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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PAUL CAMPBELL FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND PRISON SERVICE

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Malachy McGowan (instructed by Phoenix Law, solicitors) for the applicant
Ashleigh Jones (instructed by the Departmental Solicitor's office) for the respondent

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SCOFFIELD J

Introduction

[1] By this application, the applicant, a sentenced prisoner currently detained in Her Majesty's Prison Maghaberry, seeks to challenge a number of decisions on the part of the Northern Ireland Prison Service (NIPS) refusing to temporarily release him on home leave, for the last stages of his period of imprisonment, on 23 December 2021. The application was lodged on 19 December; was heard yesterday as a rolled-up hearing; and judgment has been provided today, 22 December, in recognition of the acknowledged urgency of the proceedings (in the event that the applicant was to succeed and be entitled to release tomorrow).

[2] The applicant has challenged a number of decisions because he seeks two separate types of temporary release which, together, would mean that he would be released on 23 December and (provided he did not breach his licence conditions) would then remain at liberty for the remainder of his sentence. In particular, he challenges a refusal to grant him "interim home leave" (also known as resettlement leave) prior to his release date of 6 January 2022, to begin from 28 December 2021; and a refusal to permit him an additional period of Christmas home leave to begin on 23 December and last either until 3 January 2022 (the maximum extent of

Christmas home leave available) or any sooner date on which he benefits from home and resettlement leave (e.g. until 28 December when he contends that he should be released for resettlement leave).

[3] As appears from the above, the application was brought on for hearing at some speed. Mr McGowan appeared for the applicant and Ms Jones appeared for the proposed respondent. I am grateful to both counsel for their focused and economical oral submissions; and also to the proposed respondent for its pragmatic consent to the matter being dealt with in a rolled-up hearing as a matter of urgency. This judgment is more pithily expressed than might otherwise have been the case had more time been available for its preparation.

The basis for temporary release

[4] Although there are a number of temporary release schemes in operation for sentenced prisoners in NIPS establishments, the statutory basis for each of them is section 13(1)(c) of the Prison Act (Northern Ireland) 1953 and, more particularly, Rule 27 of the Prison and Young Offenders Centres Rules (Northern Ireland) 1995 ("the 1995 Rules"). Rule 27 is in the following terms:

> "(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 health care, 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."

[5] The hallmarks of release under this rule are:

(a) that it is temporary in nature;

(b) that it may be for any period or periods (provided that the release is not inconsistent with the purpose of the rule);
(c) that it is (usually) conditional;
(d) that it may be for "any special purpose" or any of those specified purposes set out in Rule 27(2); and
(e) crucially, that it is discretionary both as to the grant of such release (see Rule 27(1)) and its continuation (see Rule 27(3)).

[6] This provides an extremely wide margin of discretion to the prison authorities to grant temporary release in a range of circumstances. It is unsurprising that NIPS has, therefore, introduced a number of policies to seek to guide the exercise of its discretion in this field – both to manage the expectation of prisoners and to ensure a measure of consistency in its own decision-making.

The relevant policies

[7] For the purposes of the present application, there are two documents – which may be said to constitute written policies – setting out how the respondent will deal with resettlement leave and Christmas home leave at the moment. Ms Jones emphasised, and I accept, that the usual policies which apply in these areas are suspended. The current arrangements – in respect of both resettlement leave and Christmas home leave – have been amended to reflect the particular requirements of the prison estate in relation to the protection of health during the Covid-19 pandemic.

[8] The first key document for the purpose of this application is the 'Home and Resettlement Leave Interim Scheme Covid-19: August 2020" ("the interim resettlement scheme"). This document emphasises that it sets out the arrangements in place to facilitate and manage home and resettlement leave during the pandemic. The purpose of such leave is essentially to support the successful reintegration of sentenced prisoners back into the community. The standard home leave scheme, along with a range of other temporary release facilities, have been suspended or altered during the course of the pandemic. Mr McGowan placed significant reliance on the opening portion of the interim resettlement scheme, which is in the following terms:

> "Northern Ireland Prison Service aims to support individuals coming towards the end of their sentence in their application for periods of home leave to assist with the transition from custody to outside life.
>
> The aim of this interim scheme is to provide guidance to prisoners and staff on the use of home leave by NIPS and to recommence a variation of the Pre Release Home and Resettlement Leave Scheme of 2005 (currently suspended) which is adapted for the Covid-19 pandemic.

> In this interim policy, if Home Leave is granted, all the days granted will be taken as a block period of leave for the period immediately preceding the prisoner's custody expiry date (CED). This change to the way in which home and resettlement leave will be granted reflects the balance to be struck between assisting individuals with integration back into family and the community against the current risks posed by the Covid-19 virus and the need to protect the health and well-being of prisoners, staff and the general public during the unprecedented global health pandemic."

[9] The key difference between this interim scheme and the standard home and resettlement leave scheme (which is suspended) is set out at the start of the third para cited above, that is to say that home leave is taken all at once immediately before the prisoner is released from their custodial sentence. In this way, the prisoner does not leave and re-enter the prison after each period of temporary release, so reducing the risk of introducing viral transmission back into the prison after a period of release.

[10] A central issue in these proceedings is whether the applicant is within the scope of this interim resettlement scheme. That is addressed in para 2.1 of the scheme, in the following terms:

> "The interim scheme applies to all those prisoners who would be eligible to be considered for Home Leave under the current 2005 Scheme and have a Home Leave Eligibility Date based on a finite date of release (Earliest Date of Release (EDR) or Custody Expiry Date). As with the current 2005 Scheme, it does not automatically follow that eligibility to be considered will result in the grant of any or the maximum quota of Home Leave."

[11] As appears from this, eligibility to benefit under the scheme is the same as that which applies under the usual, albeit currently suspended, resettlement leave scheme. It requires the prisoner to have a "finite date of release", which is a term to which I return below. The interim resettlement scheme goes on, in section 4, to describe again that the quota of days granted to a prisoner "will be taken as one block period just prior to the prisoner's CED/EDR with the last days leave ending on the morning of the prisoner's CED/EDR." That section of the scheme also sets out the maximum home leave quota for which a prisoner may be eligible based upon the period of continuous custody which they have to serve. It appears to be common case that, in the applicant's case, because his period of continuous custody is 12 months or more but less than 24 months, the maximum number of home leave days to which he would be entitled under the scheme is nine.

[12] As noted above, release under the scheme is discretionary and all prisoners who wish to avail of it must have undergone a formal risk assessment prior to being granted a period of temporary release under the scheme. The risk assessment process as outlined in section 4.3 of the interim resettlement scheme and need not be outlined in great detail for present purposes. However, the risk assessment will look at matters such as where the prisoner would reside during the period of release, what supports would be available to them, what risk there may be of drug or alcohol abuse, the prisoner's previous record of compliance with conditions, etc.

[13] The second important document is a NIPS publication entitled, 'Arrangements at Christmas 2021'. This document is designed to inform prisoners of this year's temporary release arrangements over the Christmas period taking into account the circumstances of the Covid-19 pandemic. It notes that what is called the "Interim Home Leave Scheme" (discussed above) continues to be available for those who qualify. It then provides the following guidance in relation to additional home leave over the Christmas period:

> "In addition, those individuals serving Determinate Custodial Sentences (DCS) or adult sentenced prisoners who are eligible under the Interim Home Leave Scheme and whose release date falls on or before 3rd January 2022 will be assessed against the terms of that scheme (without the need to make an application). If successful they will be released under Rule 27 subject to relevant appropriate conditions from 23 December 2021 until their Custody Expiry Date/Earliest Date of Release. DCS prisoners released under this provision will be provided with a post-dated licence."

[14] It can be seen therefore that Christmas home leave this year for DCS prisoners operates as an 'add-on' in cases where a prisoner is already eligible for temporary release under the interim resettlement scheme. Provided their release date falls on or before 3 January 2022, as well as the resettlement leave to which they may be entitled they may be granted additional Christmas leave to extend further the period of temporary release before their sentence (or their custodial period of their sentence) expires. In the way in which the Christmas arrangements operate for DCS prisoners – subject to one exceptional addressed in the next paragraph – eligibility for the interim resettlement scheme is a precondition to also securing additional Christmas leave. Again, the purpose for this approach is clear. Albeit it may be of less assistance in terms of preparing a prisoner for reintegration into the community than more sporadic and shorter periods of temporary release followed by returning to prison, the aim is to ensure that a prisoner benefits from temporary release to which they would otherwise be entitled but without returning to the prison in order to reflect infection-control measures.

[15] The exception mentioned above is that the Christmas arrangements document expressly recognises that, even when a prisoner does not fall within the cohort described above, the prison authorities always retain a discretion to grant temporary release for special reason under Rule 27 of the 1995 Rules. That is described as follows:

> "Applications for temporary release – either under the Compassionate Temporary Release Scheme / residual Rule 27 – will still be considered. In addition there is provision for Temporary Release in exceptional circumstances under Prison Rule 27(1)."

[16] Prisoners are also warned that any application for temporary release will have to take into consideration any relevant government and Public Health Agency guidance in force at the time of the application. Those who leave custody temporarily over the Christmas period but are due to return to the prison (most likely to be individual serving life, indeterminate or extended custodial sentences) are required to agree, as a condition of their release, that they will be isolated for a period of 10 days upon their return to the prison.

The applicant's circumstances

[17] The applicant in this case this was arrested and charged in October 2015 with causing an explosion with intent to endanger life in respect of an incident in Coalisland in 1997. Having spent around five years on bail, he was tried at Belfast Crown Court and was found guilty. On 26 February 2020 he was sentenced to 7½ years' custody. However, as the offence was committed before the Belfast Agreement and related to the Troubles, he was entitled to apply for early release under the scheme established pursuant to the Agreement and legislated for in the Northern Ireland (Sentences) Act 1998 ("the 1998 Act").

[18] The applicant duly applied to the Sentence Review Commissioners (SRC) who granted him a declaration under section 3 of the 1998 Act. I have been provided with a copy of the SRC determination. It notes that the applicant is "accordingly eligible to be released on licence in respect of this sentence in accordance with the provisions of the Act on a date which will now be calculated by the Northern Ireland Prison Service."

The respondent's decision

[19] In light of the fact that the applicant is due to be released on 6 January 2022, his solicitors wrote to the respondent asking that he be granted his nine days resettlement leave pursuant to the interim resettlement scheme (meaning that he would then be released on 28 December 2021) and, additionally, that he also be granted a further period of Christmas home leave (allowing him to be released on 23 December 2021). This request has been denied by the respondent and the reason

for that approach has been set out in a relatively detailed response to pre-action correspondence of 17 December 2021, the key portions of which I set out below.

[20] The respondent has indicated that as a result of the sentence imposed on the applicant, and on receipt of the committal warrant, NIPS calculated his Earliest Date of Release (EDR) as 5 October 2023. The respondent accepts of course that, pursuant to the declaration of the Sentence Review Commissioners, the applicant is now entitled to be released on licence on 6 January 2022. NIPS placed some reliance in their correspondence on the terms of section 10(7) of the 1998 Act, which is in the following terms:

> "Nothing in this section shall permit the release of a prisoner following a declaration under section 3(1) –
>
> (a) before he has served two years of the sentence to which the declaration relates; ..."

[21] The correspondence on behalf of the respondent pointed out that:

> "Therefore the effect of accelerated release, and releasing serving prisoners on licence, can only take effect from the point which the prisoner has served a custodial term of 2 years.
>
> The Applicant therefore is actually being released 22 months early on 6 January 2022 as opposed to what his Earliest Date of Release (EDR) would have been, but for the accelerated release under the Northern Ireland (Sentences) Act, 5/10/2023."

[22] The correspondence pointed out that the usual Christmas home leave arrangements were suspended. As to the interim resettlement scheme, the core reasoning is contained in the following paragraph:

> "In terms of the Interim Home Leave Scheme which continues to run over the Christmas period, eligibility to be considered for release is triggered at a certain point in a prisoner's sentence prior to his EDR. Given NIPS EDR and the SRC declaration, the temporary release of the Applicant under the Interim Home Leave Scheme (which is discretionary) would not be appropriate at this juncture."

[23] NIPS went on to explain that, in their view, the effect of the applicant's request would not be to grant him Christmas only but "rather it would be to give [him] early release *because* it is Christmas."

The applicant's challenge

[24] The applicant has relied on a range of grounds of judicial review, several of which overlap and which may be summarised as follows:

(1) The respondent misdirected itself in law in relying on section 10(7) of the 1998 Act because that section did not preclude a period of temporary release prior to the applicant's accelerated release date; and, if the applicant was temporarily released before 6 January 2022, he would still be serving his sentence during that period.

(2) The respondent misdirected itself as to the proper meaning and application of the interim resettlement leave scheme for which, when properly construed, he was eligible.

(3) The respondent had acted in breach of the common law principle of equality, which requires that like cases be treated alike, because the applicant was being treated differently, without justification, from:

    (a) a DCS prisoner with an EDR of 6 January 2022 who had not been granted accelerated release under the 1998 Act, who would be considered eligible for home leave under the interim resettlement scheme; and/or

    (b) other prisoners who, like the applicant, had been granted accelerated release under the 1998 Act but who, unlike him, had been considered eligible for pre-release home leave and/or Christmas home leave in advance of their accelerated release date (ARD).

(4) The respondent misdirected itself and/or acted irrationally by considering his date of release to be 5 October 2023 when it is now clear that, as a result of his successful application to the SRC, is release date is actually 6 January 2022.

(5) The respondent's refusal to grant the applicant the leave sought was incompatible with his rights under article 8 ECHR.

Consideration

[25] Logically, the first question for the court is whether the applicant does in fact fall within the eligibility criteria set out in the interim resettlement leave scheme. Throughout most of this document, reference is made to a prisoner's CED. In other parts, reference is made to a prisoner's CED or EDR – and Ms Jones submitted that these terms are essentially used interchangeably in the document, which I accept. However, she also submitted that, in order to avail of the scheme, a prisoner must be approaching either their CED or EDR and that, crucially, this applicant is not. That is

because his EDR (calculated without reference to his accelerated release under the 1998 Act) falls in October 2023. Although this applicant has an imminent release date, the respondent submits that this is not a CED or EDR (as those terms are understood) but, rather, an accelerated release date (ARD) arising as a result of the operation of the 1998 Act, which is a different species of release date.

[26] Mr McGowan was able to point to a reference in para 2.1 of the interim resettlement leave scheme to a more generic term, namely "a finite date of release" (see par [10] above). However, he was also required to accept that this phrase appears to be defined as either an EDR or CED. The ultimate conclusion of his submissions was that there was no proper basis for distinguishing between a release date calculated by reference to an SRC declaration under the 1998 Act on the one hand and a release date (whether a CED or EDR) calculated by reference to the provisions of other criminal law sentencing legislation.

[27] I was initially attracted to the submission that an ARD simply falls within the phrase "finite date of release" in para 2.1 of the relevant policy. In my view, it would make perfect sense for it to do so, since the purpose of the policy is to seek to assist prisoners transitioning from custody to outside life and to aid their reintegration into family life and society just before they are permanently released (whether that release is on licence or not). Nonetheless, even though the meaning in law of the words used in the respondent's policy is a matter for the court, I do not consider that this interpretation can be imposed on the words used without doing some violence to the actual text. That is because the phrase referred to above is obviously intended, given the additional explanation which follows it in parentheses, to refer to an EDR or CED. In truth, it seems to me that the respondent's policy simply does not deal with prisoners whose release date is not calculated in the conventional way but who are entitled to benefit from accelerated release under the scheme of the 1998 Act.

[28] The applicant will therefore only succeed in establishing that he is within the scope of the interim resettlement leave policy, therefore, if the reference to a CED or EDR should in fact be construed to encompass reference to an ARD. In my view, it should. The phrase "custody expiry date" is not a statutorily defined term. It seems to refer most usually to the end of a custodial period in a determinate custodial sentence when the prisoner moves (as a matter of right) to release on licence under Article 8 of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). A CED will generally be an EDR, save that it refers to an entitlement to release as of right, rather than an entitlement to apply for release on licence. Although the applicant is not moving from custody to release on licence on 6 January via the operation of the 2008 Order, in substance the transition is the same. He is now entitled to release by operation of the 1998 Act and to be subject to licence instead. The term EDR describes the earliest date when a prisoner is eligible for release, albeit they may not actually be released at that time and, once released, will be subject to licence and possible recall. Neither the phrase "Custody Expiry Date" nor "Earliest Date of Release" is defined, either in the interim scheme or, as far as I am aware, the 2005 Scheme (which pre-dated the 2008 Order).

[29] I have come to the conclusion that, properly understood and applied, the phrase CED (or indeed the phrase EDR) encompasses an ARD under the 1998 Act. I have reached this conclusion for a number of reasons:

(a) First, it accords with the ordinary and natural meaning of the words in this case. The period of his sentence which the applicant has to serve in custody expires on 6 January 2022. At that point he is now entitled to release. It is the earliest date on which the applicant can be released (indeed, on which it is expected he *will* be released).

(b) Second, and relatedly, to maintain that the applicants CED or EDR, as matters now stand, is still in October 2023 is to ignore the legal and factual reality. That *was* the date of his EDR before he was granted the relevant declaration by the SRC. The SRC's declaration means that, as a matter of law, the applicant is now eligible for release on 6 January 2022 (see section 3(1) and 10(1), (2) and (6) of the 1998 Act). Looking at the matter as one of common sense, that date is now his earliest date of release and the date on which, by operation of law, the period which he must serve in custody comes to an end.

(c) Third, this appears to me to be entirely consistent with the purpose of the interim resettlement leave scheme. A prisoner granted early release under the 1998 Act will still have to transition from prison life to life in the community. It is also in their interests and the interests of the community in general, as with any other prisoner, that that transition is managed in such a way as to successfully reintegrate them and reduce the likelihood of further offending. I see no reason in principle, at least as far as the current interim scheme is drafted, why prisoners benefiting from early release under the 1998 Act should be denied resettlement leave. The amount of such leave to which they are entitled will obviously be reduced to reflect the reduction in their continuous period of custody which results from the SRC declaration in their case; but the purpose behind the grant of such leave applies in each case.

(d) Fourth, the reference to "finite date of release" is really an indication of what both a CED and EDR share: they are each a fixed point in time when the prisoner is able to be released to serve the remainder of their sentence on licence. An ARD, whilst arising through a different statutory scheme, shares that same essential characteristic and can accordingly be taken to be encompassed within one or other of those phrases.

(e) Fifth, and lastly, I also take into account that the respondent, on request, advised the applicant in relation to earlier threatened judicial review proceedings (relating to a request for compassionate temporary release) that he would potentially be eligible to apply for home or resettlement leave under the interim resettlement leave scheme for a block of release just prior to his release date on 6 January 2022. The relevant correspondence stated: "In

> theory you could, if successful in your application, be out on Home/Resettlement leave from 28 December 2021 and you would not return to prison before your official custody expiry date (CED)." This is consistent with an internal document identifying the applicant's EDR as 6 January 2022, with a home leave eligibility date of 6 September 2021 and a quota of nine days. Ms Jones explained that the respondent's position is that these indications were in error; and that this could be supported on affidavit. However, I consider the error to be indicative of the fact that – applying the ordinary and natural meaning of a CED (or EDR) – the applicant's ARD could readily be encompassed within either of those terms. Put shortly, the 'error' seems to me likely to have been made because one can easily see how the applicant's release date should be considered to be his CED or EDR.

[30] As a result of the above, I will quash the prison authorities' decision on the applicant's case and remit the matter to them for further decision-making on the basis that the applicant's anticipated release date of 6 January 2022 is now, and is properly to be considered as, the applicant's CED or EDR within the meaning of that phrase in the interim resettlement leave scheme. The SRC declaration and the operation of the 1998 Act mean that the earlier CED of October 2023 becomes, for practical and legal purposes, irrelevant.

[31] That does not mean, of course, that the applicant is entitled to such resettlement leave as of right, or that he is necessarily entitled to the full quota of such leave. As the interim scheme makes clear, these are matters of judgment and discretion for the relevant authorities in light of their assessment of the risk posed by the prisoner in any particular case. The applicant is entitled to have his eligibility assessed on the same basis as others with an imminent CED: no more and no less. He has referred to his consistent good behaviour during the term of his imprisonment, to the lack of any adjudications against him and to his passing of drugs tests to which he has been subject. However, there is not enough information available to me to determine that the only course lawfully open to the prison authorities would be to grant the applicant resettlement leave. In any event, in the first instance this is plainly a matter for the authorities to consider with the benefit of all of the information they have available to them. They have simply not yet done so against the correct legal context.

[32] Although I do not need to decide this issue in light of my conclusion on the first issue discussed above, I would also been inclined to quash the prison authorities' decision on the basis of a misdirection in law as to the effect of section 10(7) of the 1998 Act. It is not entirely clear precisely how this provision, which was cited in the respondent's pre-action response, was considered to be relevant. The applicant understood the respondent to be suggesting that it precluded the grant of *any* form of temporary release to him during the first two years of his sentence. I can understand how that impression was gleaned. Ms Jones made clear that that was *not* the NIPS position. She accepted, for instance, that the applicant would plainly have

been entitled to release under Rule 27 if an application was made on proper compassionate grounds or if he required release for hospital treatment.

[33] However, it remains unclear to me why section 10(7) was cited in support of the respondent's position. It seems to have been understood as a provision which militated against the grant of temporary release in this case. But that appears to me to misunderstand the purpose and effect of the sub-section. The relevant portion (quoted at para [20] above) is merely saying that nothing in section 10 of the 1998 Act permits the release of a prisoner before he has served two years of the sentence. In other words, accelerated release *under section 10* can only ever occur after two years of have been served. That says nothing about whether release during that period is permitted under any *other* statutory provision (in this case, Rule 27 of the 1995 Rules). The applicant is also correct to assert that temporary release during that two-year period, subject to conditions and subject to recall, still represents a period during which he is serving his custodial sentence: see, on a similar issue, para [26] of the judgment of Morgan LCJ in *Re McGuinness' Application (No 1)* [2020] NICA 54. Insofar as section 10(7) was taken into account as relevant to the Rule 27 determination, I consider that it was wrongly taken into account.

[34] Turning to the question of whether there has been any misdirection in respect of the applicant's request for additional Christmas home leave, it seems to me that the decision in relation to that must also be quashed, as a matter of course, because it is infected by the unlawful decision relating to the resettlement leave. That is because the prison authorities proceeded on the basis that the applicant was not even eligible in principle for the interim resettlement leave scheme and therefore did not get off the starting blocks in his application for additional Christmas home leave. For the reasons I have given above, I consider that to have been an erroneous approach.

[35] Finally, in light of the respondent's position as explained to me candidly in submissions by Ms Jones, I would also have been inclined to quash the respondent's decision-making on the basis that it had failed to consider the exercise of its residual discretion to grant release to the applicant under Rule 27. The relevant submissions supported the impression given in the correspondence on behalf of the respondent that it had concluded that the applicant was not eligible under either the interim resettlement leave scheme or the Christmas temporary arrangements and, therefore, had simply refused his request without considering it as an exceptional request for temporary release under Rule 27 falling outside those schemes. It may well be that such requests are only granted very rarely given the provision which is made in home leave schemes designed to cater for the majority of cases; but they must nonetheless be considered on their merits.

[36] Ms Jones sought to persuade me, in effect, that any such consideration would have been pointless because the applicant's request did not fall within any of the specified reasons for release in Rule 27(2). I cannot accept that submission. First, those reasons are not exhaustively set out in Rule 27(2). Second, the applicant's request was in my view plainly directed towards assisting him in his transition from

prison to outside life, as well as to maintaining or enhancing his family relationships (both of which are unquestionably permissible aims to which temporary release under Rule 27 may be directed).

[37] In light of my conclusions set out above, I do not need to consider the applicant's remaining grounds. In particular, I make no finding in relation to whether other prisoners in a similar position to the applicant have previously been treated differently. Although the applicant was able to muster some evidential support for this assertion, it was limited; and, in the time available, the respondent has not had a fair or proper opportunity to investigate the position, marshal evidence in relation to this, or explain any material differences. I also do not have to consider the applicant's reliance on article 8; although I am bound to say that, in the event the decision was otherwise lawful, any restriction on the applicant's article 8 rights is likely to simply flow as a consequence of the lawfully imposed sentence of imprisonment to which he is subject.

[38] I also wish to make clear that I am making no finding on the question of whether, if a differently formulated scheme was drawn up which made a conscious and reasoned distinction between prisoners who benefit from early release under the 1998 Act and those who do not, treating the former less favourably than the latter in terms of the type or extent of home leave to which they are entitled, that would be lawful or unlawful. No such distinction is drawn in the policy documents which apply at present. Any different approach in future would have to be considered on its merits and on the basis of much fuller argument than was possible in the circumstances of this case.

Conclusion

[39] By reason of the foregoing, I grant the applicant leave to apply for judicial review; I allow the application; and I will quash the decision made in the applicant's case not to grant him any period of temporary release in advance of his anticipated release date of 6 January 2022 and remit the matter to the prison authorities for further consideration of the applicant's request in light of the conclusions set out in this judgment.

[40] To assist with that reconsideration, I make clear that for the purposes of the interim resettlement leave scheme the applicant should be treated as having a CED or EDR falling on 6 January 2022. Whether or not he ought then to be granted resettlement leave, and the extent of such leave, and whether or not he ought additionally to be able to avail of home leave over Christmas as result of the temporary arrangements described above or on some other exceptional basis under Rule 27, are matters which fall to the prison authorities for their determination taking into account their assessment of risk in this case.