THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 675 J.R.]

BRIAN MCGINLEY

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 28th day of September, 2017

1. On the 13th February, 2005, the applicant committed an offence of aggravated burglary. This involved the invasion of a family home by four masked men, including the applicant, the gang being armed with a sledge-hammer, baseball bat and other offensive weapons. The offence involved threats of an extremely violent and sexually threatening nature being made. The father was repeatedly assaulted and he and the grandfather were tied up. The mother, young children and a young cousin were falsely imprisoned. It was part of the prosecution case that a knife from the kitchen was held to a child's throat, although Mr. McGinley demurred on this point. A safe containing a large amount of valuable personal property and a vehicle were stolen. The applicant was identified through DNA, which was not available for the other perpetrators.

2. On 5th November 2010 the applicant was convicted and on 1st December, 2010, was sentenced to a period of ten years' imprisonment, backdated to 5th November, 2010. The conviction was unsuccessfully appealed to the Court of Criminal Appeal (*The People (D.P.P.) v. McGinley* [2014] IECCA 7) as subsequently was the sentence. No-one else appears to have been convicted in this regard. The applicant has not co-operated with the prosecuting authorities in relation to identifying and prosecuting the other perpetrators.

3. While in custody, the applicant received disciplinary notices on 16th March, 2012, 22nd June, 2012 and 21st July, 2013.

4. Where an applicant qualifies for enhanced remission, the rate of remission is one-third rather than the normal one-quarter. Thus the applicant's release date, if he had been entitled to enhanced remission was 5th July, 2017. The release date if normal remission applies is 5th May, 2018. If the Minister (as he is in principle entitled to do) were to decide to hold the disciplinary notices against the applicant such that the applicant would not qualify for remission at all, his release date would be 5th November, 2020.

5. The applicant applied for and was refused enhanced remission. The refusal was contained in a minute dated 18th July, 2017, from the Operations Directorate of the Irish Prison Service to the Governor of Castlerea Prison, which set out the statutory criteria to which the Minister is obliged to have regard.

6. The conclusion of the minute is that *"The minister, having considered your application for enhanced remission, including all materials supplied in support of the application and the matters outlined above has decided to refuse your application. While it is acknowledged that you have engaged in some authorised structured activity, the Minister having had regard to the nature and gravity of the offence to which the sentence of imprisonment being served relates, potential threat to the safety and security of the public and the Garda view, is not satisfied that you are less likely to reoffend and are better able to re-integrate into the community".*

Procedural history

7. On the 18th August, 2017, the applicant applied for leave to seek judicial review of that refusal to grant enhanced remission.

8. The statement of grounds challenging this conclusion sets out an embarrassing multitude of allegations in 38 separate numbered grounds. Such a profusion of legal verbiage is difficult to square with the strictures of the judgment of MacMenamin J. in *Babington v. Minister for Justice and Equality* [2012] IESC 65.

9. The reliefs sought in the statement are an order quashing the refusal decision, an order of *mandamus* requiring reconsideration of the application, and various interlocutory reliefs.

10. When granting leave, McDermott J. cut down the application by giving leave only for the order of *certiorari*, and only on grounds number 22 and 24 to 37 inclusive.

11. By motion dated 21st August, 2017, the applicant applied for an order admitting him to bail pending the determination of the judicial review proceedings. That motion was returnable for, and heard on, 13th September, 2017, and forms the subject-matter of this judgment.

An application for bail in an enhanced remission judicial review is misconceived.

12. There is a jurisdiction to grant bail in civil cases (see *B.O. v. Minister for Justice Equality and Law Reform* [2006] 3 I.R. 219 *per* Herbert J.), but in my view it should only be exercised in a civil case which itself could lead to the release of the prisoner. It is one thing to grant bail in say an Article 40 application, but the jurisdiction to grant bail is not a power to be exercised in relation to proceedings regarding incidental matters where the ultimate order of the court is not going to be one directing release.

13. As Ní Raifeartaigh J. pointed out, very pertinently if I may respectfully say so, in the similar challenge brought in *Bradley v. Minister for Justice and Equality* [2017] IEHC 422 at para. 54, *"in reality, [the applicant] cannot get what he ultimately wants from the Court in any event, namely a grant of enhanced remission. At best, he can have the existing decision quashed and the matter remitted for decision again."*

14. That fundamental difficulty is, in my view, fatal to any application of the type presented here. Where the ultimate order of the court in judicial review proceedings is, at best, the quashing of a refusal and a requirement to reconsider, it is simply not appropriate for the court to grant by way of interlocutory bail order a relief that it would not grant at the substantive stage, namely the release of the applicant. While it is true that, as Mr. Séamus Clarke B.L. (with Mr. Karl Monahan B.L.) for the applicant pointed out in the course of an able submission, an applicant could be released on bail and then returned to custody after the determination of the

judicial review, it would be an improvident and inappropriate exercise of the discretion to grant bail in civil cases to exercise that power in cases where the court would not in any event be granting release at the end of the judicial review, as to do so would lead to a host of anomalies. Would the bail continue if the decision was quashed and remitted to the Minister? If so, there is nothing to stop future applications and future challenges, the outcome being that one could stay at liberty as long as one kept litigating. That is not the law. Nor is it a desirable or proper outcome. The application fails *in limine.*

Factors relevant to the exercise of discretion to grant bail
15. If I am wrong about the foregoing I will go on to consider the balance of factors as regards a grant of bail in a case of this kind. In *Arra v. Governor of Cloverhill Prison* [2005] 1 I.R. 379*, Clarke J. held that "The factors which should lead to the exercise of a court's jurisdiction in circumstances such as this [i.e. in a judicial review context] are wider than those that would apply in the case of the grant of bail pending trial on a criminal charge"* (p. 381). The applicant's submissions here do not correctly decode this legal language into practical terms. Having regard to a wider range of factors does not mean that bail should be granted in a wider range of circumstances. If anything it means that there are a wider range of reasons, on balance, against release of a convicted person on bail in a civil case.

16. Clarke J. pointed out that the presumption of innocence does not apply post-conviction and that *"It is well established that persons convicted upon trial by indictment are not … entitled to release pending an appeal. While there are, of course, cases where persons have been admitted to bail pending appeal it would, I think, be fair to characterise same as being the exception rather than the norm."*

17. The wider set of factors which were considered by Clarke J. in that case included that *"A heavy weight in any consideration needs to be given in favour of giving effect to a statutory provision"* which benefits from the presumption of constitutionality where that forms the subject of a challenge in the judicial review proceedings. While such a constitutional challenge is not involved in the present case, the presumption of regularity and lawfulness as to administrative decisions is, analogously, relevant here, the onus of proof in the judicial review proceedings being firmly on the applicant.

18. The second factor to which regard was had by Clarke J. as regards the non-constitutional grounds of challenge in *Arra*, was that *"it is, nonetheless, necessary to give some weight to the fact that the applicant is currently in prison on foot of an order of a court of competent jurisdiction which is not manifestly ill-founded"* (p. 384).

19. Reliance is placed on the discussion of this issue in Mark de Blacam's textbook *Judicial Review*, 3rd ed. (Dublin, 2017) at p. 832, where it is noted that *"The factors governing the court's discretion are not confined to those appropriate to an application pending trial on a criminal charge"* with *Arra* referred to in a footnote. However, de Blacam does not discuss *Arra* further and suggests his own list of factors which perhaps unhelpfully do not include the two specific matters mentioned by Clarke J. in *Arra*.

What is the test for bail post-conviction?
20. The Court of Appeal in *Doolan v. Ireland* [2016] IECA 103 was prepared to proceed on the basis of the test set out in *The People (D.P.P.) v. Corbally* [2001] I.R. 180, although Birmingham J. noted that the threshold might be higher where (as here) the bail application was made outside the ordinary criminal appeal process. *Corbally* was applied in *The People (D.P.P.) v. Whelan* [2011] IECCA 96, another helpful authority in this context. At least in the absence of any developed submission that a higher test is applicable, I will assume in favour of the applicant that the *Corbally* test applies. However there was some debate at the hearing about what that test actually involves.

21. At p. 186 of *Corbally* Geoghegan J. proposed a grant of bail post-conviction where there is a "*strong chance of success*". That formula would suggest that a showing of a strong chance of success is a necessary ingredient in post-conviction bail. However, later on in the same passage, he refers to the grant of bail where there is *either* a strong appeal or imminence of release or other special circumstances.

22. I will assume in favour of the applicant that on a reading of the *Corbally* decision overall, a strong chance of success is not an essential ingredient to post- conviction bail, and that other special circumstances such as imminence of release could justify this bail in appropriate exceptional cases.

Is there a strong chance of success?
23. The major difficulty for the applicant is that judicial review against a refusal or when enhanced remission would only arise if it is demonstrated that the decision is arbitrary, capricious or unjust (*McKevitt v. the Minister for Justice, Equality and Law Reform* [2015] 1 I.R. 216).

24. The parties agree that the *McKevitt* decision supersedes the previous case law, in particular the decision of Barrett J. in *Ryan v. The Governor of Midlands Prison* [2014] IEHC 657 (reversed in any event on appeal to the Supreme Court, *Ryan v. The Governor of Midlands Prison* [2014] IESC 54), and *Farrell v. The Governor of Portlaoise Prison* [2014] IEHC 392 (Hogan J.), which relied on the (later reversed) reasoning in Barrett J.'s decision in *Ryan*. Dealing with the (pre-amendment) wording of r. 59(2) of the Prison Rules 2007, Hogan J. found that the Minister was required to release an applicant who engaged in authorised structured activity. Such an interpretation is clearly at odds with the intention of the rule maker, and effectively edits out the discretionary nature of enhanced remission ("*the Minister* may *grant* …" (emphasis added)). Furthermore, it assumes that likelihood of reoffending and of integration is an all-or-nothing affair and that participation in activities designed to achieve those ends is automatically dispositive of a question of whether the Minister can rationally be satisfied that the prisoner is less likely to re-offend and will be better able to re-integrate into the community. The *Ryan/Farrell* approach in my view illustrates the perils and inconsistencies of semantic, even text-worshipping, approaches such as literalism (or indeed originalism), and the necessity for a purposive interpretation as the predominant lens through which any text should be viewed. In textual interpretation as in so many other matters, the overriding principle is that "the letter killeth but the spirit giveth life". Such an approach has long been recognised in constitutional law (see e.g., *The People (D.P.P.) v. O'Shea* [1982] I.R. 384 at 436 *per* Henchy J.) but in a wider frame of reference is crucial to the interpretation of any legal instrument and certainly any public law instrument. As Posner J. has pointed out extra-curially, *"[a] legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but is not a good fit with its text"* ("The incoherence of Antonin Scalia", *New Republic*, 24th August), 2012; and as he emphasised more broadly in 2015 in an interview with slate.com: *"Justice Antonin Scalia's dissent [in King v. Burwell 576 U.S. ___ (2015)] can be summed up in four words: "fiat justitia, ruat coelum," which means, roughly, do justice even if doing justice causes the heavens to fall. In other words, sever legal analysis from consequences however great. That is a dangerous approach to law, and to government generally. Legal doctrine should in my view be shaped with careful regard for consequences, especially where doctrine is flexible, as in the case of statutory interpretation."* Translating to the rule-making context here, the legislator or rule-maker is thwarted when a judge refuses to apply his or her handiwork in a manner consistent with its spirit and purpose. To try to impose a literal interpretation, when purposive interpretations are available, is, in industrial relations terms, an undesirable form of judicial work-to-rule. To add an ingenuous-

sounding disclaimer that the legislator can always amend the law to make matters clear (i.e., to protect the legislative purpose against being further thwarted by semantic interpreters such as oneself) is perhaps best described as an engagingly bold form of judicial passive-aggression.

25. In this case, the spirit and purpose of the legislation is that rehabilitation is to be encouraged but early release through enhanced remission is a matter for ministerial judgment and decision, not for the blunt edge of judicial micro-management of the rehabilitative progress of the prison population, or for re-writing the rules by judicial interpretation to preclude the Minister from relying predominantly or exclusively on "*static*" matters.

26. Mr. Clarke for the applicant relies essentially on three grounds to contend that there is a strong chance of success for the contention that the decision is capricious, arbitrary or unjust.

27. Firstly he says that the Minister has focussed on "*static*" matters, particularly the nature and seriousness of the offence, rather than placing weight on the rehabilitative activities undertaking by the applicant. This is a point of no substance whatsoever. The weight to be attached to particular factors is entirely a matter for the Minister. The Minister is perfectly entitled to take the view on a particular case that the seriousness of a particular offence is such that no matter what level of rehabilitative activities are undertaken by a prisoner, an enhanced remission will not be granted. The Minister was entitled to put heavy emphasis on the nature of the offence, and would have been entitled to refuse the application on that ground alone.

28. The next ground of challenge is a lack of detailed reasons. As held by Ryan P. in *McKevitt*, the refusal of enhanced remission is an executive matter not administrative function (see also *McLoughlin v. Governor of Wheatfield Prison* [2017] IEHC 414, para. 26 *per* Baker J.). When dealing with measures at the core of executive power (such as refusal of temporary release, parole or remission, or the making of immigration decisions, to take some limited examples), the need for detailed reasons is considerably less and will arise where for example an administrative decision interferes with a vested constitutional right. It seems to me that the argument that the decision is invalid due to lack of detailed reasons is extremely weak.

29. Even if contrary to that view the argument had substance, the appropriate remedy in a context such as this would, it seems to me, be an order requiring the provision of further more detailed reasons, rather than an order quashing the decision (see my decision in *RPS Consulting Engineers Ltd. v. Kildare County Council* [2016] IEHC 113 paras. 107-111; *Hurley v. Motor Insurers' Bureau of Ireland* [1993] I.L.R.M. 886; *English v. Emery Reimbold & Strick Ltd*. [2002] EWCA Civ 605 para. 25).

30. A third ground of challenge to this decision is that because the applicant did not come to adverse Garda attention between his original arrest in 2006 and his conviction in 2010, it would be irrational to rely on a Garda view adverse to enhanced remission, unless perhaps that Garda view was formed in 2017 in the context of his recent application.

31. As it happens, Mr. John Gallagher B.L. for the respondent did not specifically indicate when the Garda view had formed. It seems to me that in the context of a purposive interpretation of r. 59, the view would have to be informed in the context of any particular application, for the simple reason that a view might vary depending on the circumstances presented in that application. Thus, it is necessary for the Minister on receipt of any particular application for enhanced remission, to seek a Garda opinion on that specific application, rather than in relying on a historic opinion expressed previously on file.

32. However the difficulty with the point in the factual context of this case is that the seriousness of the offence would have warranted refusal of enhanced remission on its own. Reliance on other factors therefore has an element of surplusage about it.

33. In *Bradley v. the Minister for Justice and Equality* [2017] IEHC 422, Ní Raifeartaigh J. was of the view that a Garda opinion that an applicant was very likely to re-offend was "*capricious, arbitrary or unjust*" if it involved *"preferring a four year–old-newspaper report quoting an anonymous source, over testimony of a Detective Garda and all of the efforts made by the applicant while in prison"* (para. 34). While one can readily understand the point being cogently made in that passage, if I may respectfully say so, I would venture to suggest that it does not necessarily follow that because a person does not come to adverse attention during the pre-trial period on bail that they have no likelihood of re-offending after release from prison. The two situations are not comparable, and there is a particularly strong incentive for a person released on pre-trial bail to avoid their adverse attention because of the immediacy and ease of revocation of bail and the prejudice that might be suffered to the pending trial as a result of their not being at liberty, not to mention the potential prejudice at any putative sentencing hearing. Furthermore, the "*efforts made by the applicant while in prison*" are a matter for the Minister, not the court, to assess.

34. The other possible qualification to the foregoing passage and the other reason why I consider that the quoted comments must be viewed in the context of their own peculiar facts is that even if the Garda view in a particular case was irrational, it does not follow that a ministerial decision which took account of that view is capricious, arbitrary or unjust in the *McKevitt* sense, particularly where the Minister has other significant material on the basis of which it would be rational to decline the application.

35. Overall then, this is not a case where there is a strong chance of success. Analysing the prospects of success of a matter that is yet to be heard calls to mind the aphorism attributed to Niels Bohr that prediction is very difficult, especially about the future; but if one were to be compelled to predict the chances of success here they seem modest.

36. While the applicant has obtained leave for these judicial review proceedings, the threshold of arguability is not particularly high. It follows from the foregoing discussion that while some of his points may be arguable, they are well short of substantial grounds for contending that the Minister's decision is arbitrary, capricious or unjust.

37. Indeed there are multiple factors emerging from the present application that make the Minister's decision appear highly reasonable.

38. Firstly, there is the seriousness of the offence (see *Doody v. Governor of Wheatfield Prison* [2015] IEHC 137, para. 26, *per* Noonan J.).

39. Secondly, there is the fact that the applicant has come very late in the day to an expression of acknowledgement of guilt or remorse.

40. Thirdly, having seen and heard the applicant in the witness box, I regard his evidence as generally minimising of his own role, and at times somewhat evasive and self-serving. One does not need to be a psychotherapist to form the view that the applicant is a very long way from arriving at a full understanding of the serious breach of fundamental human rights that he has committed against other citizens. He comes across as very much at the foothills of engagement with that issue, and particularly eager to skip across the detail

of his crime.

41. In particular, the applicant's cooperation with the authorities in the investigation and prosecution of the offence has been non-existent. He was at all times in a position to make a statement to the Gardaí identifying the other perpetrators but of course did not do so. Even in the rarefied confines of cross-examination in this bail application, he fenced and evaded a direct response on this issue.

42. There was some conflict between his evidence and the affidavit evidence on behalf of the respondent (on which there was no attempt to seek to cross-examine) as to his dealings with the psychology service in terms of an admission of guilt. In such circumstances I am not obliged to, and do not propose to, resolve that issue in favour of the applicant merely because he gave oral evidence, where the countervailing affidavit evidence was not effectively challenged (see the decision of the Supreme Court in *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50).

43. The applicant expressed some remorse in a letter to the Irish Prison Service, but denied in evidence that he did so to further his application for enhanced remission. However the letter itself concludes by seeking to progress the enhanced remission application, which lends a distinctly self-serving nature to the expression of remorse.

44. The applicant's account of the crime and his role in it had the air of being significantly sanitised and whitewashed of detail, and he put himself well away from many of the more egregious aspects of the crime. Overall, given the evasive manner and content of his giving evidence, having seen and heard him, his evidence is not something on which I would rely generally, and particularly where it conflicted with the evidence on behalf of the Minister. In particular I would prefer D/Garda Padraig Hession's evidence having heard and seen him in the witness box.

Does the imminence of release make bail appropriate?
45. The present application, as noted above, is brought during the interval between the date on which the applicant would have been released if one-third remission applies and the date on which he might expect to be released if one-quarter remission applies. Thus from his point of view there is a certain urgency to the matter, especially as we have now passed the former date. But imminence of release, or alternatively phrased an imminent date upon which the proceedings "might be moot, is not without significantly more a reason to grant bail." Geoghegan J. refers to "other" special circumstances, implying that imminent release must be coupled with special circumstances rendering it just to order post-conviction bail. In the absence of any strong chance of success, such circumstances must indeed be exceptional, but there are no such circumstances here.

Are there other special circumstances warranting post-conviction bail?
46. Mr. Clarke valiantly relied on a host of other factors relating to this applicant including his family, his wife's willingness to lodge an amount of money, the fact that he is not perceived as a flight risk, and his compliance with bail for a long time pre-trial. However none of these factors are exceptional and do not constitute special circumstances but in any event, nowhere remotely near the very high threshold at which post-conviction bail would be appropriate.

The principle of continuity of custody leans against bail
47. Even if, contrary to the above, the applicant has satisfied the threshold for bail, meeting the threshold is not determinative as the court has to consider all the circumstances in deciding whether to exercise the discretion (and in the post-conviction context it is a discretion rather than a constitutional obligation) to grant bail. I would accept the submission of Mr. Gallagher that there are strong penological reasons as to why a period of custody should be served in a single continuous block, rather than having the period separated by a significant period of liberty. It would interfere significantly with any process of rehabilitation if this applicant were to be required to return to prison in some months' or years' time following the failure of his judicial review. While I appreciate that the applicant would prefer to take his chances, and be released now, that preference is not determinative. As the economist Thomas Sowell has observed in another context, there are no solutions, only trade offs (see *North East Pylon Pressure Campaign v. An Bord Pleanála* [2016] IEHC 300, para. 97). There is no perfect solution. In my view, requiring the applicant to remain in prison, while attempting to expedite the hearing of his judicial review, is the least worst option.

The human rights of the victims of crime militate against the grant of post-conviction bail
48. Mr. Gallagher also relies on the human rights of the victims of Mr. McGinley's offence, albeit that the victim's directive (directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime ensures that persons who have fallen victim of crime are recognised, treated with respect and receive proper protection, support and access to justice) is not directly on point. But the rights of victims are not confined to the directive and have been recognised in the ECHR context in many cases such as *X and Y v. the Netherlands* (Application No. 8978/80, European Court of Human Rights, March 26th 1985) and *Söderman v. Sweden* (Application No. 5786/08, European Court of Human Rights, 12th November, 2013) para. 88. In the present context, Mr. Gallagher's submission is that where victims are anticipating an expected release date, that is a material factor to be taken into account in deciding whether to grant post-conviction bail that would put the offender back on the street well in advance of the date notified to victims. That is only a matter of common sense and is again a factor leaning against bail in a context such as this, albeit not one that makes a difference to the outcome here given the other matters already discussed above that lead to the same conclusion.

Order
49. The foregoing having been said, it is nonetheless all to the good that the applicant has engaged in rehabilitative activities. Those activities must have a value to society and to the applicant for their own sake in and of themselves, above and beyond any utilitarian value in advancing his application for enhanced remission. Otherwise what is happening is not rehabilitation but gaming the system. Contrary to the erroneous approach taken by Barrett J. in *Ryan* and Hogan J. in *Farrell*, there is no necessary read-across between rehabilitative activity and a grant of enhanced remission. The Minister still has a role in assessing risk and in exercising a discretion (see the very pertinent comments of Professor Mary Rogan in *Prison Law* (Dublin, 2014) at p. 121), which has been done in this case on what seems thus far likely to be a reasonable basis. That does not take away the value of the applicant's rehabilitative activities, but it underlines the fact that such activities must be engaged in for their own sake, and not for utilitarian, instrumental, tactical or forensic purposes.

50. For the foregoing reasons I will order:

(i). that the application for the applicant's admission to bail be refused;

(ii). that the matter be put into the judge's list on 10th October, 2017 for the purpose of applying for an early hearing date, and that subject to hearing counsel, opposition papers should be delivered by 9th October, 2017; and

(iii). that there be a recommendation for the payment of the applicant's costs under the Legal Aid (Custody Issues) Scheme. In that regard, as noted earlier, the applicant was ably represented by two junior counsel in the present application and as their assistance was particularly helpful I will direct that the recommendation will include solicitors and two junior counsel.