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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY HUGH McCORMICK
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
IN RESPECT OF DECISIONS OF THE NORTHERN IRELAND PRISON
SERVICE**

**Ms Maria Mullally (instructed by McIvor Farrell Solicitors) for the Applicant
Mr Philip Henry (instructed by the Departmental Solicitor's Office) for the Proposed
Respondent**

COLTON J

Introduction

[1] On 23 September 2015, the applicant was convicted of attempted murder and intentionally encouraging or assisting a robbery. He received a determinate custodial sentence of 15 years and six months. Of this sentence seven years and nine months was to be served on licence. His release date is 28 May 2023. Between April 2022 and August 2022, the applicant sought temporary release from prison to avail of some opportunities which would assist in his rehabilitation into society after his release date on 28 May 2023.

[2] None of these requests were granted because at the relevant time the Pre-release Resettlement and Home Leave Scheme introduced in 2005 ("the 2005 Scheme") had been suspended in March 2020 because of restrictions arising from the Covid-19 pandemic.

[3] As a result a temporary scheme was put into operation in August 2020 which was referred to as the "Interim Home Leave and Settlement Scheme" ("the 2020 Scheme"). This scheme remained in place until the introduction of a "Temporary Release Transition Leave Scheme" in November 2022 ("the 2022 Scheme"). This scheme is being trialled as a pilot and it is anticipated that a new comprehensive

scheme will be introduced in 2023. I was told in the course of the hearing, by Mr Henry, that it is anticipated that this scheme will be in place by May 2023.

[4] Returning to the applicant's situation, in June 2022 his solicitors sent pre-action protocol letters challenging the refusal to grant the applicant temporary release. In a reply to the pre-action protocol letter on 23 June 2022, the proposed respondent stated:

"The NIPS are very mindful of the need to implement a replacement scheme and can advise one is currently being progressed ... it is hoped that it will come into operation during the early part of the autumn."

[5] The applicant's solicitor properly indicated that no further action would be taken at that stage.

[6] On 28 September 2022, a second pre-action protocol letter was sent to the proposed respondent seeking release to enable the applicant to engage in counselling offered by the Commissioner for the Survivors of Institutional Childhood Abuse.

[7] On 6 October 2022, the proposed respondent's solicitors replied indicating that a review of the scheme was well advanced and also referred to the possibility of counselling from NEXUS NI.

[8] On 16 November 2022, the applicant's solicitor forwarded a third pre-action protocol letter to the proposed respondent in respect of a request for release for the purposes of the applicant undertaking counselling services, stating that the applicant had been informed by NEXUS that the waiting time for commencement of counselling would be 10 months.

[9] On 23 November 2022, the proposed respondent's solicitors replied to the pre-action protocol letter stating that temporary release days are granted on a discretionary basis and were now governed by the pilot transitional leave scheme which had been introduced on 1 November 2022.

[10] A central feature of the 2022 Scheme is that as per para 1.3:

"If transition leave is granted, the days granted will be taken as a block period of leave immediately preceding the prisoner's custody expiry date (CED/EDR). This change to the name and the way in which this type of leave will be granted reflects the primary aim of supporting and assisting individuals with their transition and reintegration back into family and the community (this will include, but is not limited to, engagement with

statutory, voluntary and community services and others in support of their transition.”

[11] Para 2.5 of the 2022 Scheme provides:

“All eligible sentenced prisoners will be able to apply to be considered eight weeks prior to their CED/EDR. Encouragement should be given to applying as early as possible.”

The applicant's challenge

[12] In the course of submissions Ms Mullally realistically accepted that, leaving aside any issues about delay, the applicant could not sustain a challenge to the decisions taken under the 2020 Scheme arising from the restrictions imposed by the Covid-19 pandemic.

[13] Thus, the challenge focuses on the provisions of the 2022 Scheme which permit only release in a block of consecutive days at the end of a prisoner's sentence, but not spread out over a number of different dates in the final 12 months of his sentence as had been the case under the 2005 Scheme. On behalf of the applicant, Ms Mullally argues that the prison service has unlawfully fettered its discretion, that the scheme it currently operates is irrational and that there has been a lack of equal treatment at common law and under the Human Rights Act 1998 on the basis that the failure to provide periods of temporary leave in the final 12 months of his sentence was incompatible with the applicant's Article 8 rights read with Article 14 under the ECHR.

The court's analysis

[14] The court is obliged to both counsel for their well-marshalled, focused and helpful written and oral arguments.

The Legislative and Policy Framework

[15] Rule 27 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 permits the NIPS to grant a prisoner a period of temporary release. It provides:

“Temporary release

27.-(1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.

(2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have

medical treatment, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.

(3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.

(4) This rule applies to prisoners other than persons-

(a) remanded in custody by any court; or

(b) committed in custody for trial; or

(c) committed to be sentenced or otherwise dealt with before or by the Crown Court.

(5) In considering any application for temporary release under this rule previous applications, including any fraudulent applications, may be taken into account.”

[16] In the context of resettlement, the NIPS has developed a series of successive policies to regulate the grant or refusal of applications for such leave.

[17] I have already summarised the relevant schemes earlier in this judgment, but it is important to analyse these in more detail.

[18] There are four relevant schemes.

[19] The first is the 2005 Scheme. The maximum period of temporary leave permitted by the 2005 Scheme depended, as with all subsequent schemes on the duration of the sentence. The 2005 Scheme provided for prisoners to be released for individual periods in the final 12 months of their sentence. It had been the NIPS’s intention to update/replace the scheme as it was introduced prior to, and therefore, did not directly address, the new sentencing regime introduced by the Criminal Justice (Northern Ireland) Order 2008, which introduced determinate, extended and indeterminate sentences.

[20] The 2020 Scheme was put into operation during the currency of the pandemic. It was always intended to be temporary and to be replaced. One of the changes introduced was the provision of release for a block of days at the end of the prisoner’s sentence. Initially, this change was put into operation mainly as an infection control measure.

[21] As will be seen from the discussion above, it remained in operation for over two years until November 2022.

[22] It is the case of the proposed respondent that during those two years it was able to observe the benefits of this block approach. Prisoners have many arrangements to make in the period immediately prior to the end of their sentence. They often cannot sign leases or tenancy agreements until they are ready to take up tenancy, they must attend with probation officers, designated risk managers and key workers, they often have to register with a new GP if housed in a new area, they have to arrange extended counselling, they have to register for other treatments and programmes provided by the public and voluntary sectors. It was the experience of the NIPS that giving prisoners a block period at the very end of their sentence enabled them to make these arrangements with the consequences that they were often more settled when their sentence concluded. In other words, rather than impede resettlement, the block approach was observed to improve resettlement.

[23] It was because of that success that the Northern Ireland Prison Service (NIPS) incorporated the same block approach into the November 2022 Scheme, which is the subject matter of this challenge.

[24] The policy document setting out the Scheme makes it clear that it is being trialled as a pilot.

[25] All of this is reflected in the policy document itself. Thus, in the background it is said that:

“... it has been recognised that giving a prisoner days on temporary release just immediately prior to the release date was beneficial in their **transition** from prison to community life.”

[26] It is indicated further that:

“The premise of the new scheme, is not intended to be a complete replacement of previous Home Leave Schemes, but rather is grounded on the success of the Interim Scheme and is designed to continue to facilitate giving those with determinate sentences, an opportunity to apply for a **transitional period** of Temporary Release until they their Custody End Date (CED) or Earliest Date of Release (EDR).”

[27] Section 1 of the Scheme states its aims and objectives in the following way:

“1.1 The aim of this scheme is to assist prisoners coming towards the end of their sentence with their

transition to the community in a structured manner, in a way which can best assist their resettlement into the community after a period in custody and can contribute to reducing the risk of reoffending. To this end the prisoner will be expected to provide details when applying for Transition Leave about how they propose to structure their time, should their application be successful.

1.2 Transition leave is not an entitlement. NIPS, in discharging its responsibilities to the safety of the public, must risk assess each application individually on its merits and against the criteria at 4.5 of the Scheme.

1.3 If transition leave is granted, the days granted will be taken as a block period of leave immediately preceding the prisoner's Custody Expiry Date (CED/EDR). This change to the name and the way in which this type of leave will be granted, reflects the primary aim of supporting and assisting individuals with their transition and reintegration back into family and the community (this will include, but is not limited to, engagement with statutory, voluntary and community services and others in support of their transition)."

[28] Section 4.5 sets out in detail how the NIPS goes about making a risk assessment of prisoners who apply for the period of transition leave.

[29] On 1 November 2022, all prisoners were sent a notice informing them of the new scheme and, in particular, the opportunity to apply for a block period of days prior to the end of their custody in prison.

[30] As indicated the new scheme which will replace the 2022 Scheme is being finalised. What will be known as the 2023 Scheme will vary slightly from the approach taken in the 2022 Scheme; the majority of leave will still be taken in a block period at the end of a prisoner's custody period; but it may be possible for prisoners who have to serve more than one year in custody to secure release on some days within the last few months of their sentence prior to their block period. This approach is intended to assist prisoners with longer sentences in their transition back into the community, given that they have been in prison custody for lengthier periods.

[31] Ms Mullally complains that limiting temporary leave for the purpose of resettlement to a block period of leave immediately preceding the custody expiry date, unlawfully fetters the discretion available to NIPS. She argues that the impact of that approach could be very significant for a prisoner such as the applicant.

[32] Related to this she argues that the policy adopted by NIPS is irrational in the *Wednesbury* sense. She argues that there has been no objective or reasonable justification put forward in support of the policy. Adopting the language of the Convention jurisprudence, she says that the actions of NIPS do not pursue a legitimate aim and lack proportionality.

[33] Turning to the issue of equal treatment she asserts that the applicant has been treated differently from other prisoners serving a determinate sentence who prior to March 2020 were able to avail of a “period” or “periods” of temporary leave in the final 12 months of sentence to assist with resettlement. In this respect she relies on the dicta of the Court of Appeal in *Re McCallion’s Application* [1997] NI 457 CA at 491:

“A challenge to a decision based on the argument of unequal treatment is a challenge based on the alleged irrationality or *Wednesbury* unreasonableness of the decision. To succeed in such a case, the challenger must be able to demonstrate that the decision was such that no reasonable decision-maker could have reached the decision and, of course, proper regard must be accorded to the decision-maker’s proper margin of appreciation. If the decision-maker may tenably consider there are points of distinction between two classes of persons or two situations, he is entitled within his margin of appreciation to treat them differently.”

[34] Ms Mullally argues that the NIPS has failed to advance any objective justification for the difference in treatment she identifies.

[35] As an extension of this submission she asserts that the failure to provide periods of temporary release in the final 12 months of sentence to assist with the applicant’s resettlement is incompatible with Article 8 of the ECHR read with Article 14 of the ECHR. Again, the applicant states he is being treated differently from a prisoner serving a determinate sentence prior to March 2020.

The court’s conclusions

[36] It will be seen that the NIPS enjoys a very broad discretion under Rule 27.

[37] It should be noted that temporary release is not limited for the purposes of resettlement. It covers a range of other scenarios, including but not limited to, the need to receive medical treatment, engaging in employment or receiving instructions or training and compassionate release for significant family events such as funerals or births.

[39] The court is being asked to consider a policy governing the exercise of a statutory discretion. In such circumstances the court's jurisdiction is limited to conducting an audit of the lawfulness of the policy, not determining what it should contain. In so doing, it must have regard to the expertise of the authorities who have been vested with the making of the relevant policy.

[40] It may well be that a case could be made that the policy to permit release on a block basis prior to the end of a custodial term is not the best way to provide for resettlement. However, it is not for the court to determine what the policy should be. It can only interfere with the policy under challenge if it contravenes some public law principle.

[41] In relation to the policy under challenge the NIPS has explained the rationale behind the relevant policy. On no account could it be considered to be irrational. To the contrary, the reasons put forward are rational.

[42] In my view, this is a complete answer to the challenge based on the fettering of discretion and the irrationality argument.

[43] The NIPS has not unlawfully fettered its discretion. It has selected a policy approach based on rational aims and objectives. An approach was selected by the NIPS based on its expertise and experience. It will be refined further with the 2023 Scheme.

[44] As to the arguments based on unequal treatment or discrimination under the provisions of the ECHR, I do not consider, that either argument gets off the ground.

[45] Fundamentally, the discrimination point fails on the basis that the applicant must identify a comparator who is in an analogous position. The applicant chooses a prisoner who received the same sentence but who was able to avail of the 2005 Scheme. That comparator is not in an analogous position. A relevant comparator is someone who applies at the same time as the applicant. There is a material difference between this applicant and an applicant eligible to apply for release prior to the 2022 Scheme. The applicant has been treated in the same way as every prisoner who is also subject to a determinate sentence.

[46] There has been much jurisprudence on the issue of discrimination claims under Article 14 of the Convention, most recently the Supreme Court decision in the case of *SC, CB and eight children v Secretary of State for Work and Pensions and others* [2021] UKSC 26. This case does not require a detailed or comprehensive review of the many authorities referred to in that decision. Put simply, the applicant is not in an analogous situation to those prisoners who applied for temporary release under the 2005 Scheme.

[47] For these reasons the court agrees with the submissions of Mr Henry to the effect that the applicant has not disclosed an arguable case with a reasonable prospect of success.

[48] Accordingly, leave to apply for judicial review is refused.