



THE SUPREME COURT

[Appeal No. 176/2018]

**Clarke CJ.
O' Donnell J.
Dunne J.
O'Malley J.
Irvine J.**

BETWEEN

B.

(A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND J.G)

APPELLANT

AND

**THE DIRECTOR OF OBERSTOWN CHILDREN DETENTION CENTRE AND THE MINISTER
FOR CHILDREN AND YOUTH AFFAIRS IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 29th day of April 2020

Introduction

1. This appeal raises an issue as to whether children serving sentences of detention under the Children Act 2001 are entitled, on the basis of the equality guarantee in Article 40.1 of the Constitution, to be treated in the same manner as adult prisoners in respect of all aspects of the rules regarding remission of sentences. In 2013, in *Byrne (A Minor) v. Director of Oberstown* [2013] IEHC 562, Hogan J. held that a minor serving a sentence of detention in Oberstown was entitled to the standard rate of one-quarter remission. That decision was accepted by the State authorities, and minors are now granted standard remission for good conduct as a matter of course. The appellant in the instant case, who was sentenced to a term of detention in Oberstown as a teenager, argues that, on the same logic, he was entitled to be considered for enhanced remission of up to one third of his sentence, in the same way as adult prisoners are under the Prison Rules.

The statutory context – detention of children

General principles

2. The Children Act 2001 ("the Act of 2001") was a comprehensive and radical overhaul of the law governing the juvenile criminal justice system. Among other innovations, it treats all persons under the age of 18 as children. A wide variety of procedures and processes are put in place that have as their objective the diversion of children away from crime and from the formal criminal justice system. However, the Act also envisages prosecution and punishment, including deprivation of liberty.
3. Where a court is concerned with a child charged with a criminal offence, the overall considerations are set out as follows in s.96 of the Act:

96.– (1) Any court when dealing with children charged with offences shall have regard to

- (a) *the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and*
 - (b) *the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.*
- (2) *Because it is desirable wherever possible –*
- (a) *to allow the education, training or employment of children to proceed without interruption,*
 - (b) *to preserve and strengthen the relationship between children and their parents and other family members,*
 - (c) *to foster the ability of families to develop their own means of dealing with offending by their children, and*
 - (d) *to allow children reside in their own homes,*
- any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstance; in particular, a period of detention should be imposed only as a measure of last resort.*
- (3) *A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless that penalty is fixed by law.*
 - (4) *The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.*
 - (5) *Any measures for dealing with offending by children shall have due regard to the interests of any victims of their offending.*

Sentences of detention under the Children Act 2001

4. The court has available to it a range of mechanisms which are intended, in accordance with the principles set out in s.96, to ensure that detention is imposed only as a measure of last resort. Where the court is satisfied of the guilt of the child, it may in any case, and must in most cases where either a community sanction or detention is contemplated, adjourn for the purpose of seeking a probation officer's report to assist in determining a suitable community sanction.
5. The provisions in respect of community sanctions are set out in ss.118 to 141 as amended. In imposing such a sanction, the court may include conditions aimed at preventing the child from committing further offences. These may require positive action

on the part of the child, such as attendance at school, counselling or medical treatment. They may relate to the child's employment or place of residence. Conditions can also limit or prohibit association with any specified person or persons of a specified class, or the consumption of alcohol. In general, they may relate to such other matters as the court considers appropriate in relation to the child. Failure to comply with a community sanction or with any condition to which it is subject may lead to the making of a detention order, where the court is satisfied that such is the only suitable way of dealing with the child (s.116(4)).

6. Section 142 as amended provides that a court may, in accordance with the Act, sentence a child to a period of detention in a children detention school. Pursuant to s.143 as amended, the court shall not make such an order unless satisfied that it is the only suitable way of dealing with the child. Section 149 (as substituted by s.141 of the Criminal Justice Act 2006) provides that the term of detention must not be longer than the term that could be imposed on an adult convicted of such an offence.
7. Under s.144 of the Act the making of a detention order may be deferred "in accordance with the provisions of this section" if a place in a detention school is not available "or for any other sufficient reason". The making of the order may be deferred only if the court is satisfied that it is in the interests of justice. If the reason for deferral is the unavailability of a place, the Director of the school must apply to the sentencing court for the order to be made when a place becomes available. If, however, the order is deferred for any other reason, the court must state the period of detention that is to be deferred and there must be a resumed hearing on a specified date. The judge must explain to the child the reason for the deferral and the expectations of the court as to the child's conduct. At the resumed hearing, the court may impose the period of detention already specified, or some shorter period. It may also suspend the whole or any portion of the period, or impose a community sanction instead of detention (s.144(9)). A deferred order may be made before the period of deferment has expired if the child is found guilty of any other offence.
8. As an alternative to children detention orders, s.151(1) as amended provides for the making of a detention and supervision order. Where an order is made under this section, the child is to spend the first half of the period specified by the court in a child detention school and the second half under the supervision of the probation and welfare service in the community. The court may specify such conditions (from a list set out in s.117) as it considers necessary for helping to ensure that the child will be of good behaviour and to reduce the likelihood of the child committing further offences. An order of this nature, in so far as it relates to detention, shall be deemed for all purposes to be a children detention order.
9. Subsection (4) of s.151 is of some significance to the submissions in this case. It currently provides that, where a child subject to a detention and supervision order is released from detention "on earning remission of sentence by industry or good conduct", or on being given temporary release under rules made pursuant to the provisions of the

Criminal Justice Act 1960, supervision in the community is deemed to commence on the date of that release. In other words, it is envisaged in the section that a child on whom a detention and supervision order is imposed may spend less than half of the period specified by the court in custody. However, as will be seen, no rules have been made concerning remission in a child detention school.

10. An amendment to s.151(4) is contemplated by s.10 of the Children (Amendment) Act 2015 which, if or when brought into force, will delete the words in quotation marks and will instead refer to remission granted pursuant to regulations made under s.221 of the Act of 2001. Section 221 empowers the Minister to make regulations of general application to children detention schools, and s.18 of the 2015 Act adds "remission of portion of a child's period of detention" to the list of matters that may be the subject of regulation. Loss of remission as punishment for breaches of discipline is also contemplated, in s. 19 of the Act of 2015. However, as of now no regulations have been made under s.221, and ss.10 and 19 of the Act of 2015 have not been commenced.

Children detention schools

11. Children detention schools are the responsibility of the Minister for Children and Youth Affairs. Their purpose is set out in s.158 of the Act in the following terms:

158.- It shall be the principal object of children detention schools to provide appropriate educational and training programmes and facilities for children referred to them by a court and, by –

- (a) having regard to their health, safety, welfare and interests, including their physical, psychological and emotional wellbeing,*
 - (b) providing proper care, guidance and supervision for them,*
 - (c) preserving and developing satisfactory relationships between them and their families,*
 - (d) exercising proper moral and disciplinary influences on them, and*
 - (e) recognising the personal, cultural and linguistic identity of each of them,*
- to promote their reintegration into society and prepare them to take their place in the community as persons who observe the law and are capable of making a positive and productive contribution to society.*

12. The Act provides for the setting up of boards of management for the schools. A board may, and must if required by the Minister, make rules for management of the school (s.179). Such rules, if made, are to set out the procedures and conditions applicable to the grant of mobility trips, temporary leave and placing out of a child under supervision in the community. The rules must be consistent with any regulations made by the Minister, or any criteria so laid down, or general directions given by him or her for the management of the school.

13. It is relevant to note the powers of the Director of the school in respect of the liberty of a child. The Director may permit a child to be absent from the school, for one-off events or on a recurring basis, for a variety of reasons and purposes, with or without staff supervision (ss.202 to 204). There is a wide discretion here – apart from the listed purposes, the Director may under s.203 permit a child to be absent for any purpose “conducive to the reintegration of the child into the community”. Apart from that, the Director is obliged to formulate a temporary leave programme for every child in the school for whom temporary leave is appropriate (s.205). A child on temporary leave is to be in the care of his parents, guardian or a responsible person, unless the Director considers this inappropriate.
14. “Placing out” of a child may be authorised by the Director under s.207 of the Act. This involves placing the child in the community under supervision to reside with his or her parents, or guardian, or a responsible person who is willing to receive and take charge of the child. The Director must be satisfied that the child will continue to receive appropriate education or training while placed out. Supervision is carried out by the probation service. The placing out continues until the detention period expires, unless revoked by the Director.
15. Under s.209 the Minister may at any time order the release of a child on compassionate grounds, if satisfied that there are exceptional circumstances justifying it.
16. At present the only children detention school in the State is Oberstown Children Detention Campus, established on the amalgamation of Oberstown Boys’ School, Oberstown Girls’ School and Trinity House School in 2016 (S.I. 273/2016). St. Patrick’s Institution closed on the 31st March 2017. Accordingly, all children serving sentences of detention are now accommodated in Oberstown.

Enhanced remission under the Prison Rules

17. The ultimate source of the power to commute or remit a punishment imposed by a court exercising criminal jurisdiction is Article 13.6 of the Constitution, which vests that power in the President but provides that it may also be conferred by law on other authorities. Section 23 of the Criminal Justice Act 1951 conferred such power on the government, and further provided that the power thereby conferred could be delegated to the Minister for Justice. The power was formally delegated to the Minister for Justice and Equality by S.I. 416/1998.
18. The power to regulate remission for prisoners serving sentences is given to the Minister for Justice and Equality by s.35 of the Prisons Act, which enables the Minister to make regulations for prisons. Regulations made under the section apply to places of custody, other than garda stations, administered by the Minister for Justice and Equality. St. Patrick’s Institution (now closed) was expressly included. Children detention schools are not.
19. Rule 59(1) of the Prison Rules 2007 (S.I. 252/2007), as amended, provides that a prisoner sentenced to a term or terms of imprisonment shall be eligible, by good conduct,

to earn remission of sentence not exceeding one quarter of such terms or terms. Standard remission is, therefore, a matter of entitlement on the part of any prisoner who does not misbehave (*O'Brien v. Governor of Limerick Prison* [1997] 2 I.L.R.M 349 and *Callan v. Ireland* [2013] IESC 35).

20. Enhanced remission is provided for in Rule 59(2) as substituted by the Prison (Amendment) (No. 2) Rules 2014 (S.I. 385/2014). A prisoner who has engaged in authorised structured activity may apply to the Minister for Justice and Equality for enhanced remission. Such remission may be up to one third of the sentence. The Minister may grant it if he or she is satisfied that the prisoner, having regard to certain specified matters, is less likely to re-offend and better able to re-integrate into the community.
21. The specified matters to be taken into consideration by the Minister are: (i) the manner and extent to which the prisoner has engaged constructively in authorised structured activity; (ii) the manner and extent to which the prisoner has taken steps to address his or her offending behaviour; (iii) the nature and gravity of the offence to which the sentence of imprisonment being served by the prisoner relates; (iv) the sentence of imprisonment concerned and any recommendations of the court that imposed that sentence in relation thereto; (v) the period of the sentence served by the prisoner; (vi) the potential threat to the safety and security of members of the public (including the victim of the offence to which the sentence of imprisonment being served by the prisoner relates) should the prisoner be released from prison; (vii) any offence of which the prisoner was convicted before being convicted of the offence to which the sentence of imprisonment being served by him or her relates; (viii) the conduct of the prisoner while in custody or during a period of temporary release; (ix) any report of, or recommendation made by the Governor of the prison concerned, the Garda Síochána, a probation officer, or any other person whom the Minister considers would be of assistance in enabling him or her to make a decision on an application.
22. Section 144 of the Criminal Justice Act 2006 inserted a new section 156B into the Children Act 2001. It would have provided that, pending the making of rules for the management of children detention schools under s.179 of the Act of 2001, the Prison Acts and any other enactment relating or applying to St. Patrick's Institution or to persons serving sentences therein should apply, with any necessary modifications, in relation to children detention schools and persons detained therein. This provision was not brought into force, and was repealed by s.3(2) of the Children (Amendment) Act 2015. Accordingly, it remains the case that the Prison Rules do not apply to children detention schools.

The decision in Byrne (A Minor) v. Director of Oberstown School [2013] IEHC 562

23. It must be emphasised at the start of the discussion of this judgment that the legal and factual context differed from that of the instant case. One significant difference is that St. Patrick's Institution, a penal institution for young males, was still operational although its closure was announced in July of 2013. Meanwhile, a provision in the Criminal Justice Act 2006 permitted detention of males aged 16 and 17 in St. Patrick's until a place became

available in a children detention school. Where such a transfer took place, the period of time for which the young person concerned could be detained was not to be varied simply by reason of the transfer.

24. Young offenders detained in St. Patrick's were entitled to remission of sentence under the Prison Rules. They therefore continued to be so entitled if transferred to Oberstown Boys' School (as it then was), since their period of detention could not be lengthened by reason of the transfer. However, since the Prison Rules did not apply to children detention schools, young offenders detained in Oberstown from the commencement of their sentences had no entitlement to remission.
25. The applicant in *Byrne* had been sentenced to two years detention in Oberstown in June 2013, with the final twelve months suspended. The warrant did not refer to any specific provision of the Act, but, having regard to its structure, this was held to be a sentence of detention and supervision under the terms of s.151(1) of the Act. He was given a release date that did not include remission. He sought an order pursuant to Article 40.4 of the Constitution at a point when, if the standard one quarter remission had been given, he would have been entitled to release. The case made was that he was being subjected to unconstitutional discrimination.
26. Hogan J. accepted that the Oberstown regime was "laudable and enlightened". He also accepted the evidence that the applicant was attending a structured school environment, had received a full specialist assessment across a range of education, psychological and medical disciplines, and was encouraged to be in close contact with his family. However, he considered that it could not be overlooked that Oberstown was primarily a place of detention. In this regard he pointed to the principle, set out in s.96, that criminal proceedings should not be used solely to provide assistance or service needed to care for or protect a child.
27. Hogan J. acknowledged that the decision not to provide for remission appeared to be a matter of policy, although that policy was not consistently repeated throughout the Act of 2001. In particular, he referred to s.151(4) as expressly envisaging early release by reason of remission.
28. On the equality claim, it was stated that there was no doubt that the Article 40.1 guarantee applied to legislation governing the sentencing process, and was engaged by legislative differentiation between offenders. Hogan J. accepted that a good deal of latitude must be granted where the Oireachtas differentiates between classes of persons for reasons of social policy, provided that the differentiation was "intrinsically proportionate and reasonable". At paragraphs 28 to 30 he said:

"28. One might accordingly envisage circumstances in which the non-application of the remission rules to certain categories of young offenders in detention could be objectively justified as a difference of "social function" for the purposes of Article 40.1 on the ground that their confinement could not realistically be equated with ordinary prison conditions. In these circumstances it might be plausibly contended

that the rationale for the operation of remission within the prison regime (namely, a reward for good behaviour) would not necessarily translate into the special context of a compulsory educational regime for young offenders which was fundamentally different from prison itself. This, essentially, is the argument which was put forward by the respondent in the present case as justification for the non-application of a regime otherwise applicable throughout the prison system.

29. *While there might well be circumstances in which such a justification might succeed, this cannot be the case here once regard is here had to the actual language of the 2001 Act. To succeed it would have to be shown that the Oireachtas had sought to set Oberstown as a place apart from the rest of the custodial regime, so that young offenders were in effect being sent to a form of compulsory education for a fixed period in a closed non-prison environment.*

30. *While the Oberstown regime may well be dedicated towards these goals, yet for several reasons this is not reflected in the actual language of the 2001 Act. There are many indications given in the body of the 2001 Act which suggest that detention in Oberstown is not regarded by the Oireachtas as being essentially different from detention elsewhere in the juvenile criminal justice system..."*

29. Hogan J. summarised those indications as being the statement in the Act that a young offender was not to be sentenced to detention for the purpose of serving his or her needs; the fact that s.151(4) contemplated that an offender in a children detention school could earn remission "*in the same manner as other young offenders and, for that matter, adult prisoners*"; the provisions permitting transfers as between children detention schools and St. Patrick's Institution; and the express contemplation in s.156B that the Prisons Act would be applied to the schools. He found the transfer provisions to be particularly significant. If detention in Oberstown was indeed essentially different to detention in St. Patrick's, one consequence would be that it would be an unconstitutional invasion of the judicial power to allow the Minister to fundamentally alter a young offender's sentence by transferring him from St. Patrick's to a children detention school.

30. Having regard to these factors, Hogan J. felt that it was clear from the Act itself that detention in a children detention school was "*simply another manifestation of detention within the juvenile criminal justice system*", and that there was no essential difference that could justify the failure to make the same provision for remission as there was for other young offenders serving their sentences in a different venue. He accordingly made an order for release under Article 40.4.

31. As noted above, the result in this case was accepted by the State respondents. Clearly, the amendments to s.151(4) of the Children (Amendment) Act 2015 (enacted after the decision in *Byrne*) envisage the making of regulations relating to remission. It is also relevant that the Act of 2015 would amend the Act of 2001 in order to provide for loss of remission as a punishment for breaches of discipline. However, these amending provisions have not been commenced. The position now is that, while the Prison Acts and Rules do not apply, remission of one quarter is granted to children detained in Oberstown

through the exercise of the general power conferred by s. 23 of the Criminal Justice Act 1951.

The High Court proceedings

32. On the 21st November 2017 the appellant pleaded guilty to one count of robbery and was sentenced by the Dublin Circuit Criminal Court to three years detention. The sentence was backdated to the 23rd May 2017, and the final 20 months were suspended on the usual terms along with an undertaking to abide by the directions of the Probation Service for that period. The relevant court order is headed "Children Act 2001, Section 142 (as amended) Order for Detention in Children Detention School".
33. Since he was entitled, under the rules applied to children after the judgment in *Byrne*, to ordinary remission amounting to one quarter of his total sentence, the custodial aspect of the appellant's detention order was due to expire on 23rd May 2018. While in detention, he appears to have made good progress. By letter dated the 22nd January 2018 sent on his behalf by his solicitor, he applied to be considered for enhanced remission. The letter stated that a refusal to permit him to apply placed him in a worse position than adult prisoners and was unfair.
34. The first named respondent replied on the 25th of January 2018. It was stated that Oberstown had taken advice in relation to the enquiry, and that consideration was currently being given by the Department of Children and Youth Affairs to the commencement of the provisions of the Children Act 2001 providing for remission in children detention schools. The appellant's solicitor responded by inviting the Oberstown authorities to create rules that would permit his client to apply for enhanced remission. No substantive answer having been received, leave to seek judicial review was sought and granted on the 26th February 2018.
35. The grounding affidavit was sworn by the appellant's solicitor and went no further than dealing with the brief outline of facts and correspondence set out above, and exhibiting the Circuit Court order. The statement of grounds commenced with an assertion that, notwithstanding the heading of the order, the applicant was detained pursuant to the terms of s.151 of the Act of 2001. It was pleaded that the failure to permit him to earn remission through industry and good conduct was a breach of s. 151(4). It was further pleaded that the failure to create an open, transparent and fair scheme governing the consideration of applications for remission through industry and good conduct breached the appellant's constitutional right to equality and placed him at a disadvantage as compared with an adult prisoner; that it failed to give effect to the will of the legislature; and that it was a breach of the respondents' obligations under s.3 of the European Convention on Human Rights Act 2003.
36. A replying affidavit was sworn on behalf of the respondents by Mr. Pat Bergin, the Director of Oberstown Children Detention Campus. Mr. Bergin deposed that the applicant was the subject of a process designed to manage his detention order by means of a structured approach that aimed to identify support mechanisms and plan for his release.

The probation service, the Child and Family Agency social work services, a youth service in his local area and his mother were all involved in the process.

37. The applicant was stated to have been engaged with the educational service in the campus and was also working two days a week in the kitchen. He was also engaged in other rehabilitative programmes but had declined to consent to a referral to a residential drug treatment programme as part of his release plan – this was a source of concern. However, based on his positive behaviour he had had a number of supervised mobility trips and two home leave visits, as provided for in the Act. Authorisation of leave from Oberstown was increased on an incremental basis, linked to positive behaviour and supported by liaison with community-based supports. As far as the appellant was concerned, the focus of the placement planning meetings had been on obtaining a community-based educational placement.
38. It should be noted that Mr. Bergin avers that an enhanced remission regime is not suitable for children in the detention campus. He considers that there is a distinction to be drawn between an adult prison regime and the detention of a child in line with a structured programme intended to comply with the Act of 2001.

The High Court judgment

39. Judgment was delivered on the 25th October 2018 by Reynolds J. (see *B. (A Minor suing through his Mother and Next Friend, C.) v. The Director of Oberstown* [2018] IEHC 601). Having dismissed as “unfounded and based on mere assertion” the appellant’s contention that he was detained pursuant to s.151 of the Act of 2001, as opposed to s.142, the trial judge also rejected his claim that a failure to consider an application for enhanced remission from a juvenile offender constituted a breach of the guarantee of equality before the law enshrined within Article 40.1 of the Constitution.
40. Distinguishing the facts of the instant case from those in *Byrne*, Reynolds J. reasoned that the guarantee provided for by Article 40.1 does not require identical treatment of all persons without recognition of different circumstances. The appellant was subject to the same regime as all other juvenile offenders detained pursuant to the provisions of the Act of 2001, and the regime in place for juvenile offenders detained in Oberstown was substantially different from that which applied to adult prisoners detained in comparable institutions. If the arguments of the appellant were to be accepted, it would mean that any policy distinction drawn by the Oireachtas between child and adult detention would be a violation of the equality guarantee. She considered that the detention of minors was primarily focused on the rehabilitation of the offender rather than punishment, and was characterised by an interdisciplinary, multiagency approach designed to meet the individual needs of the child and its best interests.
41. Finally, in her concluding observations, Reynolds J. stated that the Act of 2001 imposed duties on the respondents to adopt a tailored approach to the individual needs of the child in detention with a view to securing a sustained rehabilitation. In her view it was clear that the opportunity to avail of an enhanced remission regime could potentially conflict with a situation where a planned and coordinated release, involving other agencies, was

envisaged. In addition, the Director had considerable discretion in relation to a child's detention, including the power to grant temporary leave where considered appropriate. Such provisions were, she felt, clearly more appropriate for children than provision for enhanced remission. In all the circumstances it was not appropriate to compare the regime applied to children in detention with that applicable to adult prisoners.

The grant of leave to appeal

42. By a determination of the 20th of February 2019 (see [2019] IESCDET 46), this Court granted leave for a direct appeal from the High Court. It was noted that the case was technically moot. However, the Court accepted that the question raised in the application might fall into the category of issues that affect a reasonably significant number of individuals while tending to "avoid capture".

Submissions in the appeal

43. The appellant continues to maintain that he was detained under a detention and supervision order under the provisions of s.151 of the Act, as opposed to a children detention order under s.142. He bases this on the fact that a part of his sentence was suspended. The argument is that s.151 is the sole provision in the Act that expressly contemplates suspended sentences. It is submitted that this issue was determined by Hogan J. in the *Byrne* case. The respondents disagree, pointing to the fact that (unlike the sentence in *Byrne*) the sentence imposed here would not have been in accordance with s.151, in that more than half of the detention ordered in this case was suspended. They rely upon the fact that the applicant took no challenge to the terms of the order and invoke the doctrine *omnia praesumuntur rite esse acta*.
44. The appellant relies largely on the reasoning of Hogan J. in *Byrne* for the proposition that juvenile offenders detained in Oberstown are entitled to apply for enhanced remission. He refers to the sentence in the judgment, quoted in paragraph 29 above, suggesting that s.151(4) contemplated that young offenders detained in a children detention school could earn remission "*in the same manner as other young offenders and, for that matter, adult prisoners*".
45. It is submitted by the appellant that the respondents continue to provide remission to children at Oberstown, despite the closure of St. Patrick's Institution, because the rationale of the judgment in *Byrne* is unaffected by that development. The power to grant remission under s.23 of the Criminal Justice Act 1951 is said to be the same in respect of both child and adult offenders, and the focus of Hogan J.'s criticism was the application of Rule 59 to one institution and not to another.
46. Turning to Article 40.1, the appellant says that having put a scheme of remission in place, the respondents are obliged, under the principles discussed in *East Donegal Co-operative v. The Attorney General* [1970] I.R. 317, to operate it in accordance with the guarantee of equal treatment. The guarantee is violated if the law differentiates between offenders insofar as eligibility for remission is concerned.
47. It is of course accepted that Article 40.1 does not require the State to treat all citizens equally in all circumstances, and that Hogan J. was correct in stating that much latitude

had to be allowed where the Oireachtas differentiates between classes of persons for reasons of social policy. However, the case made is that, having regard to the provisions of the Act of 2001, detention in Oberstown is not seen by the Oireachtas as essentially different to detention elsewhere in the juvenile or indeed the general criminal justice system. In this regard, reference is made to the features of the Act relied upon by Hogan J. in his analysis. The appellant says that, accepting that the goals of Oberstown are enlightened and heavily focused on education, the fact remains that detention there is imposed following a criminal conviction and is "just another manifestation of detention generally". The differential treatment between children and adults cannot, according to the appellant, be objectively justified.

48. The appellant submits that, while accepting that the detention regime for juvenile offenders is somewhat different than that applicable to adults, he is entitled to compare himself with adult offenders for the purposes of the constitutional rights to liberty, fair procedure and natural justice. He refers here to the following passage in the judgment of O'Donnell J. in *M. R. and D.R. v. An tArd Chlaraitheoir* [2014] 3 I.R. 533:

"Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unlike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement."

49. It is argued here that the context is that of custodial detention imposed by the criminal justice system, and that a comparison between a 17-year-old and a 19-year-old, or even a 30-year-old, in custody will demonstrate that there is no difference in terms of the constitutional rights retained by them. Reliance is placed here on the judgment of Ní Raifeartaigh J. in a group of cases concerning measures, including solitary confinement or "separate detention", lack of family contact and lack of exercise, taken by the authorities in Oberstown after a serious disturbance there (*S.F. v. Director of Oberstown* [2017] IEHC 829). It was accepted by Ní Raifeartaigh J. that the educational focus of the school, and the quasi-parental role and power of the Director, did not mean that a young person in Oberstown had fewer constitutional safeguards in relation to such measures than an adult in prison.
50. The difference in age between a 17-year-old and an older offender, it is asserted, is unlikely to significantly affect their rehabilitation and the common good served by their rehabilitation is comparable. Since the intended purpose of enhanced remission is to incentivise behaviour that will assist in rehabilitation, it serves the same interests as child detention.

51. The appellant submits that the trial judge erred in finding, without a sufficient evidential basis, that an enhanced remission scheme could conflict with the planned and coordinated release preferred by the respondents. Section 96 of the Act, and the comments of Hogan J. thereon, are pointed to as prohibiting a decision to prolong a child's detention in his own interests. She also, it is said, erred in finding that the discretionary powers of the Director to grant leave were more appropriate. In this latter regard it is submitted that the judgment fails to engage with the fundamental difference between temporary, conditional liberty and the unconditional liberty that is attained on the expiry of the sentence.
52. In respect of the issue of equality, the respondents submit that the *Byrne* case should be distinguished from the instant case, on the basis that *Byrne* related to differences in treatment between children detained in different institutions. However, all children are now detained in Oberstown, pursuant to the Act of 2001.
53. The respondents further submit that the Oireachtas has placed duties upon the Director that are entirely appropriate for troubled children and are markedly different from those which apply in the adult prison regime. Sections 203 and 205 of the Act of 2001 (relating to permitted absences from the campus and temporary leave) are relied upon as demonstrating that the Oireachtas intended to confer considerable discretion as to the manner in which the detention of each child ought to proceed. It is asserted that the exercise of such discretion is far more appropriate than a regime of enhanced remission, and that to permit an enhanced remission regime for juvenile offenders could potentially conflict with a situation in which different agencies had attempted a planned and coordinated release of the offender concerned.
54. The respondents invoke the principle that the right to equal treatment is subject to consideration of differences of capacity and social function. The difference in treatment between children and adults is, on their case, aimed at the legitimate purposes enunciated in s.158 of the Act of 2001. Moreover, this distinction in treatment is proportionate having regard for the express and implied purposes of the legislation.
55. Finally, the respondents also point out that the rights conferred upon children by virtue of the Act are not available to adult offenders, and that to that extent it can be said that juvenile offenders benefit by virtue of their status as children.

Discussion

The sentence imposed on the appellant

56. The appellant says that he must be taken to have been sentenced under s.151 of the Act of 2001, because the term of detention was part-suspended and there is, he contends, no power to suspend a sentence outside the terms of the Act. The respondent has not dealt with the substantive argument on this issue, merely pointing out that no challenge was taken to the validity of the order.
57. There seems to have been no doubt but that the common law power to suspend a custodial sentence in whole or in part was available in respect of young offenders prior to

the enactment of the Children Act 2001. However, according to Osborough (“A Damocles Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland” (1982) Ir. Jur. N.S. Vol. 17), it was not often used in cases involving children. This was probably explicable by reference to the age limits applicable to the various forms of disposal of children and young offenders, combined with the minimum term of three years required in the case of those who were sentenced to detention in a reformatory school.

58. Section 99 of the Criminal Justice Act 2006, as amended, attempts to create a statutory code in respect of suspended sentences where adults are concerned. By virtue of the definition in s.98 as amended, s.99 applies only to sentences of imprisonment, served in places of detention provided under the Prisons Acts. It therefore does not appear to have any effect on any power to impose a suspended sentence on a child.
59. In *Director of Public Prosecutions v. Carter* [2015] IESC 20, this Court left open to some extent the question whether the effect of the 2006 Act was to entirely supersede the common law power, such that a sentence could only be suspended in accordance with its terms. This judgment, it must be noted, was concerned only with adults, whose sentences were clearly covered by the section. However, in *The People (DPP) v. A.S.* [2017] IECA 310 the Court of Appeal determined that as far as children were concerned the 2001 Act completely replaced the pre-existing law, including residual common law powers, with respect to juvenile justice and that, therefore, there was no jurisdiction to impose on a child a sentence suspended in accordance with s.99 of the 2006 Act.
60. Surprisingly, neither party in the instant case has referred to A.S. and this issue has not been fully argued. Assuming that the Court of Appeal was correct, it would have to be said that the sentence in this case did not accord with the provisions of the Act of 2001. It cannot be deemed to have been an order under s.151, since (unlike the situation in *Byrne*) more than half of the sentence was suspended. Neither did the trial judge follow the procedure in s.144, which would have required a deferral of sentence (for however brief a period) before finalisation. The appellant was, according to the order of the Circuit Court, sentenced on the day on which he was arraigned and the evidence heard. The reliance of the State respondents on the maxim *omnia praesumuntur rite esse acta* is misplaced – this presumption has a limited application in criminal law and cannot be seen as covering a sentence imposed other than in accordance with law.
61. However, in my view nothing turns on this issue in the instant case. The appellant has never suggested that the sentence was invalid, and cannot now complain that more than half of it was suspended. He appears to have maintained the argument that he was dealt with under s.151 because of the belief that it is the only provision that allows for suspension or part-suspension. This is clearly incorrect, having regard to s.144 in its entirety.

The equality claim

62. The equality guarantee is expressed in Article 40.1 of the Constitution in the following terms:

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

63. In *MD (A Minor) v. Ireland* [2012] IESC 10, Denham CJ. said (in paragraph 41 of the judgment):

"The central principle of the Article rests, firstly, on the common humanity which we all share and, secondly, on the general understanding that for the State to pass a law which treats people, who are objectively in the same situation vis-à-vis the law, unequally, is an affront to fundamental ideas of justice and even to rationality."

64. In *Re Article 26 and the Employment Equality Appeal Bill 1996* [1997] 2 IR 321, it was observed in the judgment of the Court that Article 40.1

"does not require the State to treat all citizens equally in all circumstances. Even in the absence of the qualification contained in the second sentence, to interpret the Article in this manner would defeat its objectives."

65. The Court said that the State was entitled to legislate so as to prevent the exploitation of young people in the workplace, or to make special provision for the elderly in the social welfare code. Classifications based on age could not be regarded as, of themselves, constitutionally invalid. However, they must be capable of justification on the grounds set out by Barrington J. in *Brennan & Ors. v. Attorney General* [1983] I.L.R.M 449 (at p 480):-

"The classification must be for a legitimate legislative purpose...it must be relevant to that purpose and each class must be treated fairly."

66. The core contention put forward by the appellant in the instant case may be summarised as being that he has not been treated equally vis-à-vis adults who, he says, are in objectively the same situation as him, in that they are undergoing custodial sentences.

67. In my view this claim is not well founded. It could be successfully maintained only if the rationale of the Children Act 2001, which distinguishes clearly between children and adults, were to be challenged and undermined.

68. In *G. v. The Director of Public Prosecutions* [2014] IEHC 33 I said (in the context of a case about expeditious trials of young offenders):

"92. Children differ from adults, not just in their physical development and lesser experience of the world, but in their intellectual, social and emotional understanding. It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult. Further, it has been accepted since, at

least, the enactment of the Children Act 1908, that the fact that these aspects of personality are still developing means that intervention at an early stage, rather than a purely punitive approach, may assist in a positive outcome as the child reaches adulthood.

93. *This is not to say that the law regards adults as incapable of development or change – the principle of rehabilitation is a cornerstone of sentencing and penal policy. It is an acknowledgment of the fact that a child is still in the process of development. It is the policy of both the legislature and the courts, therefore, to assist in that process in a positive way where practicable. This policy is one that respects both the rights of the child as an individual and the public interest in steering a child offender into a more law-abiding path.”*
69. I also made the point that, by definition, childhood is a transient status. The law as it stands does not attempt to measure personal maturity with a view to deciding whether or not a person should be treated as a child, but provides that childhood ends at the age of eighteen. It may well be, therefore, that a particular 17-year-old is more mature than a particular 19-year-old, or even a 30-year-old. However, the Oireachtas has determined that the 17-year-old should be treated differently because of his age. In so doing, it has clearly acted on the basis of a perceived difference, that is seen as relevant in the context of the criminal justice system, in the capacity and social function of adults and children. There is undoubtedly a constitutional imperative to protect children. Since the Constitution leaves it to the Oireachtas to decide when the status of childhood ends, this differential treatment can only be challenged on the basis that it is, in principle, unconstitutionally invidious. That argument has not been made in this case.
70. The issue here does not relate to matters such as the fundamental principles applicable to criminal trials, or to entitlement to fair procedures, but to the question whether the remission aspect of the penal regimes applicable to adults and children should, as a matter of constitutional equality, be assimilated.
71. When one compares those penal regimes, it will be seen that the incentives to engage in positive behaviour while in custody differ significantly. An adult given a sentence of three years, for example, knows that with ordinary good behaviour his sentence will be reduced by nine months. He also knows that if he engages in authorised structured activities, he may be granted a further three-month reduction. A prisoner serving a long sentence will know that he will not be assessed by the Parole Board for at least seven years. For a person commencing a sentence these are all relatively long-term objectives.
72. Under the regime created by the Children Act, on the other hand, certain goals will be achievable far more swiftly. A child may be told “Behave well this month and you will get a mobility trip. Behave well next month and you may get an overnight at home” and so on. The scheme of incentives is incremental, and geared towards relatively short-term steps, according to the planned management of the individual child’s sentence. If successful, the child may be able to return home or to suitable accommodation in the community long before the expiry of the sentence.

73. As already noted, the evidence presented in this case has been somewhat sparse. The appellant has not provided any factual basis upon which the Court could compare the regime to which the appellant was subject in Oberstown with that applicable to adults. Furthermore, it has not been argued that the system of incremental incentives and planned release under the Oberstown regime is not more suitable for the reality of dealing with young persons than the system of long-term incentives available to adults. Counsel for the appellant has made the point that a few months seems like a very long time to a teenager. Assuming that to be so, it might tend to strengthen a view that teenagers are less likely than adults to plan for any future that seems far away.
74. It is true that release from Oberstown into the community, under the terms of the Act, does not fully equate with the unconditional liberty of a person whose sentence has expired. However, in my view it should be seen as part of a process leading to the ultimate objective (as set out in s.158 of the Act) of reintegration into the community.
75. My analysis thus far is based on what appears to be the statutory policy in relation to custodial sentences for children. No evidence has been adduced that might tend to undermine the rationale of that policy. However, I would not, on this aspect, go as far as Reynolds J., who considered that a scheme of enhanced remission could conflict with the statutory process. It seems to me that this is a question of policy – if regulations relating to remission are to be introduced, I can see no reason why they should not include such a scheme if it is thought to be beneficial having regard to the statutory framework and objectives.
76. I do not consider that the analysis in *Byrne* is in any way inconsistent with the foregoing. It is entirely clear that in that case Hogan J. was dealing with an unjustified distinction between two categories of young offenders, within the context of the juvenile criminal justice system. The reference to earning remission in the same manner as other young offenders, "*and for that matter, adult prisoners*" is a factual one, rather than a legal conclusion. It was a fact that the young offenders with whom the applicant in that case was comparing himself (some of whom were in detention in Oberstown) were earning remission under the same rules that applied to adults. In the instant case, however, the Court has been asked to accept that the penal regime that applies to all children should be compared with that established for adults. The presumption of the legislature, that the differences between children and adults calls for different regimes, has not been shown to be factually incorrect or unfair in principle.
77. Finally, it may be helpful to note that cases of this nature can be seen as raising the issue of underinclusivity. The appellant wishes to obtain a benefit that is available, on a statutory basis, only to a category of persons to whom he does not belong. As discussed in *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional), claims based on underinclusivity can raise a problem in relation to remedies. An appropriate outcome may be apparent in some such cases. For example, in *Carmody v The Minister for Justice, Equality and Law Reform and Others* [2010] 1 I.R. 635 this Court prohibited the trial of the appellant until such time as the regulations governing criminal legal aid were

amended to cover representation by counsel in the District Court. *Byrne v. Director of Oberstown* was an application under Article 40.4, and Hogan J. ordered the release of the applicant.

78. Clearly, the appellant has not challenged the validity of Rule 59 of the Prison Rules, nor has he any interest in striking down the enhanced remission scheme as it applies to adults. It would not have been possible for him to challenge the lawfulness of his detention under a regime that did not include enhanced remission, since, unlike standard remission, enhanced remission cannot be presumed upon. It cannot be applied for until a late stage in a prisoner's sentence, and is a matter within the discretion of the Minister for Justice and Equality, having regard to the factual situation of the prisoner at the time of the application. Essentially, therefore, a person in the appellant's situation seeks an order of the court that he be included in a statutory scheme that by its terms excludes him. That raises issues in relation to the separation of powers which, while not necessarily fatal to such a claim, have simply not been addressed in these proceedings.
79. In the circumstances I would dismiss the appeal.