Neutral Citation Number: [2021] EWCA Civ 898

C1/2020/1594

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 15th June 2021

Before :

LORD JUSTICE HADDON-CAVE
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE NUGEE

- -

Between:

THE QUEEN on the application of **JAWAD AKBAR**

Appellant

-and-

THE SECRETARY OF STATE FOR JUSTICE

Respondent

- -
- -

Dan Squires QC and Anita Davies (instructed by Birnberg Peirce) for the Appellant
Ben Watson QC (instructed by Government Legal Department) for the Respondent

Hearing date: Tuesday 16 March 2021

- -

Judgment Approved by the court for handing down

Lord Justice Haddon-Cave:

1. This appeal concerns a challenge to Rule 7(1A) of the Prison Rules 1999 ("Rule 7(1A)"), which provides that the Secretary of State for Justice must not transfer any prisoner to open conditions if they are subject to a deportation order and have exhausted their rights of appeal.

Background

2. The Appellant was born in Pakistan on 20th June 1983 but is an Italian citizen through his father. In 1992, the Appellant moved to the UK with his family. During his second year of university, the Appellant became radicalised and formed extremist jihadist views.

3. On 30th March 2004, the Appellant was arrested, and later charged with four others with conspiracy to cause an explosion likely to endanger life or cause serious injury to property contrary to section 3(1)(a) of the Explosive Substances Act 1883. The Appellant was convicted after trial and sentenced to life imprisonment with a minimum term of 17 ½ years. The Appellant's tariff expires on 29th September 2021.

4. During his time in prison, the Appellant progressed from Category A to Category B in 2014, and then to Category C in 2016. There is now no further rehabilitation work he can do in closed conditions, *i.e.* without progressing to Category D open conditions.

5. On 31st December 2015, the Home Secretary notified the Appellant of the intention to deport him to Italy. The Deportation Order was subsequently made on 15th December 2017. The Appellant did not appeal the deportation order and, therefore, became "*appeal rights exhausted*" ("ARE").

6. Accordingly, by reason of Rule 7(1A), the Appellant was not eligible for transfer to open conditions. The Appellant was considered for removal under the Tariff Expired Removal Scheme ("TERS") for Foreign National Prisoners serving Indeterminate Sentences (a process which began in January 2021).

7. On 10th July 2018, the Appellant submitted representations to the Secretary of State in support of his pre-tariff review of suitability for Category D open conditions. On 18th September 2018, the Secretary of State issued a decision cancelling the Appellant's pre-tariff review referral to the Parole Board because he was ARE in respect of his deportation order.

8. On 29th May 2019, the Appellant was granted permission for judicial review. The judicial review hearing was held on 30th October 2019. In a judgment handed down on 20th November 2019, the Divisional Court (Hickinbottom LJ and Johnson J) dismissed the Appellant's claim for judicial review. The Order dismissing the Appellant's judicial review was sealed on 4th September 2020.

9. On 4th November 2020, the Appellant was granted permission to appeal by Floyd LJ.

The Law

Rules governing indeterminate sentence prisoners

10. The Prison Act 1952, section 47(1) gives the Secretary of State the power to make rules for the "classification" of prisoners. Rule 7 of the Prison Rules 1999 provides that, subject to rules 7(1A)-(1D):

> "prisoners shall be classified, in accordance with any directions of the Secretary of State, having regard to their age, temperament and record and with a view to maintaining good order and facilitating training and, in the case of convicted prisoners, of furthering the purpose of their training and treatment…".

11. The relevant directions appear in PSI 40/2011. Adults may be held in one of four security categories of decreasing security intensity: Category A, Category B, Category C and Category D. Prisoners in Category D are the only prisoners in "open conditions".

12. The Secretary of State's "Principles of Categorisation" are contained in paragraph 3.1 of PSI 40/2011:

> "All prisoners must have assigned to them the lowest security category consistent with managing their needs in terms of security and control and must meet all the criteria of the category for which they are being assessed (i.e. for Category D this will mean that they are low risk of harm, can be reasonably trusted not to abscond and for whom open conditions are appropriate i.e. will usually be within the time to serve limit)".

13. The sentencing court of an Indeterminate Sentence Prisoner ("ISP") sets a tariff, which is the minimum time an offender must spend in custody. After the tariff period has been completed, the ISP must remain in custody until the Parole Board is satisfied "that it is no longer necessary for the protection of the public that the prisoner should be confined" (s.28(6)(b) Crime (Sentences) Act 1997 ("CSA 1997")). The Secretary of State is bound by the Parole Board's decision (s.28(5) CSA 1997). This process is referred to as the 'section 28 regime'. If and when released, an ISP will be subject to licence conditions, and liable for recall to prison for the rest of their life.

Foreign Nationals serving indeterminate sentences

14. An alternative scheme has been introduced for foreign nationals who are serving indeterminate sentences of imprisonment ("Indeterminate Foreign National Prisoners" or "IFNPs"). TERS was introduced by section 119 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which inserted a new section 32A into the 1997 Act:

> "32A. Where P-
>
> (a) is a life prisoner in respect of whom a minimum term order has been made, and
> (b) is liable to removal from the United Kingdom,
>
> the Secretary of State may remove P from prison under this section at any time after P has served the relevant part of the sentence (whether or not the Parole Board has directed P's release under section 28)."

Section 32A(5) defines the "relevant part of the sentence" as, in effect, the minimum term or tariff.

15. PSI 18/2012 sets out the eligibility criteria for removal through TERS. On 7th January 2020, PSI 18/2012 was replaced by the Generic Parole Process Policy Framework, which for present purposes is in materially the same terms: see paragraphs 3.3, 4.2, and 5.3. All foreign national ISPs are presumed suitable for TERS unless they fall within one of the categories listed in paragraph 2.3, namely, (i) prisoners subject to confiscation orders, (ii) prisoners with outstanding criminal charges, (iii) where there is evidence that the prisoner in question is planning further criminal offences, (iv) prisoners *"serving a sentence for a terrorism or terrorist-related offence"*, and (v) where the removal of a prisoner would undermine the confidence of the public in the criminal justice system.

16. In relation to the instant case (iv), namely a terrorist prisoner, paragraph 2.3 provides:

> "The prisoner is serving a sentence for a terrorism or terrorism-related offence. [The Ministry of Justice Public Protection Casework Section ("PPCS")] must consider, on a case by case basis, whether TERS should be refused to IFNPs serving a sentence for a terrorism or terrorism-related offence due to the very serious nature of such offences and the significant risk that such prisoners might present both in the UK and abroad. In doing so, PPCS must always consult with the NOMS Extremism Unit before a final decision is made." (emphasis added)

17. Paragraph 2.3, therefore, requires a case-by-case assessment to be carried out in relation to terrorist prisoners as to whether TERS should be refused "due to the very serious nature of such offences and the significant risk that such prisoners might present both in the UK and abroad".

18. As a convicted terrorist, the Appellant falls within paragraph 2.3 and is, therefore, not automatically eligible for TERS.

Prisoner transfers

19. The Secretary of State has a discretion to transfer a prisoner from closed to open conditions and generally does so after referring the case to the Parole Board for its advice and recommendations under s 239(2) of the Criminal Justice Act 2003 ("the 2003 Act"). Transferring a prisoner from closed to open conditions requires a re-categorisation of the prisoner's security classification.

20. In the PSI 22/2015 on "*Transfer of life sentence prisoners to open conditions*" the Secretary of State gives directions that when deciding whether or not to recommend a transfer of an ISP to open conditions, the Parole Board should weigh the risks posed by allowing the prisoner to enter open conditions against the benefits accrued to the prisoner of being able to demonstrate his reduced risk and to access forms of temporary release. The Secretary of State is not bound to accept a recommendation by the Parole Board.

Rule 7(1A)

21. Until August 2014, the Secretary of State had the power to transfer IFNPs to open conditions, although the ARE status of an IFNP remained a relevant consideration. On 15th August 2014, the then Secretary of State, the Rt Hon. Chris Grayling MP, brought into force the Prison and Young Offender Institution (Amendment) Rules 2014 (SI 2014 No 2169), paragraph 2 of which made the general classification rule in Rule 7(1) of the Prison Rules subject to further rules:

> "(1A)…. [A] prisoner who has the relevant deportation status must not be classified as suitable for open conditions. …
>
> (1E) For the purposes of this rule, a prisoner has the relevant deportation status if-
>
> (a) there is a deportation order against the prisoner under section 5(1) of the Immigration Act 1971; and
> (b) no appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 … that may be brought or continued from within the United Kingdom in relation to the decision to make the deportation order
>
> (i) could be brought (ignoring any possibility of an appeal out of time with permission), or
> (ii) is pending …"

22. Rule 7(1A) effectively bars prisoners such as the Appellant who are ARE IFNPs from eligibility for consideration for transfer to open conditions.

23. The rationale for Rule 7(1A) was stated in paragraph 2.6 of PSI 37/2014 "*Eligibility for Open Conditions and for ROTL of Prisoners Subject to Deportation Proceedings*" as follows:

> "[ARE] prisoners are expected to be removed from the UK at the appropriate point in their sentence and therefore do not require the resettlement opportunities in the UK which are an integral part of the open estate. In addition, the allocation of any prisoner to the open estate carries with it some degree of risk of abscond, and it would be inappropriate and unnecessary to introduce such a risk for prisoners who have no need for the particular regime opportunities associated with open conditions."

ECHR Provisions

24. Article 5 provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> (a) the lawful detention of a person after conviction by a competent court; …
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

25. Article 8, the Right to Respect for Private and Family Life, provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

26. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

Divisional Court Judgment

27. The Appellant raised two grounds of challenge before the Divisional Court:

    (i) *Ground 1:* Rule 7(1A) was in breach of Article 14 as falling within Articles 5 and/or 8 and being discriminatory as between ARE prisoners and all other prisoners.

    (ii) *Ground 2:* The Respondent's decision through Rule 7(1A) to deprive himself of the power to transfer ARE prisoners to open conditions was irrational.

28. It is necessary to set out the Divisional Court's reasoning in some detail.

Ground 1

29. The Divisional Court noted that a complaint of discrimination under Article 14 requires four elements to be established, namely:

    (1) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?
    (2) Was the difference in treatment on the ground of one of the listed characteristics in Article 14 or "other status"?
    (3) Were the claimant and the person who has been treated differently in analogous situations?
    (4) Was there objective justification for the different treatment? Different treatment will be objectively justified if it pursues a legitimate aim and the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised.

(see *R (DA and DS) v Secretary of State for Work and Pensions* [2019] UKSC 21; at [136] *per* Baroness Hale of Richmond PSC, and *R (Stott) v Secretary of State for Justice* [2018] UKSC 59; at [8] *per* Lady Black JSC)

30. It was common ground that there was a difference of treatment and that Question (3) was not in issue. The Divisional Court therefore only addressed Questions (1), (2) and (4).

Q(1): Ground 1 – Article 14 Ambit

31. The Divisional Court dealt with the first question in paragraphs [57]-[78] of its judgment.

32. The Divisional Court held the test of whether Rule 7(1A) fell within the ambit of Articles 5 and /or 8 for the purposes of Article 14 was "whether the measure in rule 7(1A) has more than a tenuous connection with the core values protected by article 5 and/or article 8". The Divisional Court further held that European and domestic authorities took a wide and generous approach to the "ambit" of Convention rights for the purpose of applying Article 14.

33. As regards Article 5, the Divisional Court concluded that, whilst not capable of forming a claim for a violation of Article 5, access to prison facilities pre-tariff aimed at rehabilitation, did fall within the ambit of Article 5 and triggered the protection of Article 14. This is both pre- and post-tariff. As the Divisional Court explained (at [72(vii)]:

> "…[T]here is a risk that the Claimant (and any other ARE prisoner in his position) may not be accepted and removed under TERS, or may not be removed immediately at the expiry of the tariff period, in which event he will fall back into the section 28 scheme. … In respect of that, the evidence is clear: whilst an ISP may be released without a period in open conditions, his prospects of persuading the Parole Board that his risk is sufficiently reduced to allow his release are likely to be improved if he has first had the opportunity of being tested in open conditions. … The Claimant therefore has an interest in being considered for open conditions in order to increase the prospect that he will gain his liberty at or shortly after the expiry of his tariff."

34. The Divisional Court concluded, however, that the present case did not fall within the ambit of Article 8. The Divisional Court noted that a prisoner who is deprived of his liberty retains his right to a private and family life. Whilst recognising that transfer to open conditions would grant the Appellant greater contact with his family, the Divisional Court stated that denial of opportunities to interact with family members was a necessary consequence of imprisonment and "if his imprisonment is lawful under article 5, then we do not consider that there are values that are capable of falling within the ambit of article 8". The Divisional Court further held that the Appellant had failed to identify "some discrete family life or private life interest that is not necessarily curtailed by his lawful imprisonment, but which is impacted by rule 7(1A)" (see generally [74]-[76]).

Q(2): Ground 1 – Is the difference of treatment on the ground of a "status" covered by Article 14?

35. The Divisional Court considered the second question in paragraphs [79]-[92] of its judgment, namely whether the difference in treatment of which the Appellant complained was on the ground of a "*status*" covered by Article 14.

36. The Divisional Court said that it did not find this a simple issue. It drew attention to a tension in the authorities. On the one hand, authorities such as *Bah v United Kingdom* (2012) 54 EHRR 21 and *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 which proceeded on the basis immigration status was "*status*" for the purposes of Article 14 and, as the Respondent accepted below, made it more difficult to argue that being the subject of a deportation order was not a *"status"* for these purposes. On the other hand, authorities such as *R(Francis) v Secretary of State for Justice* [2012] EWCA Civ 1200 and *R(Mormoroc) v Secretary of State for Justice* [2017] EWCA Civ 989, binding authority on the Divisional Court, which decided that being subject to a deportation order did not confer a *"status"* under Article 14.

37. The Divisional Court highlighted, however, the principle that not every *"status"* is treated the same when it comes to the fourth criterion, *i.e.* objective and reasonable justification ([82]).

38. The Divisional Court declined to determine the second question on *"status"*, stating that whilst it was prepared to assume the point in favour of the Claimant, it did not regard the issue as determinative. The Divisional Court further explained (at [92]):

> "92. Nevertheless, although proceeding on that basis, we consider that that is neither a classification of a sensitive or suspect kind which requires particularly convincing or weighty reasons to justify making it a ground for treating people differently; nor is it a status which can be properly regarded as an essential aspect of an individual's personality in the sense of making someone the person who he or she is. As we have explained (see paragraph 83 above), that is important when it comes to the issue of justification: we do not consider that this status lies towards the centre of Lord Walker's concentric circles. Whilst of course important, it is more peripheral. We return to that as an issue when we deal with justification… ." (emphasis added)

Q(4): Ground 1 – Is there an objective and reasonable justification for the difference in treatment?

39. The Divisional Court dealt with the fourth question in paragraphs [93]-[120] of its judgment.

40. The Divisional Court succinctly summarised the justification as requiring that the measure which causes the difference in treatment (*i.e.* rule 7(1A)) must be in pursuit of a legitimate objective, and the means employed to realise the objective must be proportionate.

41. The Divisional Court set out the well-known four-stage proportionality test of Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 and cited Leggatt LJ's summary of the test in *R (SC) v Secretary of State for Work and Pensions* [2019]

EWCA 615 at [84], namely that the core issue to address in the justification test is whether "the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure…or whether a fair balance has been struck between the rights of the individual and the interests of the community".

42. The Divisional Court also cited extensively from later passages in Leggatt LJ's judgment in *SC* at [87-89] in which Leggatt LJ explained the scope of the state's 'margin of appreciation' or 'margin of judgment', particularly in areas of socio-economic policy, where the court will respect the choice made by the legislature unless the difference in treatment is "manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to a legitimate aim pursued".

43. The Divisional Court observed that the margin of judgment accorded to the state depended upon the nature of the ground on which the difference in treatment is based and that personal characteristics - such as race, nationality and gender - required a higher intensity of review than areas where democratically elected branches of government are better placed to determine whether something is in the public interest (see [98]).

44. The Divisional Court relied on the Home Detention Curfew ("HDC") cases (see further below) which the Divisional Court found to be "*strongly supportive*" of a justification for Rule 7(1A) [114].

Divisional Court's reasons on justification

45. The Divisional Court then set out detailed reasons for concluding that the difference in treatment under Rule 7(1A) was justified ([117] and see further below) and concluded (at [117]xv]):

> "We do not consider that the Secretary of State acted irrationally or otherwise unlawfully by giving non-ARE prisoners preference for open conditions, in circumstances in which they will benefit by being able to evidence risk reduction in circumstances similar to those they will enjoy upon release, over ARE Prisoners who may enjoy other benefits but cannot enjoy benefits in the form particularly provided by open conditions."

46. The Divisional Court rejected a further point by Mr Squires QC, that the Secretary of State was not entitled to deprive himself entirely of the residual power to consider a transfer of an ARE prisoner to open conditions, save exceptionally on a case-by-case basis. The Divisional Court held that ARE prisoners were in a materially different position from national prisoners such that it was justified to treat them differently. The Secretary of State was entitled to exclude them as a class.

47. The Divisional Court summarised its proportionality analysis as follows:

    (i) Rule 7(1A) has a legitimate aim. It is legitimate to treat ARE prisoners differently for the reasons given above.

    (ii) Rule 7(1A) is rationally connected to that aim.

(iii) No less intrusive measure could be used without compromising the aim. If ARE prisoners could be transferred to open conditions, this would require an individual assessment for all ARE prisoners, while the vast majority of ARE prisoners will be removed at tariff expiry. This assessment would be "wasteful and unnecessary, and would result in both the de-prioritisation of domestic prisoners and in an increased risk in ARE prisoners absconding".

(iv) Rule 7(1A) will only have an adverse effect on prisoners convicted of terrorist offences. But the impact on those prisoners is outweighed by the extent to which the measure advances its legitimate aims. Accordingly, Rule 7(1A) is not manifestly disproportionate.

Ground 2 – Rationality

48. The Divisional Court dealt with the Appellant's rationality challenge under Ground 2 in paragraphs [121] to [124] of its judgment. It held that Ground 2 failed for essentially the same reasons as Ground 1, namely that the discriminatory effect was justified.

Grounds for Appeal

49. The Appellant contends:

(i) **Ground 1**: The Divisional Court erred in applying a 'manifestly without reasonable foundation' test when considering whether Rule 7(1A) is objectively justified for the purposes of Article 14.

(ii) **Ground 2**: The Appellant submits that the Divisional Court did not apply the appropriate test to justification where a Defendant gives up a power to act. The Divisional Court should have asked itself whether the Secretary of State had produced evidence which showed that there was some mischief in simply possessing the power.

(iii) **Ground 3**: The Divisional Court erred in its finding that the Secretary of State was justified in giving preference to non-ARE prisoners as they were more likely to benefit from open conditions.

Respondent's Additional Reasons

50. The Secretary of State invites the Court to uphold the Divisional Court's judgment for two additional reasons:

(i) **Additional Reason 1**: The claim is not 'within the ambit' of Article 5 for the purposes of Article 14.

(ii) **Additional Reason 2**: The Appellant does not have "other status" for the purposes of Article 14.

Ground 1 – did the Divisional Court err in applying the 'manifestly without reasonable foundation' test?

Submissions

51. Mr Squires QC submitted that the Divisional Court applied the wrong test when considering whether Rule 7(1A) was objectively justified under Article 14. The Divisional Court had incorrectly approached the question on the basis that the justification had to be shown to be "*manifestly without reasonable foundation*" ("MWRF"). He pointed *e.g.* to [120] of the Divisional Court's judgment where it stated its conclusion that Rule 7(1A) was not a "manifestly disproportionate means of pursuing the legitimate aims of prioritising non-ARE prisoners who are likely to resettle in the UK" [120]. He submitted that close scrutiny was required in cases involving a prison policy affecting liberty; and since the challenge concerned decisions affecting the prospect of the Applicant's release "weighty reasons" were necessary for justification.

52. Mr Watson QC accepted that the MWRF test was not one which either party had urged upon the Divisional Court and the Divisional Court's use of the phrase *"manifestly disproportionate"* in [120] was puzzling. He submitted, however, that in the current context a substantial margin of judgment was available to the Secretary of State; and even if the Divisional Court had enunciated the test incorrectly, it would make no difference because the result should be the same. The Divisional Court's conclusion provided ample justification that the policy was nevertheless correct.

Analysis

53. A considerable amount of the argument and citation before us was devoted to the precise nature of the test to be applied by a court when carrying out an Article 14 justification exercise. It is only necessary to refer to two of the authorities cited at this stage.

54. First, *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 which concerned a local council's decision to amend a Special Educational Needs policy. A challenge was brought under Article 14 on a similar basis to the present case, namely that the court below had wrongly applied the MWRF test. In an illuminating judgment, Singh LJ highlighted three basic principles:

    (1) First, the principle of "margin of appreciation". Singh LJ explained (at [54]) that it was recognised in both European and domestic jurisprudence that national institutions will often be better placed to assess whether "a fair balance" has been struck between the rights of the individual and the general interests of the community and that the scope of the margin of appreciation "will vary" according to the circumstances, the subject-matter and its background (see Lord Bingham in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at [39]; and Lord Hope in *R v Director of Public Prosecutions, ex p. Kebilene* [2000] 2 AC 326, at 381).

    (2) Second, the principle that not all grounds of discrimination are treated in the same way under Article 14 . Singh LJ explained (at [55]) that it was recognised in both European and domestic jurisprudence that under the

Human Rights Act certain grounds of discrimination are "suspect", in particular, race, sex, nationality and sexual orientation, and will therefore call for more stringent scrutiny other than grounds of discrimination and "very weighty reasons" will usually be required to justify what would otherwise be discrimination on such grounds (see Lord Hoffmann in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 at [15]-[17] and Lord Walker at [55]-[60]).

(3) Third, the principle that the courts recognise that they are not well placed to question the judgement made by either the executive or the legislature in relation to matters of public expenditure. Singh LJ explained (at [56]) that this was both on the ground of relative institutional competence and on the ground of democratic legitimacy. The allocation of scarce or finite public resources calls for political judgement and courts "must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature." ([56])

55. After analysing the authorities (including several of those cited before us, in particular, *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820 and *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1*),* Singh LJ explained that there was no binding decision which confined the MWRF test to the context of welfare benefits as had been suggested and several decisions which suggested that it was not so confined (see [70]-[75]). Singh LJ continued:

> "76. Furthermore, and in any event, in my view, the crucial point is not so much whether the "manifestly without reasonable foundation" test is the applicable test; it is rather how the conventional proportionality test, even if that is the applicable test, should be applied given that the context is one in which a public authority is required to allocate finite resources and to choose priorities when it comes to setting its budget; and is also a context in which the ground of discrimination is not one of the "suspect" grounds. In this context, it seems to me that there is no material difference between application of the conventional proportionality test, giving appropriate weight and respect to the judgement of the executive or legislature, and the "manifestly without reasonable foundation" test."

56. Singh LJ (with whom Bean LJ and Newey LJ agreed) concluded that even if the correct test to be applied was not the MWRF test, nevertheless the policy in question adopted was within the relevant margin of judgment afforded to the local council even when applying the conventional proportionality test.

57. Second, *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department v National Residential Landlords Association and others* [2021] EWCA Civ 542 concerned a scheme under the Immigration Act 2014 which prohibited the renting of accommodation to non-British or EEA citizens who were irregular immigrants. A challenge was brought under Article 14 which raised questions as to the MWRF test. After reviewing the authorities, Hickinbottom LJ explained that there were no bright lines and *e.g.* the degree of social and economic policy involved in any measure would be "infinitely variable" and arrived at a conclusion similar to that articulated by Singh LJ, namely:

> "141. … [W]hether seen in terms of the application of the manifestly without reasonable foundation criterion or simply in terms of the usual balancing exercise inherent in the assessment of proportionality, the result should be the same…"

58. Hickinbottom LJ (with whom Davis LJ and Henderson LJ agreed) found that there was justification for any discrimination in that case on the basis of the usual balancing exercise ([142]).

59. In my view, whether the Divisional Court approached the question of the margin of judgment to be accorded the decision-maker in this case on the basis of a conventional proportionality test or on the basis of a MWRF test does not make any material difference. A MWRF test is simply shorthand for the widest margin accorded to decision makers (or a "full area of judgment" as described by Leggatt LJ in *R (SC) v SSWP* [2019] 1 WLR 5687 at [87] cited by the Divisional Court at [96]). Further, the terms "margin of discretion" and "intensity of security" are two ways of describing essentially the same thing: a wide margin of discretion means less scrutiny and close or anxious scrutiny connotes a narrow margin of discretion. As Lady Hale observed in *R(DA and others) v. Secretary of State for Work and Pensions* [2019] UKSC 21 at [152], the court may well have to return to this "difficult question" as to the precise nature of the MWRF test at some point in the future, but this is neither the case nor the context to do so.

60. The real issues in the present appeal are two-fold: (a) whether a wide area of judgment was appropriate in the present case and (b) whether Rule 7(1A) was objectively justified for the purposes of Article 14. I deal with these issues under Ground 3 below.

Ground 2 – did the Divisional Court apply the appropriate test to justification where a defendant gives up a power to act?

Submissions

61. Mr Squires contended on behalf of the Appellant that only in striking circumstances would it be appropriate for the decision-maker to divest themselves and their successors of a discretion to act, such that even in exceptional circumstances where the exercise of the power would be in the public interest, its exercise is barred.

62. He submitted that the proper test to justify the change of policy required the Secretary of State to show that there was 'some mischief' in simply possessing a power to transfer ARE prisoners to open conditions which justified its complete removal. The Secretary of State has not established on the evidence that there was any harm in having the power to transfer ARE prisoners to open conditions.

63. Although the Divisional Court identified (a) scarce resources and (b) raising the unrealistic expectation of transfer to open condition, there was no evidence to support these considerations.

64. Mr Watson submitted that the test which the Appellant posited had no basis in law. There was no authority which suggested a distinction between cases where a power is removed and cases where a power never existed in the first place. It was legally

irrelevant to the analysis under Article 14 whether or not Rule 7(1A) modified a previously existing power.

Analysis

65. I reject this ground of appeal. There is no authority for Mr Squires' novel contention that the court must apply a different test when considering the removal of a power as opposed to the modification of an existing power. The distinction is artificial and contains little rationale.

66. The Divisional Court correctly rejected the argument. It identified the negative consequences of the power in relation to (a) scarce resources and (b) raising the unrealistic expectation of transfer to open conditions and noted that (at [118]) "there are unlikely to be highly fact-sensitive differences between many individual ARE prisoners which impact on this material difference". The material difference being that the primary aim of open conditions is for resettlement and IFNP ARE prisoners are unlikely to be resettled in the UK.

Ground 3 – did the Divisional Court err in finding that the preference to non-ARE prisoners was justified?

Submissions

67. Mr Squires made three main submissions on behalf of the Appellant. First, the Divisional Court's finding (at [117(xv)]) that non-ARE prisoners would benefit from open conditions to a greater extent than ARE prisoners because of the ability for non-ARE prisoners to demonstrate risk reduction in circumstances similar to their resettlement could not justify Rule 7(1A).

68. Second, giving preference to non-ARE prisoners does not justify the complete removal of the power to transfer ARE prisoners. Preference can be achieved through criteria for the exercise of the discretion which favoured non-ARE prisoners.

69. Third, the evidence before the Divisional Court did not suggest that the desire to give preference to non-ARE prisoners justifies barring all ARE prisoners from open prison. The Divisional Court wrongly concluded that "were it not for Rule 7(1A) it seems to us on the evidence that it is likely that there would be over-capacity and/or waiting times for transfer to open conditions would increase". He submitted that conclusion was flawed because (a) the evidence did not show any delays in transferring prisoners caused by a lack of capacity in the open estate; (b) there is no suggestion that Rule 7(1A) assisted non-ARE prisoners in accessing open conditions. The numbers of ARE prisoners who might be transferred to open conditions were very small. And (c) there are more over-capacity closed prisons than open prisoners, so there was no evidence that there would be any difficulty in transferring prisoners from closed to open conditions.

70. Mr Watson also made three main points on behalf of the Respondent. First, the Appellant in focusing on paragraph [117(xv)] of the Judgment failed to recognise that the Divisional Court's conclusion in that paragraph was dependent on its reasoning in the preceding paragraphs [117(i)-(xv)].

71. Second, Rule 7(1A) passed the 'less intrusive measure' element of the proportionality test and, accordingly, the Divisional Court was not required to consider alternative ways to prefer non-ARE prisoners.

72. Third, the Appellant was in effect seeking to re-argue or challenge the weight to be given to the Divisional Court's findings and failed to grapple with the Divisional Court's essential conclusion at [117(xiii)] that the Secretary of State was entitled to reach the *policy* conclusion that open conditions should be prioritised for non-ARE prisoners who will be resettled in the UK. In any event, that the Divisional Court was entitled to find on the evidence that the open estate was operationally full [117(xi)].

Analysis

Introduction

73. At the heart of this case is prisoner management and the balancing of scarce resources. The management of prisons and offender classification is by operation of statute a matter for the Secretary of State (see s.47(1) of the Prison Act 1952). Further, as Singh LJ reminded us in *Drexler,* the allocation of scarce or finite public resources calls for political judgement and courts "must tread with caution, affording appropriate weight and respect to the judgement formed by the executive or the legislature" ([56]). The measure under challenge, Rule 7(1A), involves (a) prisoner allocation and (b) the use of the limited but valuable resource of Category D open prison places. The measure is not one which impinges directly on the right to liberty. In policy terms, liberty for IFNP ARE prisoners is not achieved through open conditions but primarily through deportation under the TERS regime. The essential issue is whether the Secretary of State acted lawfully in allocating these places to the class of prisoners likely to be released back into the community as opposed to the class likely to be deported. A substantial margin of judgment is afforded to decision-makers charged with these responsibilities.

Margin of judgment

74. In my view, the Divisional Court's approach to the issue before them was correct and orthodox: this was essentially a fact-sensitive review as to the margin of judgment to be afforded to the decision-maker and the starting point was to consider the nature of the "status" in question.

75. The Divisional Court was also right to emphasise that not every "status" is treated the same when it comes to objective and reasonable justification, *i.e.* the fourth criterion ([82]). As the ECtHR in *Bah* made clear (at [47]):

> "47. … [T]he nature of the status upon which the differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States. …[I]mmigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. … Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality". (emphasis added)

76. As the Divisional Court noted, the same theme was also picked up by Leggatt LJ in *SC* (at [66]) where he cited the following well-known statement by Lord Walker in *R(RJM) v. Secretary of State for Work and Pensions* [2008] UKHL 63 at [5]:

> "In [*R. (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 A.C. 311], at [5], Lord Walker depicted the grounds covered by art.14 as falling within a series of concentric circles, with those characteristics which are innate or most closely connected with an individual's personality at the core. (He gave the examples of gender, sexual orientation, pigmentation of the skin and congenital disability.) A wider circle would include characteristics such as nationality, language, religion and politics, which are regarded as important to the development of an individual's personality and reflect important values protected by the Convention. Further out in the concentric circles are characteristics that are 'more concerned with what people do, or with what happens to them, than with who they are' but which may still come within art.14 —homelessness being one of these. The corollary of this scheme is that:
>
> > 'The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify.'
>
> This approach was endorsed by Lord Wilson, giving the lead judgment of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 W.L.R. 3250 at [21]"

77. The Divisional Court rightly observed that the margin of judgment accorded to the state depended upon the nature of the ground on which the difference in treatment is based and that personal characteristics - such as race, nationality and gender - required a higher intensity of review than areas where democratically elected branches of government are better placed to determine whether something is in the public interest (see [98]):

> "98. Before us, there was some debate as to whether r.7(1A) fell within that same category; but, in our view, that is not a binary question. The "area of judgment" referred to by Leggatt LJ depends upon the nature of the ground on which the difference in treatment is significantly based. If it is based on (e.g.) race, nationality, gender, religion or sexual orientation, then a reviewing court will look, with especial intensity, for particularly convincing and weighty reasons to justify that treatment. But the area of judgment is also dependent upon other factors, such as the objective of the measure: in certain areas, as Leggatt LJ indicated, democratically-elected or -accountable branches of government are better placed to determine whether something is in the public interest and, if so, the weight to be accorded to that factor in the public interest. In those areas, the courts will allow the relevant branch of government a greater margin of judgment, dependent upon a whole variety of factors such as the branch of government involved (and, if it is the executive, the extent to which

> Parliament had control over the measure by (e.g.) the positive or negative resolution procedure), the aims of the measure, and the extent to which the branch of government had those aims in mind at the time the measure was introduced. As Leggatt LJ indicated (at [90]-[93]), as well as affecting the area of judgment allowed to the branch of government introducing the measure, for essentially the same reasons, these matters also bear upon the appropriate intensity of review by any reviewing court."

78. In a further passage, the Divisional Court held:

> "110. As indicated in *Bah* (see [82] above), the nature of the status upon which differential treatment is based weighs heavily in determining the scope of margin of appreciation accorded to an individual state. In *Bah*, it was emphasised that "immigration status" is not an inherent or immutable personal characteristic such as gender or race, and it had some element of choice. We accept that that choice is not always completely open – the fact that an ARE prisoner is the subject of a deportation order is not entirely his choice – but nevertheless choice plays some part in the categorisation, e.g. it is the prisoner's choice to commit the crime which formed the basis of the deportation order, and to commit it in the UK. Moreover, in this case, it was the Claimant's choice not to challenge the decision to make a deportation order against him. Furthermore, the subject matter of this case (the provision of open conditions to a prisoner), whilst perhaps not at the core of socio-economic policy (as are welfare benefits), is influenced by strands of such policy, e.g. the balance to be struck between the desirability of resettling prisoners into the community in the UK as against the risk to the public occasioned by allowing such prisoners greater freedom."

79. In summary, the more central the relevant "status" is to the core of the right infringed or to an individual's core make up, the more difficult it will be to justify the discrimination in question and 'weighty reasons' will be required; and the corollary is that the more peripheral the personal characteristic relied upon is, the easier relatively it will be to justify discrimination and less 'weighty reasons' will be required.

HDC cases

80. The Divisional Court relied on the HDC cases, in particular *R (Brooke) v Secretary of State for Justice* [2009] EWHC 1396 (Admin), *R (Francis) v Secretary of State for Justice and Secretary of State for the Home Department* [2012] EWCA Civ 1200, *R (Mormoroc) v Secretary of State for Justice* [2012] EWCA Civ 1200, and *R(Serrano) v. Secretary of State for Justice* [2012] EWHC 3123 (Admin). The stated purpose of the HDC scheme, which allowed some offenders to be released early from prison, was to manage the transition from custody back into the community. The HDC cases addressed the different treatment of FNPs for the purpose of the HDC scheme. The HDC cases held that there was a clear justification for a distinction between foreign and national prisoners, as "the scheme designed to promote resettlement into the UK community cannot be expected to apply on the same terms to those subject to notice of intention to make a deportation order" [112].

81. In *Brooke,* Blake J held that difference in treatment of IFNPs under the HDC scheme had "abundant justification" because the Secretary of State was entitled to conclude

that "it is in the public interest that serious offenders sentenced to determinate terms are not at liberty until they have served their minimum term" […]. As Blake J further explained (at [20]), "the eligibility for early removal for foreign nationals is their removability, the fact that they can be removed at all", i.e. in contrast to numerous foreign nationals in the UK with rights of abode who could not be removed.

82. In *Francis,* Pill LJ said (at [40]–[41]):

> "40. … [I]n any event, there is clear justification in substance for a distinction between foreign and national prisoners. A scheme designed to promote resettlement into the UK community cannot be expected to apply on the same terms to those subject to notice of intention to make a deportation order…
>
> 41. … A scheme designed for reintegration into the community cannot be expected to operate in the same way for those liable to deportation."

83. As Males J explained in *R(Serrano) v. Secretary of State for Justice* [2012] EWHC 3123 (Admin) at [67], the HDC cases such as *Francis* make clear that the differences in treatment are based on liability to removal from the UK not nationality (let alone *exclusively* on the grounds of nationality):

> "67. In my judgment the reasoning of Pill LJ at [40] to [42] [in Francis]… constitutes a determination both (1) that difference in treatment regarding release on HDC based on liability to removal from the United Kingdom is not discrimination on the ground of nationality (see in particular [41] and the citation from Brooke at [42]) and (2) that in any event such difference in treatment, even if on the ground of nationality, is clearly justified and so is not a breach of Article 14 (see [40])."

84. The Divisional Court accepted Mr Watson's overarching submission that, as the HDC cases indicated, "…there is a fundamental difference between prisoners who are liable to be released into the community in the UK, and prisoners who are not likely to be released as such at all but are liable to be removed from the UK at the end of their minimum custodial term" [111]. The Divisional Court found that the essential purpose of both HDC and open conditions was to manage the resettlement of offenders back into the community [114].

85. On this basis, the Divisional Court concluded that the HDC cases were analogous to the present scheme and "strongly supportive" of the Secretary of State's case that Rule 7(1A) is justified in Article 14 terms [114]. In my view, it was right to do so. The fact that transfer to open conditions has the additional benefit of also enabling prisoners to demonstrate to the Parole Board that they no longer pose a risk and are fit for release does not materially affect the analysis.

86. Mr Squires relied on *Clift v UK* (App 7205/07, 12 July 2010) and *Rangelov v Germany* (App 5123/07, 22 June 2012) in which the ECtHR stated in identical terms at [73] and [87] respectively:

> "While in principle a wide margin of appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary and unlawful… Very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention…"

87. It is sufficient to consider the latter case, *Rangelov,* in detail. The applicant, a Bulgarian national, was convicted of burglary and attempted burglary in a German court and sentenced to imprisonment in Germany. During his imprisonment, an expulsion order was issued against him which was to take effect on the completion of his sentence. The applicant was unable to access a therapy programme whilst in detention or be eligible for day release because of the expulsion order against him. He contended that those exclusions affected his prospect of suspending the preventive detention order against him and being released on probation as he had been refused important measures which could enable him to prove that he was no longer dangerous. He brought a challenge for beach of Article 14 in conjunction with Article 5.

88. The Court found that since only foreign nationals could be subject to expulsion orders, therefore the difference in treatment was based on the ground of nationality and "very weighty reasons" would have to be put forward to justify a difference in treatment on this basis. The Court also recognised that the applicant was denied the chance to complete a therapy programme which was necessary to fulfil important preconditions for the suspension of the preventive detention order and release on probation. The Court stated that "while in principle a similar wide margin of appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful" [87].

89. The Court also found that the refusal to grant the applicant measures normally considered important in obtaining a suspension of the preventive detention order and the lack of alternative measures, such as different forms of therapy, created a disproportionate difference in treatment in breach of Article 14.

90. In my view, neither *Rangelov* (nor *Clift*) materially advances the Appellant's case. The following points are pertinent.

91. First, the difference in treatment arising from Rule 7(1A) is not based on nationality, let alone 'exclusively' on the grounds of nationality. It is based on the fact that here, as in the HDC cases, the prisoner is liable to deportation (see above and Males J in *R(Serrano)*). As I have already emphasised and Blake J explained in *Brooke* at [20], "the eligibility for early removal for foreign nationals is their removability, the fact that they can be removed at all", i.e. in contrast to numerous foreign nationals in the UK with rights of abode who could not be removed.

92. Second, it would be a mischaracterisation to say that Rule 7(1A) is a domestic measure which "resulted in detention which was arbitrary and unlawful". It is axiomatic that a pre-tariff prisoner has no right to liberty. As Davis explained in *R. (Ryder) v The Lord Chancellor [2015] EWHC 1857* at [71]:

> "71. … The claimant has no right to liberty at this stage. He is lawfully

> detained in circumstances where his minimum term has not yet expired. It is true that a transfer to open conditions may well greatly facilitate—perhaps enable—his release in due course on expiry of the minimum term. But he nevertheless has no legal right to such a transfer, let alone such a release. Further, while it can fairly be said that for many life prisoners a transfer to open conditions will be a necessary pre-condition for release … that is neither a legal pre-condition nor an invariable de facto pre-condition."

93. Third, the TERS regime represents a carefully worked out bespoke alternative regime designed to govern IFNPs who are ARE and is quite separate from the s.28 Parole Board regime (as the Divisional Court found at [117]).

Dr Bennett's evidence

94. Mr Squires sought to challenge many of the Divisional Court's key findings, in particular as to the essential purpose of open conditions being reintegration, the separate nature of the TERS regime (see above and [111] and [117]) and the fact that open prison places are a scarce resource. However, these findings were firmly based on the detailed evidence of the Deputy Director for the Operational Security Group in the Security, Order and Counter Terrorism Directorate of HMPPS, Dr Bennett, who explained the history and rationale for the introduction of Rule 7(1A). In view of Mr Squires' submissions, it is necessary to rehearse Dr Bennett's evidence in some detail.

95. Dr Bennett explained that the original impetus for the changes brought about by Rule 7(1A) was a case in late 2013 of a Barbadian national serving life for murder whose prospective transfer to open conditions was opposed by his victim's family. The original submission to the Secretary of State dated 6th August 2014 set out the following rationale for the proposed new policy under Rule 7(1A) entitled "Barring those subject to deportation proceedings from open conditions/ROTL [Release on Temporary Licence]":

> "<u>Key issues</u>
>
> 8. Open prisons and ROTL are an important resource for resettlement which should be targeted on those who will resettle in this country. Prisoners who are expected to be deported do not need these resettlement facilities. In addition, allocation to open prison or ROTL will always carry a degree of risk that the prisoner will abscond or fail to return to prison. It would be inappropriate and unnecessary to introduce such a risk for prisoners who have no need of the resettlement opportunities that open prison or ROTL offers. Consistent with this rationale… the amendments to Prison Rules apply to those prisoners we can be confident will be deported. We have worked with the Home Office to identify how to define this group.
>
> 9. The Rules as drafted will apply where a prisoner has a deportation order and standard appeal rights in the UK have been exhausted. …
>
> 10. The Rules will operate alongside the new policy described above which significantly tightens the criteria for moves to open or ROTL for any prisoner who is liable to deportation. In addition, the restrictions in this legislation will work in tandem with the new Home Office Immigration Act 2014. From

October 2014, this will result in more prisoners receiving a deportation order earlier in the process and many will have exhausted appeal rights in this country at an earlier stage in sentence. More appeals will only be possible from outside the UK. This means that more prisoners will be subject to the prohibition in the Rules at an earlier stage. In due course we expect many more prisoners eligible for deportation to have exhausted appeal rights in the UK before they reach the point where they might otherwise have been considered for ROTL or for open conditions."

96. The policy background was set out in an Explanatory Memorandum to the draft statutory instrument which accompanied the 6th August 2014 submission to the Secretary of State, in the following terms:

> "7.1 If a prisoner is classified as suitable for open conditions, he or she is able to be located in the open estate. Open conditions, and temporary release from prison, are designed to contribute to a prisoner's preparation for release and resettlement in the UK. The open estate provides conditions more akin to those that prisoners will face upon release with no significant security barriers and access to unescorted release for resettlement activities such as work. Only prisoners assessed as suitable for open conditions and of low risk to the public are considered for open prisons. Progression to open conditions is not an automatic entitlement, and not all prisoners will spend time in open conditions before release. Prisoners allocated to open conditions will generally be no more than 2 years from release or consideration of release.
>
> 7.2 Prisoners against whom a Deportation Order has been made and who have exhausted any appeal rights within the UK against that order are expected to be removed from the UK at the appropriate point in their sentence. They do not therefore require the resettlement opportunities which are an integral part of the open estate or temporary release. The open estate is a limited resource and is prioritised for prisoners who will gain most benefit in terms of their successful resettlement in the UK. In addition, the allocation of any prisoner to the open estate or temporary release carries with it some degree of risk of abscond, and it is considered inappropriate and unnecessary to take such a risk for prisoners who have no need for resettlement opportunities associated with open conditions and temporary release. Provision for this group of prisoners in terms of rehabilitation and risk reduction will continue to be available in the closed estate...".

97. As the Divisional Court explained, 'resettlement' in this context was "a reference to return to living in the community in the UK without any significant increase in risk from reoffending" ([38]).

98. The rationale for the changes, which were subject to an Equality Impact Assessment (EIA), was elucidated by Dr Bennett as follows:

> "(a) Government policy is to remove prisoners who are 'appeal rights exhausted' from the UK at the earliest opportunity (e.g. pursuant to Prisoner Transfer Agreements (PTAs), and TERS, which I describe below), and it would

be inconsistent with that aim for those prisoners to be prioritised for regime opportunities that support resettlement in the UK.
(b) Open prisons are a valuable but limited resource, providing [then] just over 5% of total prison capacity. The open estate must therefore be properly managed to ensure the most efficient use of space from those who will gain the most benefit from open conditions.
(c) Prisoners who are expected to be deported do not require the opportunities for resettlement in the UK that are an inherent part of open conditions. In addition, allocation to open prison or Release on Temporary Licence (ROTL) will always carry a degree of risk that the prisoner will abscond or fail to return to prison. Foreign nationals may have an additional motivation to abscond due to the prospect of deportation, the consequences of which would be more serious as this would frustrate both the criminal sentence and the deportation process. It would be inappropriate and unnecessary to introduce that risk for prisoners who have no need of the resettlement opportunities that open prison or ROTL offers.
(d) It was also noted that although the open estate traditionally presents an opportunity for ISPs to demonstrate risk reduction to the Parole Board, allocation to open conditions is never automatic and public protection is foremost. In practice, a significant number of ISPs (around 36% as at 2014, although predominantly those serving IPP sentences) are not allocated to open conditions and are released from closed conditions."

99. As to the 'limited resource' available in Category D prisons, Dr Bennett explained that the number of prisoners eligible for transfer to open conditions generally far exceeded the open estate's capacity. Dr Bennett also explained the 'resettlement opportunities' which are an inherent part of open conditions, in the following terms:

> "Once transferred to open conditions, a prisoner will continue his rehabilitation by engaging in work and other purposeful activities. Although there is access to some temporary release from Category C resettlement prisons, it is in open prisons where most prisoners will begin to access [ROTL]. The primary purpose of ROTL is to help offenders prepare for their resettlement in the community in the UK. Most ROTL is work-related and designed to improve employment prospects; in some cases, employers will work with an offender on ROTL, and take them on after release. Another key purpose is to help the offender rebuild links with their families and local communities in the UK, allowing them to visit and stay overnight at the resettlement address. In this way, ROTL allows risk management plans for offenders to be tested in the community where they will be released under strict instructions. Resettlement is permitted only where the activity is linked to the offender's sentence plan, and where they meet the risk assessment requirements".

100. Dr Bennett explained that those offenders, like the Appellant, who are (i) serving an indeterminate sentence, (ii) subject to a Deportation Order, and (iii) ARE, are considered through separate and independent processes such as TERS consistent with the fact that they will not be resettling in the UK at the conclusion of their sentence. As such, while TERS operates in parallel to the Parole Board process, it is independent:

"The Parole Board's assessment is not dependent on any decision made regarding TERS: even if removal under TERS is refused, the Parole Board will still consider release in the normal way and may well direct release. Equally, deportation pursuant to the TERS processes does not require approval by the Parole Board".

101. Dr Bennett also explained that two other regimes were open to IFNPs. The first being Progression Regimes ("PRs"), which were anticipated at the time the amendments to rule 7 were made, and are "designed to support adult male ISPs and extended determinate sentenced (EDS) prisoners who have previously struggled to provide the Parole Board with the evidence of risk reduction needed to progress in their sentence, for example to open conditions (if eligible) or to release". PRs are available to those, such as the Appellant, who are excluded from open conditions, and specifically cater for prisoners who will not be detained in open conditions (for a variety of reasons). The second was EU Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union ("the Council Framework Decision on Prison Transfers"). This Framework Decision, like TERS, operates outside the processes involving risk assessment by the Parole Board. It enables an EU Member State to transfer a prisoner to another Member State of which he is a national.

102. PS1 52/2011 (Immigration, Removal and Repatriation Services) makes it clear that prisoners who are given the relevant classification are placed in open conditions "with the sole focus of improving a prisoner's chance of successful resettlement in the UK".

103. I am satisfied that the findings of the Divisional Court which underpinned its conclusions were well founded on the evidence.

Justification

104. In my view, the Divisional Court were also entitled to hold on the evidence that the difference in treatment given to ARE and non-ARE prisoners in Rule 7(1A) was justified in Article 14 terms. The Divisional Court set out 15 reasons which can be summarised as follows in the order that appears in their judgment ([117(i)-(xv)]):

    (i) For the majority of ARE prisoners, TERS requires mandatory removal from the UK at tariff expiry so many ARE prisoners will terminate their detention without showing that they have reduced their risk to an acceptable level. Therefore, they may be released earlier than if they were a national prisoner.

    (ii) Prisoners subject to TERS have other opportunities to demonstrate their decreased risk, for example, through courses taken in closed conditions and through the Progression Regimes which are specifically designed to evidence risk reduction in closed conditions.

    (iii) The role of open conditions in enabling prisoners to demonstrate risk reduction does not apply to the majority of ARE prisoners who can leave custody without demonstration of any particular level of risk.

    (iv) ARE prisoners who have been convicted of terrorist offences which are "very serious" are the only category of ARE prisoner whose future risk will be

assessed under TERS, and there is a clear preference in favour of their removal if they pose less than a significant risk to the UK.

(v) It is not irrational for the Secretary of State to reserve the assessment of the risk posed by such terrorist prisoners to himself in consultation with the National Offender Management Service ("NOMS") Extremist Unit rather than delegating it to the Parole Board.

(vi) If such prisoners are not removed, such prisoners may be required to show they pose an acceptable risk under section 28 without the benefit of open conditions to demonstrate their risk reduction but the difference in treatment was justified.

(vii) The Prisoner will have access to risk reduction measures available in closed conditions, in particular Progression Regimes.

(viii) The further aim of open conditions is "resettlement" without any significant increase in risk; but risk is not a criterion for removal under TERS.

(ix) The Secretary of State is fully entitled to take a different policy stance towards "resettlement" of IFNPs who are ARE prisoners who will very probably be removed on tariff expiry from national prisoners who will, upon release, almost certainly be required to resettle into a UK community.

(x) The benefits of increasing the ability to enjoy family and private life of a prisoner are at most peripheral to the aims of open conditions.

(xi) The evidence is that open condition prisons are at about 99% capacity, i.e. for operational purposes they are "full". It may be that closed prisons are over-subscribed and more expensive; but the Secretary of State does not act irrationally simply because he places prisoners in a particular category.

(xii) The Secretary of State was entitled to prioritise the finite resource of open prison places for national prisoners who are far more likely to be released into the local community than ARE prisoners who are more likely to be removed from the UK.

(xiii) The evidence shows that open prisons are operationally full. Were it not for Rule 7(1A), it is likely that there would be over-capacity or waiting times for transfer to open conditions would increase.

(xiv) The Secretary of State was entitled to take into account that giving ARE prisoners the opportunity of ROTL increases the risk of absconding.

(xv) Accordingly, the Divisional Court concluded, the Secretary of State did not act irrationally or unlawfully by giving non-ARE prisoners preference for open conditions.

Summary

105. For these reasons, in my view, the Divisional Court was right to find (at [119]) that the four elements of the *Bank Mellat* test were met. In summary:

(i) First, Rule 7(1A) had a legitimate aim: the Secretary of State was entitled legitimately to favour those who are overwhelmingly more likely to resettle in

a UK community after release over IFNP ARE prisoners who were likely to be deported on tariff expiry and who posed a risk of absconding if they are allowed in open conditions.

(ii) Second, Rule 7(1A) was rationally connected to that aim.

(iii) Third, a less intrusive measure could not be used without unacceptably compromising that aim: if ARE prisoners were entitled to be considered to be transferred to open conditions, that would require the assessment of all ARE prisoners, including the vast majority who will in any event be removed at tariff expiry without any consideration of risk posed. Such an exercise would be wasteful and unnecessary, and would result in both the de-prioritisation of domestic prisoners and in an increased risk in ARE prisoners absconding.

(iv) Fourth, Rule 7(1A) will have no effect on most ARE prisoners. In respect of those convicted of terrorist offences, it may have some adverse effect; but its effects on individual prisoners are outweighed by the extent to which the measure will advance the legitimate aims of the policy.

106. The Divisional Court expressed its final conclusion as follows (at [120]):

> "We thus do not consider that treating ARE prisoners (who, at the end of their period of detention, are inherently unlikely to resettle in UK communities) differently from other prisoners, by not affording them an opportunity to be transferred to open conditions or enjoy ROTL, is a manifestly disproportionate means of pursuing the legitimate aims of prioritising non-ARE prisoners who are likely to resettle in UK communities."

107. I agree with the Divisional Court's analysis and conclusion and for the reasons they gave would dismiss the appeal.

108. In the light of my conclusion on the Appellant's appeal, it is not necessary to deal with the Secretary of State's additional reasons for upholding the Divisional Court's judgment.

Postscript - Operation of Rule 7(1A)

109. The Appellant's essential argument is that Rule 7(1A) is discriminatory because it deprives him of the opportunity of applying for transfer to open conditions in order to demonstrate his 'reduced' risk of further offending and, therefore, Rule 7(1A) materially affects his pathway to release from detention. In my view, the Appellant's argument is flawed for the following further reasons in addition to those set out above.

110. The Appellant's ability to demonstrate his risk at the first stage under the TERS regime cannot be said to be materially affected by his inability to apply for open conditions. The TERS risk regime is quite separate from the Parole Board's risk regime. Under the TERS scheme, there is a distinct procedure for analysing eligibility for deportation or risk for offenders who have been convicted of terrorist-related offences. The risk analysis is conducted by the Ministry of Justice PPCS in consultation with the NOMS Extremism Unit. It does not involve, or require, any consideration of time spent in open conditions and does not involve the Parole Board in any way.

111. Further, the chances of the Appellant being deemed unsuitable for deportation under TERS and being held eligible for open conditions by the Parole Board are vanishingly small. In order for the Appellant to be deemed unsuitable for deportation, the PPCS and NOMS Extremism Unit will have had to have decided that he has been sentenced for a terrorist offence of a "very serious nature" and that he continues to pose a "significant risk" in both the UK and abroad. In such circumstances, it is highly unlikely that he would subsequently be recommended for open conditions by the Parole Board.

112. Thus, the only two realistic alternative possibilities for a terrorist ARE IFNP like the Appellant are either (a) removal under TERS or (b) detention in secure accommodation. A third scenario necessarily posited by the Appellant's case (*i.e*. a refusal of TERS because of a terrorist's continuing threat level but then transfer into open conditions by the Parole Board) is highly unlikely to occur in practice for the reasons explained above.

113. Moreover, on the Appellant's own case, he poses a low risk and is likely to achieve release from detention by deportation under the TERS regime in the normal way and his case will never come before the Parole Board for consideration for open conditions in any event.

114. In my view, the Appellant's argument based on the discriminatory nature of Rule 7(1A) is essentially a chimera.

Lord Justice Nugee

115. I agree.

Lady Justice Nicola Davies

116. I also agree.