoner to make application for enhanced remission under Order 59(2), rather than that it is something that the Minister is to required to consider in respect of each prisoner who might be eligible even where no application is made by the prisoner. That view is confirmed by the existence of an application form which Mr Lynn has exhibited relating to the applicant's earlier application for enhanced remission which he completed and gave to the Governor in November 2013. The form is headed: ***Application for Remission pursuant to Order 59.2 of the Prison Rules 2007***. I note also that Order 59(1) of the Prison Rules which governs the one quarter remission speaks of a prisoner being *"eligible by good conduct to earn a remission of sentence not exceeding one quarter of such term ...".* I am not aware whether a prisoner is required to first complete an application form so that he/she can be considered eligible or not for one quarter remission, or whether it is automatically applied absent less than good conduct, and that it is a decision simply made by the Governor at the appropriate time. But I note that under the Incentivised Regimes Scheme operating in Irish prisons the Governor will keep records of a prisoner's engagement in structured activities and of behaviour, achievements, interaction with staff and other prisoners, and other matters relevant to good behaviour. Hence, the Minister has available to her details necessary to consider eligibility for remission or enhanced remission.

6. At any rate, not having received any response from the Governor to his letter dated 11th July 2014 the applicant's solicitor wrote to the Minister by letter dated 21st July 2014, in which he sought a one third remission under 59.2 of the Prison Rules, and gave an outline of the structured activities which the applicant has undertaken while in prison for the purpose of the Incentivised Regimes Scheme, noting also that the applicant had been transferred to the Training Unit "*where he continues to enjoy a super-enhanced status in recognition of his conduct whilst in custody*". The letter went on to describe the applicant as "*a model prisoner*", and requested that the application be considered "in early course" since if eligible for this enhanced remission he ought already to be released. The letter warned that unless the application was considered "within a reasonable time" an application to court may be required, and warned that if a decision was not received by 10.30am on 24th July 2014, the right to apply to Court for appropriate reliefs was reserved.

7. The imposed deadline passed without response or decision on the application, and the present application was commenced. The failure to receive a response was characterised in the applicant's solicitor's grounding affidavit as a refusal to confer upon the applicant the benefit of a bona fide exercise of the Minister's discretion under Order 59.2 of the Prison Rules such that the applicant's detention is now unlawful.

8. Mr Lynn replied to that letter dated 21st July 2014 by letter dated 23rd July 2014. First of all, he stated that the deadline imposed by the letter of the 21st July 2014 was unreasonable. He went on to set out the content of Rule 59.2 and stated further in that regard:

> *"In considering whether a prisoners 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 prisoners behaviour/conduct whilst imprisoned or during any periods of Temporary Release and the views of An Garda Siochana.*
>
> *I will have to obtain information from prison management & therapeutic services regarding the above, review his file and draft a submission to the Minister who will then have to make a decision on the application.*
>
> *Your instructions regarding the initiation of proceedings are noted. However, you should advise your client that any such action will be vigourously contested by the State. The correspondence will be used as evidence in order to pursue failed litigants for the full costs of any such proceedings in circumstances where we defend such litigation successfully. It is further our policy to seek the necessary orders so that should a failed litigant not be a 'mark' at the time of proceedings, should he/she become a mark at a future date (civil compensation claim etc) we will take the necessary steps to execute any such orders to recoup our costs.*
>
> *Your clients application for one third remission will be dealt with in due course. "*

9. That response though it was faxed at 11.23hrs on 23rd July 2014 was not brought to the attention of Hogan J. on the morning of the 24th July 2014 when the application for an inquiry was first moved before him. But I am informed through Counsel that it was brought to his attention at 2pm that day. It certainly evinces no appreciation of the fact that the point of mootness in relation to up to one third remission is fast approaching, and gives no indication that the matter will be dealt with on an urgent basis. As I have said, if the applicant is eligible for the full one third he ought to be released already. I am told that Mr Lynn is presently on annual leave, which suggests that none of the steps which Mr Lynn has said need to be taken before the Minister can make a decision will be taken until he returns to work. I do not know when that will occur. But it also seems to make clear that the Minister's view is that until a prisoner makes application for one third remission, she is not required to give consideration to that question under Rule 59.2 of the Prison Rules.

10. Mr Lynn's affidavit goes on to refer to a previous application which the applicant made for one third remission last November which the applicant's solicitor appears to have been unaware of. Presumably his client had not informed him of that previous application, nor of the response to it. Mr Lynn exhibited a copy of the application and the response. In his letter of application the applicant had stated that he was a "trustee prisoner for the past two years" and had completed numerous courses in order to better himself. That may be a misprint for "a trusted prisoner". He stated that he has abided by prison rules, has done his job as a cleaner in the prison and has taken care of the day to day upkeep of D Wing. He stated also how beneficial he has found the courses that he had taken, and went on to mention his two very young children, how he has changed his life around, and will receive great support from his family when he is released. Finally he referred to the fact that he had been moved to the Training Wing, and had been entrusted with cleaning jobs both in the officers' quarters and the counsellors' offices, as well as the landing. He says he was selected for those jobs because he is highly trusted, reliable and of good manner. These are the matters on which he based his earlier application for the full one third remission.

11. That application received a response from Mr Lynn by letter dated 16th December 2014. It informed him that with normal remission he would be released on the 3rd October 2014. It then set forth what seems to be a standard paragraph in precisely the same terms as Mr Lynn's response to the applicant's solicitor's letter dated 21st July 2014 where he referred to Rule 59.2 and what matters would be taken into account when considering his eligibility for one third remission. But the response concluded by stating:

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

12. Nothing has been adduced on the present application to indicate that the applicant did anything further in relation to this response to his application. In fact Mr Lynn avers that the applicant did not respond in any way to take his application further. Perhaps it is explained by the fact that in early February 2014 the applicant was granted Temporary Release in order to participate in what Mr Lynn has called 'The Community Returns Scheme' from 14th February 2014. It seems to have been a 16 week programme while on temporary release, and if my calculations are reasonably accurate, the end of that 16 week programme would have brought him to the middle of June - a time that would seem to relate closely to the date on which a full one third enhanced remission would have seen him released under Order 59.2 of the Prison Rules. However his performance while on that regime seems to have been less than optimal according to what Mr Lynn has stated. In that regard he states in paragraph 7 of his affidavit:

> *"I say that the applicant was subsequently released on weekly reviewable temporary release to participate in the Community Returns Scheme from 12th February 2014 with I6 weeks Community Return. I say that the applicant attended an Induction meeting on the I31h February 2014 when a Community Service placement agreement was established for him. He agreed to attend a city centre project each Tuesday, Thursday and Friday beginning the 18th February 2014 and was due to finish on the 6th June 2014. I say that a formal warning was issued to the applicant on the 10th April 2014 (week 8) following his arrival to placement late (at 10.25am). I say that the applicant had further absences which were facilitated following his production of documents confirming acceptable reasons which included a daughters hospital appointment, viral infections, headaches. I say that he was spoken to on the 6th June 2014 about the extent of his medical related absences, which included backache, and he agreed that his completion would be extended by 2 weeks to compensate for his 6 absences. I say that the applicant attended as required for the first of these additional weeks but was absent on the 17th June 2014 and made no contact to explain his absence. I say that contact was made with him on the 17th June 2014 and he attributed his absence that day to further medical difficulties attributed to a back injury. He further stated that he had attended Mater Hospital on the 17th June 2014, had scans and would produce a letter to this effect. He asserted that despite these difficulties, he would be fit to resume placement. He was directed to provide a letter to the office on the morning of the 18th June 2014 and failed to do so. In these circumstances the applicant was deemed to have been in breach of the Community Return programme [having] had two unacceptable absences. I say that on the 25th June 2014 the applicant was refused a further period of weekly reviewable temporary release due to the risk of his breaching the terms of said release and failing to adhere to his obligations pursuant to the Community Return Scheme and presenting a risk of re-offending. "*

13. More worrying still is the fact that Mr Lynn has averred that on the 7th May 2014 the applicant appeared before Blanchardstown District Court having been charged with certain offences alleged to have been committed while out on temporary release, namely providing a false name to Gardai and being in possession of certain articles.

14. These are all matters which the applicant's solicitor was unaware of when he was instructed to write his letters of the 11th and 21st July 2014. I have little doubt that if he had been made aware by the applicant of these happenings since February 2014 and of the previous application made by the applicant at the end of November 2013 and which was not taken further following Mr Lynn's reply dated 16th December 2013, he might not have considered it appropriate to write in the terms in which he did, and indeed thereafter launch the present proceedings.

15. The applicant's solicitor took further instructions in the light of Mr Lynn's replying affidavit. Those instructions yielded a further affidavit by him in which he states that the onus is on the Minister and not on the applicant to determine whether the applicant is eligible for enhanced remission of sentence under Order 59.2 of the Prison Rules, and that it is not incumbent upon the applicant to make application in that regard.

16. The applicant's solicitor goes on to state that he spoke to the applicant by telephone call made to him in the Training Unit on the 30th July 2014, and says that the applicant has informed him that he never received the letter dated 16th December 2013 to which Mr Lynn has referred. It is noted by him that the letter appears to be addressed to the Governor rather than to the applicant, though I note that it commences "Dear Mr Keogh". But he goes on to refer to the difficulties which the requirements specified in Mr Lynn's letter dated 16th December 2013 would pose for a prisoner, and refers to the fact that all the necessary information which the Minister would have to have regard to concerning a prisoner's behaviour and engagement in structured activities is contained in a file which the prison is required under the Rules to maintain. He considers therefore that the Minister ought to have considered the applicant's earlier application when it was made in early December 2013, rather than place additional requirements upon the applicant, as Mr Lynn communicated in his letter of reply dated 16th December 2013.

17. Regarding the contents of paragraph 7 of Mr Lynn's affidavit, the applicant's solicitor says that he has spoken to the applicant's father about those matters, and he sets out what he has been told. It is not clear why the solicitor has not spoken to the applicant about that paragraph where he seems to have spoken to the applicant by telephone on the 31st July 2014. What has been stated in that regard is clearly hearsay evidence only. That said, however, and if one accepts what the applicant's father has stated with regard, for example as to the events of the 17th June 2014 referred to by Mr Lynn, what the applicant stated in relation to attending the Mater Hospital and having scans taken and that he would produce a letter to that effect was simply an untruth - apart from the bare fact of having attended at the Mater Hospital. In relation to the non-production by the applicant of a letter of explanation on the 18th June 2014 the applicant's father has apparently stated that a medical certificate which the applicant obtained from his GP on the 17th June 2014 was delivered to the Training Unit at 1pm on 18th June 2014 and to Justin McCarthy of the Smithfield Probation Service at 2pm on the same date.

18. Against that factual background, John Aylmer SC has made his legal submissions in support of an order for release being granted by this Court. He submits that on any fair and reasonable assessment of the applicant's application for one third remission by the Minister he must be entitled to same, and that the Minister's failure to make a timely decision in that regard is wrongful and represents a failure to give the applicant the benefit of a bona fide exercise of the Minister's discretion to which he is entitled. That failure is said also to be capricious, arbitrary and unjust. Considerable reliance is placed upon the judgment of Barrett J. in *Ryan* to which I have already referred. I am urged to follow it.

19. In that case Barrett J decided that there could be no doubt that the prisoner was entitled to one third remission on the facts of his case, and that the Minister could rationally have reached no other decision on the facts of his case, whereas his application was refused.

20. In the present case the contents of paragraph 7 of Mr Lynn's affidavit are troublesome, as is the applicant's lack of candour and non-disclosure of relevant facts by not instructing his solicitor in relation to his December 2013 application and the events that unfolded during his period of temporary release after February 2014 and especially his having been before Blanchardstown District Court in May 2014 while on temporary release. The fact that he enjoys the presumption of innocence on those charges does not in my view alter his duty of candour in relation to what happened. In my view these matters are factors which distinguish the case from the Ryan case to the extent that the Court ought not simply to follow it, as if the Ryan case represents a 'get out of jail card' for any prisoner who has engaged to some extent during his period of imprisonment with courses available and who has earned an enhanced level of privileges in accordance with the Incentivised Regimes Policy referred to.

20. There are two applications which the Court must have regard to when considering whether the applicant's detention is now unlawful in the events that have arisen. The first is that made by the applicant at the end of November 2013 and which, according to the respondent was responded to in its reply dated 16th December 2013; the second is that which emanated from the applicant's solicitor by letter firstly dated 11th July 2014 to the Governor, followed up by the letter dated 21st July 2014, and responded to by letter dated 23rd July 2014.

21. In relation to the first application which appears to have foundered after the reply to it dated 16th December 2013, it is not credible that the applicant did not receive that reply. If he did not, it is surprising that he did not make inquiries as to why an application of such importance to him was not being responded to. I think it is reasonable to infer that the temporary release which commenced in February 2014 was with a view to anticipating his early release. His performance on that 16 week Community Programme would have seen him finish it at around the time that he would be entitled to be released if he was granted one third remission. Unfortunately the applicant did not perform satisfactorily while on the programme as Mr Lynn has stated in paragraph 7 of his affidavit. In my view the fact that no decision appears to have been made one way or another on the first application for one third remission must be seen in the light of those events when considering if his detention at the moment is in accordance with law. The present application is not one commenced by way of judicial review, where the applicant seeks an order of mandamus to compel the Minister to make a decision on that first application. This Court can look at all the factual background in order to determine whether his detention at the moment is in accordance with law. Bearing in mind that if the Minister were to have taken the view that the applicant's conduct while on temporary release led to her being not satisfied that as a result of having engaged in structured activities he was less likely to re-offend and not better able to reintegrate into the community, she would be entitled to not grant a further period of remission up to one third, it seems to me that this Court cannot conclude that his detention is now unlawful simply because she took no further step on his earlier application beyond the response dated 16th December 2013. In so far as the applicant submits that the onus should not be on the applicant to pursue these matters under Order 59.2 of the Prison Rules, and that the onus is on the Minister to have made a decision in the light of information which her own records would enable her to make, I would say that while such an argument might well be relevant on a judicial review of the failure to decide the application, it does not speak to the question of whether his detention is now unlawful, particularly given the facts we now know about the time he was on temporary

release.

22. As for the later application commenced through his solicitor on the 11th July 2014 and followed up with a threat of proceedings in his letter dated 21st July 2014, I have already criticised that application on the basis of a lack of candour and non disclosure of relevant facts. That apart however one must again bear in mind that these are not judicial review proceedings where delay on the Minister's part in reaching a decision is being argued. I am not to be taken as stating that an application under Article 40 is inappropriate in all cases, and that in all such cases relief should be pursued by way of judicial review. I agree that an application for release under Article 40.4.2 of the Constitution is an important and sometimes vital mechanism where the protection and vindication of constitutional rights is at stake - the right to liberty being near the top of the hierarchy of such rights. Nevertheless it will not in all cases be the appropriate application for the purpose of vindicating such rights. In the present case I do not consider that it was the appropriate step to have taken in circumstances where there were facts in the background which, if the solicitor had been fully instructed by the applicant and not left struggling with limited instructions which I suspect was designed to try and fit this case into the conclusions reached by Barrett J. in the Ryan case, he would no doubt have advised the applicant that an application under Article 40 was unlikely to succeed and that an urgent application by way of judicial review was the proper course to take in order to produce a decision on the later application for one third remission. It is in my view unreasonable that having failed to follow up on his earlier application for whatever reason, he should wait until a number of days after the Ryan judgment was delivered before contacting his solicitor to make another application, and then having imposed an impossible deadline of 48 hours or thereabouts in a letter dated 21st July 2014 then assert that his detention is unlawful. These applications must inevitably take some time to process. Mr Lynn has explained the steps which must be taken before the Minister can be placed in a position to make a decision. The applicant could have moved much earlier so as to enable a decision to be taken in time for him to have a chance of benefiting from the full additional 8% of remission that he was desirous of obtaining. Perhaps he was inhibited from doing so by his knowledge of how he had performed on the Community Programme after his temporary release in February 2014. Not unreasonably in my view, he may have considered that he had blown his chances of being granted that additional remission. One way or another, I do not consider that his detention under present circumstances is unlawful. This is a different case than was before Barrett J. in Ryan, and it is not a precedent therefore which I should simply follow.

23. Having said all that, I have concerns about how Order 59.2 of the Prison Rules operates in practice, and it might be helpful if I said something about that. I perceive that unless a prisoner actually makes an application for up to one third remission, the Minister will not give any consideration to whether or not a prisoner, by engaging in authorised structured activity, is less likely to re-offend and will be better able to reintegrate into the community. The rule makes no reference to any application to be made by the prisoner. On the contrary the rule contemplates that the Minister will consider this and be satisfied or not in that regard. The point has been made in this case, and it is no doubt the case, that all the records of a prisoner's attendance on such structured courses and of his behaviour and conduct on such courses, and generally, are kept on the prisoner's record in the prison. I observe at the same time that there does not appear to be any guidance as to how the Minister is to become satisfied as to any reduction in the likelihood of re-offending or whether he has become better able to reintegrate into the community. On one reading, and this is touched upon by Barrett J. in his decision in Ryan, the rule is indicating that it is by virtue of having engaged satisfactorily in such structured activities that enables the Minister to be so satisfied. On the other hand that may be an over-simplification, as simply because one signs up for a number of courses and attends is no guarantee that any benefit has been derived. A prisoner might just go through the motions of attending the course and be no better for it. If that is correct then some form of subjective examination of the success of the prisoner's attendance should be required. Yet, there is no visible and transparent procedure or process in place to achieve this.

24. A prisoner in my view is entitled to clarity as far as his expectations are concerned. In the present case, for example, the courses which the applicant participated in were all done in 2011 apart from one in 2012. He appears to have been considered a good prisoner thereafter since, at least according to his solicitor's affidavit, he appears to have been entrusted with duties within the prison of some responsibility as described therein. But there is no evidence that he undertook any structured activity in the past almost three years. The question arises whether the prisoner was entitled to presume that he had fulfilled the requirements for consideration for one third remission even though the activities in question were engaged in by him some years ago. This seems unclear. The policy behind the privileges regime is clear. The regime is there to incentivise a prisoner into good behaviour by rewarding him with increased privileges, which may be removed again in the event that his behaviour disimproves again. That regime is of assistance in managing a prison, and will be conducive to prisoner safety and welfare also. The fact that enhanced privileges are taken away again does not get a mention in Order 59.2 as a reason why having participated in structured activities a person might not be considered to qualify for one third remission. Presumably it would be a factor which the Minister would be entitled to take into account when she was deciding that despite having participated in structured activities the prisoner was not less likely to re-offend or was not better able to reintegrate. But the rule and the regime therefore lacks clarity and certainty from a prisoner's perspective, and that must be an undesirable state of affairs where such certainty would greatly assist a prisoner in appreciating the consequences of his behaviour both good and bad.

25. There is no clarity around how a prisoner is expected to go about making an application for additional remission. Perhaps he is told upon arrival at the prison when a formal meeting occurs in order to explain the regime to an incoming prisoner. But it is not clear in the rule that a person's entitlement to an additional remission for "further good conduct" is dependent upon his application in that regard, and there is nothing to inform the prisoner as to the timing of such an application by him. Mr Lynn in his affidavit has explained the logistics of such an application. He has explained the great volume of such applications which come over his desk and the steps which have to be taken in order to place the necessary information before the Minister. All this was explained in the context of his view that the applicant's solicitor's deadline of 48 hours for decision was totally unreasonable. But the prisoner cannot be expected to know anything about Mr Lynn's workload or of any other colleagues in his section who deal with these applications. First of all a prisoner might well believe, given the provisions of 59.2 that the Minister would be in touch with him at the relevant time to let him know that she was considering him for earlier release and even might invite him to assist her in that decision by attending an interview with the Governor or other official in the Prison Service, or by inviting a written submission perhaps. But secondly, there is nothing to tell him that he must first make an application or when he ought to make such an application. That will inevitably lead to a situation where a prisoner, who has been a model prisoner at all times, who has participated in every course he could possibly have been expected to have participated in, and who must therefore inevitably be considered to have earned early remission under 59.2, will be deprived of that entitlement (albeit discretionary) simply because he did not fill out a form and apply for it - even though there is nothing in the rule which places the onus upon him to do so.

26. Such a vista does not present itself in the present case, because the applicant clearly understood that he had to apply, and he did so. But a case will come along where a prisoner who has clearly and unarguably earned the entitlement to additional remission will have been deprived of it because of a lack of understanding of the need to apply in sufficient time (whatever that might be) so as to make his application meaningful. There is clearly no point in applying for additional remission if one does not do so in time to avail of that additional 8% of remission time. Delay can render the application moot if it is not applied for in a sufficiently timely fashion, yet the prisoner cannot know how long it takes for his application to receive a decision by the Minister. In my view, consideration ought to be given to revising the Prison Rules in this regard so as to provide clarity by incorporating a specified procedure, including by

stating whether an application must be made by the prisoner, when any such application should be made, to whom such an application should be made, in what manner such an application should be made, and specifying with more clarity than now the criteria which will apply, and the basis on which a decision will be made. Additional remission is an important feature of a prison's regime. It assists in the maintaining of good order within the prison and also prisoner safety and welfare. All the more reason for there to be complete clarity and detail around the regime, and transparency as to how it operates, and what factors will be taken into account in the Minister's decision.