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*Judgment: approved by the Court for handing down*
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**Dunn's (Kenneth) Application [2010] NIQB 54**

**IN THE MATTER OF AN APPLICATION BY KENNETH DUNN FOR JUDICIAL REVIEW**

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**McCLOSKEY J**

## I INTRODUCTION

**[1]** By this application for judicial review the Applicant, a sentenced prisoner, challenges a decision whereby a Minster of State ("*the Minister*"), on behalf of the Secretary of State for Northern Ireland ("*the Secretary of State*"), who was then the relevant responsible Minister, declined to exercise the Royal Prerogative of mercy so as to effect his early release from imprisonment. Initially, the Applicant sought to impugn this decision on a series of wide-ranging grounds. However, the court, when granting leave to apply for judicial review confined the Applicant's challenge to the single ground of whether the Minister, in making the impugned decision, adopted and applied an unduly rigid policy, thereby improperly fettering his discretion.

## II FACTUAL MATRIX

**[2]** The factual matrix, somewhat unusually, is infused with certain judicial decisions. It is uncontroversial, save for certain issues bearing on the impugned decision, and can be outlined in relatively brief compass.

**[3]** On 20th April 2007, the Applicant was the recipient of a sentence of eight months imprisonment, imposed for the offence of theft. On 20th December 2007, he was convicted of the separate offences of assault occasioning grievous bodily harm and criminal damage, receiving consecutive sentences of twelve months and six months imprisonment respectively. Some six months later, in June 2008, there was a further prosecution of the Applicant and, in the context of an impending trial, it was

determined to hold a so-called "***Rooney***" hearing.[1] In advance, the Applicant's legal representatives sought to ascertain from the Prison Service the extent of their client's remand custody in relation to this discrete offence. To the Applicant's recollection (per his affidavit), the figure provided in response was approximately 480 days. The affidavit continues:

> *"I understand that this figure was communicated to the trial judge prior to his honour giving his indication of sentence. I relied upon this figure when calculating how much time I would have left to serve based on the indication given at the* ***Rooney*** *hearing".*

The trial judge's ensuing "indication" was one of five years imprisonment and this is the sentence which was duly imposed on the Applicant, on 30th June 2008.

**[4]** Thereafter, the Applicant recalls the display of a notice above his prison cell door to the effect that his projected date of release from prison was 9th September 2009. [The court takes notice of the well established practice whereby a notice of this kind, specifying the sentenced prisoner's "EDR" i.e. earliest date of release, is exhibited in this way, within a couple of days of the court pronouncing sentence]. This was at no time altered. Next, on 1st October 2008, the Applicant was transferred to HMP Magilligan. It is well known that this prison facility is dedicated to short term prisoners. Given the foregoing, his expectation was that he would be incarcerated there for a further period of some eleven months. Then, on the understanding that the balance of his sentence was less than twelve months, he applied to be transferred to a particular wing of the prison. This elicited a response to the effect that his release date was 14th July 2010. This represents an additional period of imprisonment of approximately ten months.

**[5]** Following some correspondence, the Applicant brought an application for judicial review whereby he challenged the recalculation of his release date. On 23rd September 2009, the Divisional Court dismissed his application. In the intervening period, differently constituted Divisional Courts had heard and determined similar challenges. In each of these cases, the court had to decide how the relevant statutory provisions regulating credit for remand custody in sentence release calculations should be construed and applied, in circumstances where the convicted prisoner is the subject of multiple sentences of imprisonment, usually entailing a series of different dates . These issues were considered in ***Re Montgomery's Application*** [2008] NIQB 130 and ***McAfee's Application*** [2008] NIQB 142.

**[6]** In ***Montgomery,*** the central argument advanced on behalf of the Respondent was (in terms) that in matters of this kind there is a golden rule enshrining a prohibition against double counting: any period of remand custody can be reckoned once and once only, whatever the circumstances. Particular reliance was placed on a

[1] See Attorney General's Reference No 1 of 2005 [2005] NICA 44 …

passage in the judgment of Lord Bingham CJ in ***The Queen –v- Governor of Brockhill Prison, ex parte Evans*** [1997] QB 443, at p. 461:

> *"Time spent in custody in relation to any of the offences for which sentence is passed should serve to reduce the term to be served, subject always to the condition that **time can never be counted more than once**".*

[My emphasis].

The Divisional Court analysed the decision in ***Evans*** in the following way:

> *" [23] The crucial factor in Ex parte Evans was that the proper interpretation of the relevant statutory provisions referred to above was that any reference to a sentence or sentences of imprisonment (or term or terms of imprisonment) were to be regarded as a single term, whether made up of consecutive, or wholly or partly concurrent sentences. The interpretation section of the Treatment of Offenders Act 1968, section 33(2) is to the same effect. It provides –*
>
> > *(2) For the purposes of any reference in [the Prison Act in relation to a sentence imposed before 1st March 1976 and] this Act to a term of imprisonment or to a term of detention in a young offenders centre, consecutive terms or terms which are wholly or partly concurrent shall be treated a single term." (This section has been amended by the Criminal Justice Order (Northern Ireland) 2008 with effect from 25 September 2008)*
>
> *Where such a single term is being considered (whether made up of concurrent or consecutive sentences) the offender is entitled to have all periods of remand in custody credited towards that single term. It is in that context that Lord Bingham CJ stated that time spent in custody can never be counted twice. Where concurrent and consecutive sentences are treated as a single term, remand periods for different offences are aggregated and count towards the single term (whether concurrent or consecutive). Remand periods for different offences are not counted against the sentence for each offence, where the sentence is a single term, as that would result in the remand period being counted twice. It is clear that Lord Bingham's*

*interpretation of the relevant statutory provisions is correct where concurrent and consecutive sentences are treated as a single term. "*

Continuing, Higgins LJ expressed the conclusion of the Court in these terms:

> *"[24] In the instant case the applicant was sentenced on different dates to sentences which were neither consecutive nor concurrent. They were free-standing sentences and in respect of each the applicant had spent partly concurrent periods on remand. The sentences could not in any way be regarded as a single term. How periods of remand in such unusual (though not unique) circumstances should be treated was not considered in <u>Ex parte Evans</u> or any of the other cases to which we have been referred. In those circumstances it is necessary to consider the language of the statute. By section 26(2A) he is entitled to have his sentence of imprisonment reduced by any relevant period during which he was in custody by an order of a court made in connection with any proceedings relating to that sentence. The applicant was remanded in custody in connection with the complaint that he was in breach of the probation order for which breach he was sentenced. He was remanded in connection with that complaint from 9 April 2008. Coincidentally he was in custody on remand on the burglary charge for which he was given credit when sentenced on that charge. As was stated in Ex parte Naughton ( and approved in <u>Ex parte Evans</u>) the use of the word 'only' in Section 2A(b)(ii) is intended to preclude any account being taken of periods in custody unrelated to the offence or offences for which the relevant sentence or sentences were passed. The period 9 April to 17 June 2008 could not be said to be unrelated to the complaint that he was in breach of probation as he was remanded in custody by a court of competent jurisdiction on that complaint. The fact that he was also on remand on another offence does not alter the position. Nor can that period on remand be regarded notionally as a term of imprisonment. This is a criminal statute and where the liberty of the subject is concerned it should be interpreted strictly and in accordance with the clear words of the section. It is clear that the applicant was on remand between 9 April 2008 and 17 June 2008 (and until 5 September 2008) in connection with the complaint that he was in breach of probation and was entitled to have his sentence on that complaint reduced by the entire amount that he was on remand on foot of the complaint. For these reasons we*

> *concluded that the applicant should be released immediately."*

As appears from the final sentence in the judgment, the context was one of "*freestanding sentences where there have been overlapping or concurrent periods on remand in custody*".

**[7]** Within a month, a fully constituted Divisional Court convened to make the decision in ***Re McAfee's Application*** [2008] NIQB 142. This was another challenge to a calculation by the Prison Service of a sentenced prisoner's date of release. The court noted the essence of the decision in ***Montgomery*** viz. the sentences under consideration were neither consecutive nor concurrent, they had been imposed on different dates, the prisoner had undergone partly concurrent periods of remand custody in respect of each and the sentences could not be considered a single term. The Lord Chief Justice noted:

> "*[13] The court's decision in* ***Montgomery*** *depends critically on the conclusion that Lord Bingham had intended to confine his injunction about double counting to those cases where the sentences could be said to constitute a single term*".

Significantly, the decision in ***The Queen –v-Secretary of State for the Home Department, ex parte Kitaya*** [unreported, The Times, 30th January 1998] and the full judgment of Sedley LJ in ***The Queen –v- Governor of Haverigg Prison, ex parte McMahon*** [unreported, 1997] had not been brought to the attention of the first Divisional Court. The Lord Chief Justice, having reviewed the various English decisions *in extenso,* observed:

> *"**[15]** As was pointed out by Mr Maguire QC (who appeared on behalf of the respondent with Mr McGleenan), if the result in Montgomery was correct, a co-defendant charged with the same offences and sentenced at the same time to the same terms of imprisonment but who had been remanded on bail would serve longer in prison than the offender who had been remanded in custody. This we consider to be a compelling argument against the notion of double counting in any circumstances whatever. That conclusion appears to us to be in accord with the object of the statutory scheme. The purpose of section 26 is to ensure that periods of pre-trial custody can be taken into account in reducing the sentence of the court but there is no obvious policy reason that this reduction should be augmented where an offender has been convicted in circumstances that lead to his being sentenced to what the court in Montgomery described as freestanding offences."*

The court's conclusions are encapsulated in the following passages:

> "**[20]** *Having considered the Kitaya case and the rather fuller version of McMahon we have concluded that the decision in Montgomery should not be followed. The rule against double counting (which is soundly based in common sense and logic) should inform the interpretation of section 26. While a literal interpretation of the provision could produce the result contended for by the applicant, on further reflection, all the members of this court (which happily include those who constituted the court in Montgomery) have reached the view that this was not the intention of the legislature. The purpose of the legislation is to ensure that offenders do not spend longer in prison than is warranted by the pronounced sentence. It is not designed to allow a prisoner convicted of multiple offences to be the undeserving beneficiary of a reduction in a series of sentences because of a single period of detention on remand.*
>
> ***[21]*** *Although the principle of stare decisis does not apply in the Divisional Court, plainly we must pause before deciding not to follow an earlier decision of this court, particularly one so recently given as Montgomery. But, if we are convinced that an earlier decision was wrong we are not obliged to follow it (see R v Greater Manchester Coroner, ex p Tal [1985] QB 67 at 81). Having given the matter anxious thought we are satisfied that, had the judgments in Kitaya been available to the earlier court, Montgomery would not have been decided as it was. We therefore dismiss this application.*"

**[8]** Against this background, the Applicant's later challenge to the Prison Service recalculation of his sentence release date was dismissed by the Divisional Court, on 23rd September 2009. As a perusal of the decisions in ***Montgomery*** and ***McAfee*** and the correspondence in the present case confirms, the introduction and application of new Prison Service sentence release calculation instructions have stimulated a series of contentious decisions and ensuing litigation. In substance, the decision in ***McAfee*** has endorsed the correctness of the new instructions. [*En passant*, the court was informed that a petition to the Supreme Court in the ***McAfee*** case for permission to appeal has recently been refused].

## III THE IMPUGNED DECISION

**[9]** Undeterred, in an admirably composed letter dated 13th November 2009, the Applicant's solicitors urged the Minister to exercise the Royal Prerogative of mercy in their client's favour. The main theme of their application was that the Applicant was the victim of a substantial injustice which the Minister was empowered to

remedy. This culminated in the impugned decision, which was communicated to the Applicant's solicitors by a letter dated 19th January 2010 in which a senior official, writing on behalf of the Minister, stated:

> "*The circumstances in which the Secretary of State considers whether to recommend that the Sovereign exercise the Royal Prerogative of mercy are well established. Your application referred to the Ministry of Justice's final report on the Government's review of executive Royal Prerogative powers, paragraph 64(d) of which deals with mistakes surrounding a prisoner's release. From that you will appreciate that the Secretary weighs all the relevant factors in order to decide whether, in such cases, there has been a pledge of public faith that he should honour by granting a remission pardon …*
>
> *I must confirm that the Minister, on behalf of the Secretary of State, having weighed all the factors relevant to Mr. Dunn's case, is not satisfied that there has been such a pledge in your client's case and is not, therefore, prepared to recommend that the Prerogative be used in this instance*".

**[10]** The impugned decision coincided with the initiation of these proceedings. It now belongs to the domain of the new Minister of Justice in Northern Ireland, by virtue of the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010, which, per Article 1(2), came into operation on 12th April 2010. The effect of this measure is to convert most of the policing and justice functions enshrined in paragraph 9 of Schedule 3 to the Northern Ireland Act 1998 from "*reserved*" to "*transferred*" matters. As a result, the specified matters now lie within the competence of the local executive and Assembly. The evidence establishes that, with commendable expedition, the newly appointed Minister of Justice has reviewed the impugned decision of his predecessor. The outcome is an affirmation.

**[11]** The material upon which the Minister made the impugned decision consists of a detailed written briefing supplemented by certain appendices. These materials are exhibited to an affidavit sworn on the Minister's behalf. These take the form of an initial résumé, accompanied by a more detailed submission. The opening sentence in the résumé may be highlighted:

> "*This case involves balancing the various arguments to decide whether or not a pledge of public faith has been given around an estimated prison release date; and if so, should it be honoured*".

This is followed by an outline of the factors potentially in favour of the prisoner's application and the perceived countervailing considerations. The résumé concludes:

> "*Taking all the relevant factors together, we believe that in this case no pledge of public faith has been given that ought to be honoured and that the* [Royal Prerogative of mercy] *should not be used. The court's passed sentence on Dunn's respective offences and the* [earliest date of release] *of 14 July 2010 properly reflects the correct time he should spend in prison for these. Only with strong cause would be now in effect interfere with the sentencer's decisions. Dunn's victims, and the general public, may well expect him to serve his properly calculated sentences.*"

The text also exhorted the Minister to read the accompanying materials in full.

**[12]** The initial résumé was followed by a fuller submission, which rehearses the factual background and contains the following material passages:

> "*A.8 The* [Royal Prerogative of mercy] *is the power of the Sovereign to show mercy towards an offender by mitigating or removing the consequences of his conviction, by way of 'pardon'. It is exercised by the Sovereign on Ministerial advice. The criteria for the consideration of applications and the limits of the* [RPM] *are not fixed, but they are influenced by precedent …*
>
> *Its use has become increasingly exceptional and rare throughout the UK …*
>
> *A.9 There are three established categories of pardon, but the only one relevant to Dunn's case is the remission pardon …*
>
> *A.10* ***One recognised use of the remission pardon is where a mistake has been made in a prisoner's release date. In such circumstances the Secretary of State has to decide whether a pledge of public faith has been made that should be honoured. This is the issue at hand in respect of prisoner Dunn. ...***
>
> *A.11 The decision maker will, amongst other factors, weigh his duty to enforce the sentence handed down by the court against the reasonable expectations of the prisoner and his family. He will take account of the time during which the prisoner was misled, the extent to which he made plans based on the 'wrong' release date and the length of time by which the sentence would be reduced …*

> *Other factors in Dunn's case might include the risk of harm to others or himself were he to be released early*".

[Emphasis added].

Having outlined other aspects of the application and the history, the submission to the Minister continues:

> "*The courts passed sentence on Dunn's respective offences and the* [earliest date of release] *of 14 July 2010 properly reflects the correct time he should spend in prison for these. Only with strong cause would we now in effect interfere with the sentences decisions. Dunn's victims, and the general public, may well expect him to serve his properly calculated sentences …*
>
> *His application makes no suggestion that in October 2008 he or his family had made firm plans for his release in September 2009 …*
>
> *Dunn has a record of serious violent offending.* [The Prison Service] *confirm that there is a risk of him harming others, or himself. His early release would be especially vulnerable to criticism if he were to reoffend before 14 July 2010 …*
>
> *If Dunn were to be granted the* [Royal Prerogative of mercy], *numerous other applications would be received under the sentence calculation umbrella …*
>
> *The* [Royal Prerogative of mercy] *must remain an exceptional instrument – one which has not been exercised in Northern Ireland for the past ten years or so. We do not see Dunn as exceptional.*"

The ministerial submission concludes with the following recommendation:

> "*In conclusion each* [Royal Prerogative of mercy] *application has to be assessed on its own individual characteristics. But taking all these factors together, we believe that in this case* ***no pledge of public faith has been given that ought to be honoured****. We therefore recommend that you decide not to recommend to Her Majesty that the* [Royal Prerogative of mercy] *be exercised in this case*".

The Minister concurred with this recommendation. In accordance with the conventional (though not inflexible) practice, the Minister has not sworn an affidavit. Accordingly, the evidential sources of the impugned decision are the ministerial briefing with its appendices and the letter of decision, dated 19th January 2010.

**[13]** The submission to the Minister drew on two sources in particular. The first is a Home Office memorandum (a HMSO publication) entitled "The Royal Prerogative of Mercy", compiled by W. H. Cornish (presumably a senior civil servant) in June 1970. As appears from the "Introductory Note", this was designed to operate as *guidance*:

> "*The object in view in undertaking the preparation of this Memorandum was the provision of a guide to Home Office practice in relation to the exercise of the Royal Prerogative of Mercy … it was … seen to be necessary to sketch in a very general way the development which connects modern practice with the origins of the power and the treatment of the subject by older writers.*"

The Memorandum treats the topic of remission of prison sentences as an identifiable, freestanding category, within which there is a discrete sub-category considered under the banner of "Prisoner Misled by the Prison Service". Paragraph 335 recites:

> "*It sometimes happens that the prison authorities make a mistake in informing a prisoner of the earliest date at which he may expect to be released subject to good behaviour.* ***In some of these cases it may be considered that the circumstances in which this has occurred amount to a pledge of public faith which ought to be honoured ...***
>
> ***It is not enough that a mistake should have been made: it is a question for determination in the circumstances of each individual case whether public faith has been pledged to such an extent as to require or justify the granting of remission ...***
>
> ***There is no hard and fast rule to determine the answer to this question: much depends on whether the prisoner has been under a misapprehension for a long time or on whether the error is not discovered until quite near the expected earliest date of release. In such a case it is not merely a question of having his hopes dashed: domestic plans which may have been made in good faith may be upset or, for instance, an***

> ***opportunity for obtaining employment on release may be lost*.”**

[Emphasis added].

The Cornish Memorandum is the precursor of the most recently published statement of Government policy in this sphere, contained in the Ministry of Justice publication entitled “The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report”, promulgated in 2009. Paragraph 64(d) of this publication is couched in terms closely comparable to paragraph 335 of the Cornish Memorandum. It is apparent that these sources influenced the preparation of the ministerial submission, while the Respondent’s official avers in his affidavit that the enumeration of factors brought to the Minister’s attention consciously over-reached the boundaries of paragraph 64 of the most recent publication.

## IV THE COMPETING ARGUMENTS AND THE COURT’S CONCLUSIONS

**[14]** On behalf of the Applicant, Mr. Lavery QC (appearing with Mr. Bernard), faithful to the narrow reach of the sole permitted ground of challenge, espoused the well known ***British Oxygen*** principle as the centrepiece of his argument. This principle, which prohibits the intrusion of improper fetters in the realm of public law decision making, can be traced to the judgment of Bankes LJ in ***R –v- Port of London Authority, exparte Kynoch*** [1919] 1 KB 176, at p. 184:

> *“There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy and, without refusing to hear an applicant, intimates to him what its policy is and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the Applicants would admit that, if the policy has been adopted for reasons which the authority may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.”*

In ***British Oxygen –v- Minister of Technology*** [1971] AC 610, Lord Reid, having cited this passage, continued (at p. 625):

> *“I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not ‘shut his ears to an application’ …*

> *I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule.* ***There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say ..."***.

[My emphasis].

While Lord Reid refers to the exercise of *statutory* discretions, the proposition that, in the present state of development of public law, the philosophy enshrined in this passage applies to the exercise of *all* discretions by Ministers and public authorities belonging to the domain of public law, thereby embracing the instant case, seems to me unexceptional.

**[15]** The governing principles are conveniently expressed in ***Re Herdman's Application*** [2003] NIQB 46, in these terms:

> *"**[19]** A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust – Halsbury's Laws of England Vol 1 (1) para 32. But the decision maker must be prepared to consider the individual circumstances of each case and be prepared, if the circumstances demand it, to make an exception to the policy - British Oxygen Co Ltd v Minister of Technology [1971] AC 610.*
>
> ***[20]*** *A policy may operate to place an illegitimate fetter on the exercise of discretion in two ways. The policy may be intrinsically inflexible in erecting an unacceptably high threshold for an applicant to cross. Alternatively if the policy is applied too rigorously and there is a lack of preparedness on the part of the decision maker to entertain exceptions to it.*
>
> ***"[21]*** *I have held that the policy devised by the Chief Constable to deal with applications for a firearms certificate is not intrinsically inflexible – Re Martin Meehan's*

> *application (2002) NIQB 45. It is clear, however, that there must be a readiness to recognise exceptions to that policy if warranted by the specific circumstances of a particular case. This requirement is not satisfied by a routine examination of the particular facts that arise in an individual application. There must be a rigorous inquiry as to whether those circumstances justify an exception being made to the general policy. Put simply, the minister must not only be conscious of the particular circumstances of the applicant he must also scrupulously consider whether those circumstances warrant a departure form the normal rule. The need to do so is more critical where the policy erects a high – albeit not unacceptably so – standard."*

In that case, the Applicant succeeded, the court concluding that the Minister had failed to have adequate regard to the exceptional nature of his case and was insufficiently alert to the possibility of acknowledging that an exception should be made: see paragraphs [29] and [33]. Mr. Lavery QC also prayed in aid the judgment of Leggatt LJ in ***The Queen –v- London Borough of Bexley, ex parte Jones*** [1995] ELR 42, where it was held :

> *"The principle was well-established, and it was common ground, that a local authority could not adopt a policy which precluded the exercise of its discretion, nor could an authority slavishly follow a policy without regard to the merits of individual cases. It was legitimate for a statutory body such as the respondent to adopt a policy designed to ensure a rational and consistent approach to the exercise of a statutory discretion in particular types of case. But it could only do so provided that the policy fairly admitted exceptions to it. The respondent had effectively disabled itself from considering individual cases and there had been no convincing evidence that at any material time it had an exceptions procedure worth the name. There was no indication that there had been a genuine willingness to consider individual cases. On the contrary, there was every indication of rigid adherence to its policy. In his Lordship's judgment, an effective exceptions procedure depended on having the information available by reference to which special circumstances could be assessed, with a view to considering whether an exception should be made in favour of an individual. His Lordship was not satisfied that the respondent had such a procedure in place. The result was that the respondent fettered its discretion by adopting a policy, from which no departure was contemplated, of invariably refusing awards to applicants under s 1(6) of the 1962 Act for designated courses. It was not possible to say that the applicant had been afforded a proper opportunity to*

> *make such representations as she believed supported her request for special consideration."*

**[16]** Mr. Lavery argued that the ministerial submission contained "*strong indications*" to the effect that prisoners who have not already been released should serve their full sentence, characterising this as a "*driving factor*" in the impugned decision. He also highlighted those passages containing strains of "floodgates" concerns and possible adverse publicity, submitting that the impugned decision must, in consequence, be at the very least suspect. While acknowledging that the sensibilities of victims were properly taken into account, he submitted that these could never be determinative of a release decision made under the aegis of the Royal Prerogative. He submitted that the presumed intention of the sentencing court is not determinative of the period of ensuing detention. Rather, it is overlaid by executive discretion, as illustrated by the 50% remission of sentence rule. He highlighted that none of the mistakenly released prisoners has been recalled to prison, while none of the members of the "misled" group, to which the Applicant belongs, has been granted early release. Given the strong orientation of the ministerial submission, pointing the Minister in one direction only, it was argued that, ultimately, a purely formulaic decision making exercise had occurred.

**[17]** On behalf of the Respondent, Mr. McGleenan invited the court to read the ministerial submission fairly and *in bonam partem.* He submitted that the Minister was presented with more than one option and defended the formulation of a specific recommendation, highlighting that this was conventional and in no way binding on the decision maker. He contended that the submission properly balanced the need for consistency in decision making in this sphere with responsiveness by the authority concerned to the individual case. In short, it was submitted that the evidence demonstrates that the Minister approached the matter with an open mind and made his decision accordingly. Mr. McGleenan's submissions on the substantive issues were advanced without prejudice to his preliminary contention that the impugned decision is not justiciable.

**[18]** I shall deal first with this latter argument. I have reviewed the leading authorities on the issue of justiciability with specific reference to cases involving the exercise of prerogative powers. It is unnecessary to rehearse those authorities *in extenso* in the present context. In the speech of Lord Roskill in ***Council of Civil Service Unions –v- Minister for the Civil Service*** [1985] AC 374, the emphasis is contextual, focussing on "*the subject matter of the prerogative power which is exercised*". In the speech of Lord Diplock (at p. 411), the emphasis is somewhat different, drawing attention to the circumstance that decisions made in the exercise of prerogative powers –

> *"…will generally involve the application of Government policy. The reasons for the decision maker taking one course rather than another do not normally involve*

*questions which, if disputed, the judicial process is adapted to provide the right answer*".

The justiciability objection failed in ***Lewis –v- Attorney General of Jamaica*** [2001] 2 AC 50, a death sentence case, where the Privy Council, by a majority, held that the exercise of the prerogative of mercy required procedures which were fair and proper and amenable to judicial review. This decision is harmonious with the modern trend of judicial decision making with a progressively increasing focus on intensity of review, rather than justiciability.

**[19]** I am satisfied that the exercise of the prerogative power in play in the present case is justiciable. From the court's perspective, the subject matter is far from alien. Furthermore, the only permitted ground of challenge to the impugned decision does not involve the court, in this instance, in reviewing Government policy or the competing factors in the decision making process. Rather, the court is engaged in the familiar exercise of applying a well established principle of public law – the ***British Oxygen*** doctrine – to the outcome of this process. For these reasons, I conclude that the subject matter of this challenge is justiciable.

**[20]** As regards the substantive merits, I conclude as follows. The resolution of the narrow authorised ground of attack on the impugned decision requires the court to construe and evaluate the documentary materials belonging to the decision making process and to form an impression accordingly. In my view, these materials confound, rather than sustain, the Applicant's challenge. Read critically, though fairly, and in unison, they convey to me a sense of balance. The authors were, of course, espousing a certain outcome. However, from the outset of the submission, the Minister was reminded of the importance of "***balancing the various arguments***" and, swiftly thereafter, was provided with a condensed menu of the main factors inclining **in both** competing directions.

**[21]** This theme is reiterated and reinforced in the language of "*taking all the relevant factors together*", coupled with the emphasis on the need to consider all of the materials briefed before reaching a decision. I can find nowhere in these materials the overt or covert formulation of any inflexible canon of policy or, indeed, any insuperable hurdle, whether of a policy nature or otherwise. This is exemplified in the passages quoted in paragraphs [11] and [12] above (particularly internal paragraph A.11). Moreover, the factors expressly brought to the Minister's attention were not represented as exhaustive. In my estimation, the submission conveyed to the Minister not only that he had choices at his disposal but that he should faithfully consider how to determine the matter. In my view, there is no warrant for inferring that the ensuing decision was made other than conscientiously and with an open mind. That the Minister's decision should give effect to an obviously potent public interest , namely , the full completion of every sentenced prisoner's term of imprisonment is , objectively , unsurprising . While this was clearly a factor of dominant influence , I am satisfied that it did not operate so as to close the Minister's mind to the individual attributes and merits of the Applicant's case.

**[22]** For the reasons elaborated above, I dismiss this application.

**[23]** I would add, as a footnote, that while I did not have to formally determine this issue, it appeared to me that this was not a criminal cause or matter: see **Re *JR27's Application*** [2010] NIQB 12. Neither party advanced the contrary argument and both acknowledged that, in any event, there would be no objection to the case being heard by a single judge of the High Court: see Order 53, Rule 2(6) of the Rules of the Court of Judicature and Section 16(5) of the Judicature (NI) Act 1978.