

Neutral Citation No: [2023] NIKB 123

Ref: HUM12374

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 21/12/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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

**IN THE MATTER OF AN APPLICATION BY PAULO JORGE SANTOS
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**Ronan Lavery KC & Maria Mullally (instructed by McIvor Farrell) for the Applicant
Philip Henry (instructed by the Departmental Solicitor's Office) for the Proposed
Respondent**

HUMPHREYS J

Introduction

[1] The applicant is a prisoner at HMP Maghaberry, having been sentenced to a determinate custodial sentence of two years and two months, split equally between custody and licence. His custody expiry date (CED) is 28 March 2024 and his sentence licence expiry date (SLED) is 27 April 2025.

[2] By this application for leave to apply for judicial review, he seeks to challenge:

- (i) The refusal of his application for transition leave made on 23 October 2023 under the Temporary Release Transition Leave Scheme of May 2023 ('the 2023 scheme'); and
- (ii) The legality of the scheme itself.

[3] The proposed respondent is the Northern Ireland Prison Service ('NIPS') which introduced and administers the scheme.

The Application

[4] On 12 October 2023 the applicant made his application for two days transition leave for two reasons:

(i) He had an appointment with the Portuguese Embassy on 14 November 2023 to update his identification papers and thereby enable him to apply for settled status in the UK; and

(ii) To spend some time with his mother and children.

[5] By letter dated 2 November 2023 NIPS refused his application on the following basis:

“Your client has applied too early to be considered for Transition Leave...I advised him that his early date of release is not until 28 January 2024, and he will be eligible to re-apply for same 8 weeks prior to his early date of release.”

[6] In the evidence grounding the application, reference is made to the applicant’s heroin addiction and the assertion is made that he wishes to avail of transition leave in order to seek help with his addiction issues. However, it is quite apparent that this played no part in the original application.

[7] On 13 November 2023 it was indicated that NIPS were putting in place arrangements to facilitate the applicant having a virtual appointment with the Portuguese Embassy. This did not take place, but subsequent arrangements were made for this to occur on 23 November.

The Scheme and its Legislative Basis

[8] Rule 27 of the Prison and Young Offenders’ Centre Rules (Northern Ireland) 1995 provides:

“Temporary release

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

(2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have medical treatment, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.

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

- (4) This rule applies to prisoners other than persons-
 - (a) remanded in custody by any court; or
 - (b) committed in custody for trial; or
 - (c) committed to be sentenced or otherwise dealt with before or by the Crown Court.
- (5) In considering any application for temporary release under this rule previous applications, including any fraudulent applications, may be taken into account.”

[9] The 2023 scheme is the latest version of a series of schemes made by NIPS under Rule 27. The Pre-Release and Home Leave Scheme 2005 was suspended in March 2020 at the commencement of the Covid-19 pandemic and an Interim Home and Resettlement Scheme was introduced in August 2020. A new Transition Leave Scheme started as a pilot on 1 November 2022. Both the 2005 arrangements and the pilot scheme came to an end on 1 May 2023 when they were replaced by the 2023 scheme.

[10] Insofar as is material, the 2023 scheme provides as follows:

- (i) Transition leave is not an entitlement, NIPS assesses each application according to the criteria set out at paragraph 4.5 of the scheme (para 1.2);
- (ii) For those prisoners with under one year’s continuous custody, transition leave will be taken as a block period immediately preceding the CED whilst those with continuous custody of over a year may take shorter periods of transition leave in the last few months of their custody (para 1.3);
- (iii) For prisoners with continuous custody of more than 12 but less than 18 months (such as the applicant), transition leave may be granted of up to nine days which may be split with two days taken in the last two months of the custody period and seven days as a block just prior to the CED (para 4.2);
- (iv) The prisoner’s Transition Leave Eligibility Date (‘TLED’) is defined as the earliest day when he could potentially be granted a period of transition leave, and the ‘latest date to apply’ is eight weeks prior to the TLED. It is stressed that it is the responsibility of the prisoner to ensure that the application is submitted eight weeks in advance of the TLED (para 4.4);
- (v) Each application must then be risk assessed in accordance with the scheme criteria (para 4.5).

[11] Applying the scheme to this applicant, the following dates can be identified:

CED	28 March 2024
TLED	28 January 2024
Latest Date to Apply	3 December 2023

The Test for Leave

[12] At this stage, it is incumbent on the applicant to demonstrate an arguable case with a realistic prospect of success.

The Grounds for Judicial Review

[13] The applicant challenges the decision made and the scheme on the following grounds:

- (i) The failure to permit periods of transition leave in the final months of the prisoner's sentence represents a breach of his rights under article 8 ECHR;
- (ii) NIPS has acted irrationally and unlawfully fettered its discretion by limiting the periods of transition leave as set out in the 2023 scheme;
- (iii) NIPS has misapplied and misinterpreted the 2023 scheme.

[14] In *Re McCormick's Application* [2023] NIKB 38, Colton J recently considered a similar challenge to the 2022 scheme. Under that scheme, all transition leave was taken in a single block immediately prior to the CED and it expressly provided:

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

[15] The applicant in that case complained about the 'block period' approach which contrasted to the 2005 scheme which permitted the taking of transition leave on a number of different dates across the last 12 months of a sentence. In summary, Colton J concluded:

- (i) NIPS enjoys a broad discretion under Rule 27;
- (ii) In the case where a public body adopts a policy in relation to the exercise of a statutory discretion, the court's role is limited to conducting an audit of the lawfulness of such a policy;

- (iii) It is not for the court to determine whether the block period approach represents the best basis for resettlement;
- (iv) NIPS had provided a rational basis for the adoption of the scheme and this could not be impugned on the basis of *Wednesbury* unreasonableness;
- (v) The policy adopted by NIPS was based on rational aims and objectives and did not represent an unlawful fetter;
- (vi) The ECHR arguments did not get off the ground.

[16] The scheme under challenge in this application for leave is similar to the 2022 pilot scheme, save that additional periods of leave may be permitted outside the block period at the end of the time spent in custody. The 2023 scheme is therefore more flexible than the one which it replaced.

[17] A change in the availability and eligibility requirements for temporary release could constitute a breach of an individual prisoner's article 8 rights. In *Re Griffin's Application* [2005] NICA 15, Kerr LCJ observed that a sentence of imprisonment necessarily involves deprivation of society with one's family and restrictions on one's personal life. However, in that case, the applicant would have been entitled to a longer period of home leave that was the case under a subsequently introduced policy. As such, the court found:

"the diminution of that opportunity must involve an interference with his article 8 rights" (para [27])

[18] However, on the facts of this case, the only change in the applicant's entitlement is to the effect that transition leave is taken within the last two months of his sentence rather than during the last four months under the 2005 scheme. The applicant remains eligible for nine days' transition leave in total. There has been no reduction in the number of days to which the applicant could be entitled. It could not therefore be said on the facts of this case that there has been any interference with his rights, let alone a disproportionate one.

[19] I entirely agree with the reasoning of Colton J in relation to the claims of irrationality and unlawful fettering of discretion. A body with the institutional expertise and experience of NIPS is entitled to adopt a policy which, in its opinion, best reflects the aims of temporary release. In *R (A) v SSHD* [2021] UKSC 37, the Supreme Court observed:

"In particular, where a number of officials all have to exercise the same discretionary powers in a stream of individual cases which come before them, a policy may provide them with guidance so they apply the powers in

similar ways and the risk of arbitrary or capricious differences of outcomes is reduced. If placed in the public domain, policies can help individuals understand how discretionary powers are likely to be exercised in their situations and can provide standards against which public authorities can be held to account. In all these ways, policies can be an important tool in promoting good administration.” [para [2]]

[20] In *Re McAllister's Application* [2006] NIQB 58, Weatherup J confirmed that NIPS is entitled to apply to prisoners a policy on home leave. I therefore reject any challenge to the 2023 scheme per se as being unarguable.

[21] There is, however, a significant difference between the 2022 pilot and the 2023 scheme. In the former, applications for transition leave could only be made within eight weeks of the CED. In the latter, ‘the latest date’ for applications is stated to be eight weeks from the TLED which is, in turn, two months from the CED.

[22] The letter from Governor Elliott dated 2 November 2023 demonstrates a misunderstanding of the rules of the 2023 scheme. He states that the application made on 23 October 2023 was “too early to be considered.” This may have been the case under the 2022 pilot but para 4.4 of the 2023 scheme is concerned with the latest date for applications, not the earliest date. The letter goes on to say:

“I advised him that his early date of release is not until 28 January 2024 and that he will be eligible to re-apply for same 8 weeks prior to his early date of release.”

[23] It is unfortunate that the Governor chose to use terminology different from that set out in the scheme. By “early date of release” the author means the TLED which is not, in fact, an early date of release at all but the date from which he could potentially be granted a period of transition leave. The TLED is correctly identified as 28 January 2024. However, rather than be eligible to re-apply eight weeks prior to this date, the letter ought to have advised that the latest date for an application was 3 December 2023.

[24] The 2023 scheme says nothing about early or premature applications for transition leave. The purpose of the eight week period prior to the TLED is to allow time for risk assessments to be carried out. There is no prohibition on applications prior to that date.

[25] As a result, it is arguable that the application was not considered within the framework of the scheme and NIPS has misinterpreted its terms.

Conclusion

[26] For the reasons outlined, leave is granted to apply for judicial review, limited to the ground of illegality/misinterpretation of the scheme.

[27] I will hear counsel as to directions to the substantive hearing.