



Neutral Citation Number: [2019] EWHC 3123 (Admin)

Case No: CO/5051/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/19

Before :

LORD JUSTICE HICKINBOTTOM

and

MR JUSTICE JOHNSON

**THE QUEEN ON THE APPLICATION OF
JAWAD AKBAR**

Claimant

-and-

THE SECRETARY OF STATE FOR JUSTICE

Defendant

Dan Squires QC and Anita Davies (instructed by Birnberg Peirce Solicitors)
for the Claimant

Ben Watson (instructed by Government Legal Department) for the Defendant

Hearing date: 30 October 2019

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This is the judgment of the court.
2. Generally, to obtain release from prison, a life prisoner is required to satisfy the Parole Board of England and Wales (“the Parole Board”) that he no longer poses more than an acceptable risk to the public. To assist him to do so, and to test him in conditions more approaching those on release, during the course of his custodial sentence he would normally progress from high security to lower security prisons until, prior to the expiry of his minimum term or tariff, he would hope to be transferred to an open prison where, for example, he can enjoy release on temporary licence (“ROTL”). The Secretary of State has a power, but not an obligation, to transfer him to open conditions if the Parole Board recommends such a transfer.
3. However, in 2014, the Secretary of State added rule 7(1A) to the Prison Rules 1999 (SI 1999 No 728) (“the Prison Rules”) removing his own power to transfer life prisoners to open conditions if they are subject to a deportation order in respect of which they have no extant right to appeal, i.e. they are “appeals rights exhausted” or “ARE”. We shall refer to prisoners who are the subject of a deportation order and are ARE as “ARE prisoners”.
4. The Claimant is a foreign national prisoner (“FNP”) who is currently serving a life sentence for a terrorist offence, with a tariff which is due to expire in September 2021. He is the subject of a deportation order which he has never challenged, and so is ARE. He is firmly of the view that, but for rule 7(1A), he would have been referred to the Parole Board by now to consider whether he should be transferred to open conditions: but that rule means that he cannot be considered for transfer. He has consequently not been referred to the Parole Board for any assessment of risk.
5. In this claim, the Claimant challenges rule 7(1A), which he submits is unlawful on two grounds:
 - i) The rule is in breach of article 14 of the European Convention on Human Rights (“ECHR”), as falling within the ambit of article 5 and/or 8 of the Convention and being a discriminatory and unjustified difference in treatment between ARE prisoners and all other prisoners (including prisoners who are the subject of a deportation order who are not ARE).
 - ii) The Secretary of State’s decision through rule 7(1A) to deprive himself of the power to transfer any ARE prisoner into open conditions was irrational.
6. Before us, Dan Squires QC and Anita Davies appeared for the Claimant, and Ben Watson for the Secretary of State. We thank them all for their contribution to the debate.

Categorisation of Prisoners

7. Section 47(1) of the Prison Act 1952 gives the Secretary of State the power to make rules “for the regulation and management of prisons... and for the classification... of

persons required to be detained therein”. The management of prisons and of prisoners, including how prisoners are classified and how different categories of prisoner are managed, is essentially an administrative matter for the Secretary of State in respect of which the Secretary of State has a wide discretion or margin of appreciation.

8. The relevant rules are the Prison Rules. Rule 7 provides that, subject to rules 7(1A)-(1D) to which we shall shortly return, “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...”.
9. The relevant directions appear in PSI 40/2011 Categorisation and Recategorisation of Adult Male Prisoners. Paragraph 2.1 states:

“Adult male prisoners may be held in one of four security categories.

Category A

Prisoners whose escape would be highly dangerous to the public or the police or the security of the State and for whom the aim must be to make escape impossible.

Category B

Prisoners for whom the very highest conditions of security are not necessary but for whom escape must be made very difficult.

Category C

Prisoners who cannot be trusted in open conditions but who do not have the resources and will to make a determined escape attempt.

Category D

Prisoners who present a low risk; can reasonably be trusted in open conditions and for whom open conditions are appropriate.”

Prisoners in Categories A, B and C are said to be in “closed conditions”, whilst those in Category D are in “open conditions”.

10. Paragraph 3.1, under the heading “Principles of Categorisation”, explains:

“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).”

It is noteworthy that, whilst allocation to Categories A, B and C is determined on the basis of an assessment of the risks of harm and absconding posed by the prisoner, it is a condition of transfer to Category D that open conditions are also “appropriate”, i.e. that it is within a reasonable time of the earliest release date.

11. We will come to the mechanics of transfer to – and the purpose and aims of – open conditions shortly (see paragraphs 29-34 below); but a life prisoner who has progressed well can expect to be transferred to open conditions at some point during the last couple of years of his minimum custodial term. There are significant differences between closed and open conditions, the latter providing a generally less severe regime, with a far greater sense of personal autonomy as opposed to a rigidly imposed structure. For example, whereas higher category prisoners may spend long periods each day locked in their cells, cell doors in a category D prison are not regularly locked. Once cleared for ROTL, there is considerable freedom during the day to leave the prison, for example to attend educational courses or work or to visit family and friends including “resettlement overnight release” once per month allowing the offender to spend four consecutive nights with his family. Of course, any prisoner who has been in custody for a substantial period is likely to benefit personally from steps taken to assist his return to living in the community. However, “resettlement” in this context has to be seen in its proper, public interest context in which the assessment of risk as a result of reoffending is a priority. “Resettlement” is thus a reference to return to living in the community without any significant increase in risk from reoffending.

Indeterminate Sentence Prisoners: Release Provisions

12. Whilst brought under article 14 of the ECHR, for reasons which will become apparent in due course, we consider article 5 is key to the proper consideration of this claim. So far as relevant, it 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.”

13. For most serious offences for which a custodial sentence is warranted, the sentencing court fixes a determinate period for the sentence which represents the punishment which, in all the circumstances, the court considers appropriate. There are various provisions in relation to earlier release (including Home Detention Curfew (“HDC”), to which we shall return: see paragraphs 86 and 111 and following below), but the offender must be released by the end of the determinate period.

14. However, in some cases the offender may pose an unacceptable risk of reoffending (and thus of causing further serious harm) which the court considers must be addressed and reduced to an acceptable level before the offender is released. In such cases, the court may – and in some circumstances (e.g. on a conviction for murder) must – impose a life sentence or other indeterminate sentence to which the release provisions for life sentences apply. Offenders upon which such a sentence is imposed are called “indeterminate sentence prisoners” (or “ISPs”).
15. ISPs are subject to the release provisions of section 28 of the Crime (Sentences) Act 1997 (“the 1997 Act”). The sentencing court fixes a “tariff” by reference to the seriousness of the offence and the circumstances of the offender, the object of which is punishment. The tariff is the minimum term which the offender must spend in custody. However, even after that term has been served, he will remain in detention unless and until he can demonstrate that he no longer presents an unacceptable risk to the public. The object of that second part of the sentence is to prevent unacceptable risks to the public as presented by the offender, coupled with any required continued rehabilitation with a view to reducing the residual risk he poses to an acceptable level to allow for his release. If and when released, he will still be subject to licence conditions, and liable to recall, for the rest of his life.
16. As recently confirmed by the Supreme Court in Brown v Parole Board for Scotland [2017] UKSC 69; [2018] AC 1 (especially at [39] per Lord Reed JSC), in terms of article 5 of the ECHR, the fact that an ISP has been sentenced by a court following conviction means that his minimum custodial term is justified by article 5(1)(a), because that term is fixed by the sentencing court as the appropriate punishment. However, the period after the expiry of the tariff cannot be justified on the grounds of punishment, but only on the basis that this is a period for rehabilitation and risk reduction until a point is reached when the offender’s risk to the public is reduced to an acceptable level, whereupon there is no further lawful purpose in his continued detention. Article 5(4) entitles the offender then to take proceedings to determine the unlawfulness of his continued detention and order his release.
17. Once an ISP’s tariff has expired, both our domestic scheme and article 5 of the ECHR therefore require the assessment of the risk he poses to the public and, in particular, an assessment of whether that risk has been reduced to an acceptable level to allow for his release. Those assessments are made by the Parole Board, an expert body in the evaluation of risk.
18. As the burden of satisfying the Parole Board that the risk he poses has been reduced to an acceptable level lies on the offender, an ISP needs an evidential foundation to do so. In practice, that is likely to include evidence of successful completion of courses designed to address his offending behaviour, whether of a violent or sexual nature; and evidence that he has had his progress and eventually readiness to be released into the community successfully tested by phased release involving a transfer from closed to open prison conditions.
19. The scheme operates in the following way. By section 239(2) of the Criminal Justice Act 2003, the Parole Board has a duty to advise the Secretary of State “with respect to any matter referred to it by him which is to do with the early release or recall of prisoners”. Most referrals “to do with the early release... of prisoners” seek the Board’s advice on the risk that a prisoner would represent to the public on release, and a

consequent direction as to whether he should now be released permanently subject only to licence conditions.

20. By section 28(7) of the 1997 Act, an ISP can require the Secretary of State to refer his case to the Parole Board at the end of “the relevant part of his sentence” (i.e. at the end of his tariff period), and at two-year intervals thereafter. Because article 5(1)(a) of the ECHR does not authorise detention after the expiry of the tariff period and there is an obligation on the ISP to show that the risk he poses has reduced to an acceptable level to allow his release thereafter, it is now well-established that he must be given a proper opportunity for rehabilitation, i.e. both to reduce the risk he poses and to evidence that reduction. The main facilities, interventions and resources for addressing and reducing core risk factors are in closed conditions: but open conditions are regarded as important to test the extent to which that work in closed conditions has been successful and to address any residual aspects of risk.
21. Because of the need to give an ISP a proper opportunity to evidence risk reduction as at the tariff expiry date, it is the Secretary of State’s policy to begin the first reference process sufficiently before that date to ensure that the Parole Board can reach an initial decision on release by tariff expiry (see Section 3 of PSI 22/2015 Generic Parole Process for Indeterminate and Determinate Sentenced Prisoners).
22. On a reference, the Parole Board can only direct release if it is “satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined” (section 28(6)(b) of the 1997 Act), i.e. that the risk posed by the offender is acceptable. If the offender’s tariff period has expired and the Parole Board directs his release, the Secretary of State is required to release him (section 28(5)).

Indeterminate Foreign National Prisoners: Removal Provisions

23. The release provisions set out above generally apply to FNPs who are serving indeterminate sentences of imprisonment (“IFNPs”).
24. However, with effect from 1 May 2012, section 119 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced an alternative scheme for IFNPs, namely the Tariff Expired Removal Scheme (“TERS”) by inserting a new section 32A into the 1997 Act, as follows:

“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 “relevant part of the sentence” as the same as in section 28, i.e. as the tariff.

25. As with section 28, the operation of this section therefore results in the offender leaving custody: but the offender is “removed”, not “released”, from prison. Section 32A(3) makes clear that removal from prison under this section can only be for the purpose of removal of the offender from the UK: and, if and for so long as the offender stays in (or returns to) the UK, he is liable to be returned to prison. Removal from the UK under section 32A therefore merely suspends the sentence whilst the offender stays out of the UK.

26. Importantly, removal under section 32A does not generally require the prisoner to show that his risk has reduced to a particular level, or therefore any consideration or assessment of future risk. Directions for the scheme are set out in PSI 18/2012 Tariff Expired Removal Scheme, which applies to all IFNPs. Paragraph 2.1 explains:

“TERS is mandatory therefore any IFNP liable to removal from the UK must be considered under this scheme. All IFNPs will be presumed suitable for removal under the scheme unless they meet the criteria for refusal set out below...”.

27. The reasons for considering an IFNP unsuitable for removal are set out in paragraph 2.3 under the heading “Reasons for considering a prisoner unsuitable for removal”. They include circumstances in which, e.g., the prisoner has an outstanding confiscation order or outstanding criminal charges against him, or the removal of the prisoner would undermine the confidence of the public in the criminal justice system. Of importance in this claim is the following criterion:

“The prisoner is serving a sentence for a terrorism or terrorism-related offence. [The Secretary of State’s Public Protection Casework Section (“[the] 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, [the] PPCS must always consult with the NOMS Extremism Unit before a final decision is made.”

The reference to “terrorism or terrorism-related offence” is to those offences as defined in the Terrorism Acts: in this judgment, we shall refer to them collectively as “terrorist offences”. Of all the criteria for considering a prisoner unsuitable for removal under the TERS, this is the only one that requires any consideration of future risk. Generally, an IFNP can be removed from the UK (and, for those purposes, from prison) without any consideration of future risk.

28. Over 500 IFNPs have been removed under TERS. Only 11 have been rejected for removal under the scheme, none because they were serving a sentence for terrorist offences (paragraphs 58-59 of Dr Jamie Bennett’s statement dated 15 August 2019: Dr Jamie Bennett is the Deputy Director for the Operational Security Group in the Security, Order and Counter Terrorism Directorate in HM Prison and Probation Service). Indeed, because of the recent introduction of these provisions – and the lengthy minimum terms usually imposed for terrorist offences – no IFNP convicted of such an offence has yet been considered for TERS. In respect of such a prisoner, whether TERS should be invoked or refused for a prisoner clearly requires

consideration of the risk he poses in the form of further terrorist offences. In respect of that issue, Dr Bennett says (paragraph 57(b) of his statement):

“... There is no further policy or guidance to support how PPCS, in consultation with the NOMS Extremism Unit, would make such decisions. However, colleagues from the PPCS and the Extremism Unit have advised that if this arose they would seek to understand the extent of any information indicating an ongoing terrorist threat from the individual to the UK or abroad (from the prison, but also from police and other partner agencies). The assessment to be made would be whether the prisoner poses an ongoing terrorist threat to the UK or abroad.”

Indeterminate Sentence Prisoners: Transfer Provisions

29. As we have explained, in open conditions, an offender’s progress can be assessed in a number of ways not in practice available whilst he is in closed conditions, notably in the context of ROTL by short-term temporary release on day and overnight licence. For many ISPs, the transfer to open conditions will therefore be important if not vital in showing that his risk has been sufficiently reduced to be acceptable.
30. The Secretary of State has a discretion to transfer a prisoner from closed to open conditions without any Parole Board review (Chapter 5 of PSI 22/2015, which reflects R (Guittard) v Secretary of State for Justice [2009] EWHC 2951 (Admin)). However, prior to transferring a prisoner, the Secretary of State will usually refer the case to the Board under the provisions of section 239(2) of the 2003 Act (see paragraph 19 above) for its advice on the risks and benefits of doing so, and a recommendation as to whether or not to do so at that stage of the sentence. The transfer of an ISP from closed to open conditions involves the re-categorisation of the prisoner’s security classification, which as we have already indicated is generally an administrative matter. However, it is now well-established that a transfer is “to do with [the prisoner’s early] release” since the withholding of transfer may slow progress towards release; and the earlier a prisoner is transferred to open conditions, the sooner he is likely to be released (R (Hill) v Secretary of State for the Home Department [2007] EWHC 2164 (Admin) at [5]-[7] per Irwin J (as he then was), and R (Yusuf) v Parole Board [2010] EWHC 1483 (Admin); [2011] 1 WLR 63 at [7] per Keith J). However, unlike decisions as to release, the Secretary of State is not bound to accept the Parole Board’s recommendation on transfer of an ISP to open conditions.
31. Annex O to PSI 22/2015 sets out the Secretary of State’s directions to the Parole Board under section 239(6) of the 2003 Act, which proceed on the basis that transfer to open conditions may be beneficial in giving a prisoner a better opportunity to evidence reduced risk to allow for his release at the earliest time after his tariff expiry. Under the heading, “Transfer of [ISPs] to open conditions”, the directions state:
 - “1. A period in open conditions can in certain circumstances be beneficial for those [ISPs] who are eligible to be considered for such a transfer.
 2. Open conditions can be particularly beneficial for such ISPs, where they have spent a long time in custody, as it gives

them the opportunity to be considered for resettlement leave (although there is no automatic entitlement to such leave and any decision to grant such leave will depend upon a careful assessment of risk). It is not necessary in every case, however, for an offender to spend time in open conditions in order for the Parole Board to direct their release.

3. The main facilities, interventions, and resources for addressing and reducing core risk factors exist principally in the closed prison estate. The focus in open conditions is to test the efficacy of such core risk reduction work and to address, where possible, any residual aspects of risk.”

32. The directions in Annex O to PSI 22/2015 go on to deal with how the Parole Board should consider whether to recommend a transfer of an ISP to open conditions:

“5. A move to open conditions should be based on a balanced assessment of risk and benefits. However, the Parole Board’s emphasis should be on the risk reduction aspect and, in particular, on the need for the ISP to have made significant progress in changing his/her attitudes and tackling behavioural problems in closed conditions, without which a move to open conditions will not generally be considered.

Directions

6. Before recommending the transfer of an ISP to open conditions, the Parole Board must consider:-

- all information before it, including any written or oral evidence obtained by the Board; and
- each case on its individual merits without discrimination on any grounds.

7. The Parole Board must take the following main factors into account when evaluating the risks of transfer against the benefits:-

- a) the extent to which the ISP has made sufficient progress during the sentence in addressing and reducing risk to a level consistent with protecting the public from harm, in circumstances where the ISP in open conditions may be in the community, unsupervised, under licensed temporary release;
- b) the extent to which the ISP is likely to comply with the conditions of any such form of temporary release (should the authorities in the open prison assess him as suitable for temporary release);

- c) the extent to which the ISP is considered trustworthy enough not to abscond; and
 - d) the extent to which the ISP is likely to derive benefit from being able to address areas of concern and to be tested in the open conditions environment such as to suggest that a transfer to open conditions is worthwhile at that stage.”
33. Therefore, unlike the assessment on release (which considers only the level of risk posed by the offender), the Parole Board’s assessment on transfer of an ISP to open conditions requires it to evaluate risk but then balance the risk as found against the benefit that may accrue to the offender from being in open conditions in terms of being better able to address any remaining areas of concern and evidence reduced risk. However, as paragraph 5 makes clear, the focus remains on the risk posed by the offender; and it is perhaps noteworthy that all of the factors identified in paragraph 7 except (d) relate to risk not benefit.
34. It seems that about one-third of ISPs progress to release without any open conditions stage; but, as we have already indicated, for most ISPs transfer from closed to open prison conditions is an important if not essential step towards showing to the Parole Board’s satisfaction that the risk posed has been reduced to an acceptable level.

Indeterminate Foreign National Prisoners: Removal Provisions

35. Until August 2014, the above provisions applied to IFNPs: the Secretary of State had a power to transfer an IFNP to open conditions, although of course the fact that the offender was an ARE prisoner would be a relevant consideration for the purposes of that decision.
36. On 15 August 2014, the Secretary of State made 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 new rules, which read (so far as relevant to this claim) as follows:

“(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...”.

Rule 7(1A) therefore proscribes ARE prisoners from being transferred to open conditions. Rules 7(1B)-(1D) concern transitional provisions which are not relevant to this claim.

37. The new rules were supported by PSI 37/2014 Eligibility for Open Conditions and for ROTL of Prisoners Subject to Deportation Proceedings, the details of which are not relevant to this claim, but which make clear that:

“**Prisoners in closed conditions** who have a Deportation Order against them and who have either exhausted appeal rights in the UK or whose appeal rights must be exercised from abroad: *must not* be classified as suitable for open conditions; and *must not* be granted temporary release [i.e. ROTL]” (all emphasis in the original).

38. Dr Bennett says that the impetus for these changes was a case in 2013 of a Barbadian national serving life for murder whose prospective transfer to open conditions was opposed by the victim’s family (paragraph 26 of his statement). That may have been the trigger; but the policy background (“What is being done and why”) was set out in paragraph 7 of an Explanatory Memorandum to the draft 2014 statutory instrument which accompanied the 6 August 2014 submission to the Secretary of State for approval. It read:

“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...”.

As we have explained (see paragraph 11 above), “resettlement” here is a reference to return to living in the community in the UK without any significant increase in risk from reoffending.

39. The same rationale for rule 7(1A) was effectively summarised in paragraph 2.6 of PSI 37/2014:

“[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.”

40. In his statement (at paragraph 28), Dr Bennett draws the following particular reasoning from that paragraph (emphasis in the original):

“(a) Government policy is to remove prisoners who are ‘[ARE]’ from the UK at the earliest opportunity (e.g. pursuant to Prisoner Transfer Agreements..., and TERS...), and it would be inconsistent with that aim for those same 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 resettlement opportunities in the UK that are an inherent part of open conditions. 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. 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.”

41. In respect of the resettlement opportunities in the UK being an inherent part of open conditions as referred to in (c), Dr Bennett says this (at paragraph 17):

“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 restatement 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.”

42. We shall return to those aims of open conditions when we consider justification (see paragraphs 93 and following below).

43. In addition to TERS, Dr Bennett refers to two other arrangements open to IFNPs:

- i) Progression Regimes within the closed prison estate are designed to support ISPs who have previously found it difficult to provide sufficient evidence to progress in their sentence, e.g. to open conditions or release. Dr Bennett explains (at paragraphs 36-43 of his statement) that they use a range of tools to assess progress, responsibility and activity against relevant risks, but within closed conditions; and they are effectively an alternative to open conditions for ISPs who might otherwise be excluded from open conditions, for example by rule 7(1A) or as a result of a high absconding risk.
- ii) 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.

The Factual Background

44. The Claimant was born in Pakistan on 20 June 1983. He has Italian citizenship through his father, who was born near Rome. The Claimant lived in Pakistan until he was 7 years old, and then in Italy for two years. In 1992, he moved to the UK with his family, and has lived here since then.
45. The Claimant became radicalised during his second year at university, where he developed extremist jihadist views, which extended to propounding the maiming and killing of non-believers particularly from countries such as the UK which were involved in military intervention in Afghanistan and Iraq.
46. On 30 March 2004, he 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. They had planned terrorist attacks on the London Underground, nightclubs, public houses, synagogues, and public services such as gas and water. After a trial lasting over a year at the Central Criminal Court, the Claimant and some (but not all) of his co-accused were convicted, and each was sentenced to life imprisonment. The Claimant's minimum term was fixed at 17½ years. The Claimant appealed against conviction and sentence, but his appeal was dismissed ([2008] EWCA 1612). His tariff expires on 29 September 2021.
47. In prison, we accept on the evidence that the Claimant has generally behaved well, and worked hard towards rehabilitation. As a result, he progressed from Category A to B in 2014, and then to Category C in 2016. He has distanced himself from his co-conspirators, and has worked with a psychologist and taken part in offender programmes now available for those convicted of terrorist offences. He has completed all courses successfully, and there is now no further rehabilitation work he can do in closed conditions.
48. On 31 December 2015, on the basis of his conviction and sentence, the Home Secretary notified the Claimant of the intention to deport him to Italy. The Claimant indicated that he would not oppose a deportation order, and was willing to return to Italy when he was able to do so. A deportation order was made on 15 December 2017. The Claimant has not sought to challenge it. He is, consequently, ARE. The deportation order expressly authorised the Claimant's detention pending removal under paragraph 2(3) of Schedule 3 to the Immigration Act 1971. It is not suggested that that authorisation is unlawful.
49. The Claimant is currently serving his sentence in HMP Mount, a Category C facility. As a result of rule 7(1A), he is not eligible for open conditions. He will be considered for removal under TERS, a process which will begin in January 2021, nine months prior to his tariff expiry. As we have said, the Claimant will be the first IFNP who has been convicted of a terrorist offence who has been the subject of consideration for removal under TERS, and Dr Bennett is careful not to pre-empt the decision that will be made by the PPCS on behalf of the Secretary of State in consultation with the NOMS Extremism Unit. However, he says (at paragraph 84 of his statement):

“Assuming the view is reached that the evidence does not suggest the Claimant poses [an ongoing terrorist threat to the UK or abroad], and subject to any adverse developments, then the

anticipated outcome of the process would be that the Claimant will be removed [to Italy] pursuant to TERS following his tariff expiry...”.

That, of course, is neither more nor less than TERS requires.

50. In respect of other possible arrangements (see paragraph 43 above):

- i) The Claimant is eligible for a Progression Regime. In September 2018, he applied to HMP Warren Hill – the prison offering such a regime nearest to his family in the UK – but was rejected because of the limited security arrangements at that prison. He has now applied to HMP Erlestoke. He has been reluctant to consider transfer to other prisons at which a Progression Regime would be available because of the distance they are from his family.
- ii) The Claimant’s case has been considered under the Council Framework Decision on Prison Transfers, but repatriation to Italy prior to tariff expiry was not considered appropriate because, in his case, the minimum tariff for conspiracy to commit a terrorism-related offence in Italy would be 26 years; and removal to Italy would therefore result in aggravation of his sentence which is not permitted under the Framework Decision.

Grounds of Challenge: Introduction

51. As Ground 1, his primary ground of challenge, Mr Squires submits that rule 7(1A) breaches the prohibition of discrimination under article 14 of the ECHR, because the rule impacts on the way in which the right to liberty (under article 5) and the right to respect for private and family life (under article 8) are secured; and it does so in a way which unjustifiably discriminates between ARE prisoners like him, and all other prisoners.

52. 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”.

The “rights and freedoms... in the Convention” which, Mr Squires submits, are relevant in this claim are article 5 (quoted at paragraph 12 above) and article 8 which, under the heading, “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.”

53. It is now well-established that a complaint of discrimination under article 14 requires four elements to be established (see, e.g., R (DA and DS) v Secretary of State for Work and Pensions [2019] UKSC 21; [2019] 1 WLR 3289 at [136] per Baroness Hale of Richmond PSC, and R (Stott) v Secretary of State for Justice [2018] UKSC 59; [2018] 3 WLR 1831 at [8] per Lady Black JSC), namely:
- i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?
 - ii) Was the difference in treatment on the ground of one of the listed characteristics in article 14 or “other status”?
 - iii) Were the claimant and the person who has been treated differently in analogous situations?
 - iv) 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.
54. In the Claimant’s case, it is common ground that there is a difference in treatment such that question (iii), looked at discretely, is not in issue; but the parties are at issue in relation to each of the other questions.
55. In addition to the article 14 ground, Mr Squires submits as his Ground 2 that the Secretary of State’s decision to deprive himself of the power to transfer an ARE prisoner to open conditions was irrational in the Wednesbury sense.
56. We will deal first with the three issues arising in relation to the article 14 Ground 1, namely (i) “ambit” (see paragraphs 57-78 below), (ii) “status”: (paragraphs 79-92) and (iv) “justification” (paragraphs 93-120), before we consider Ground 2 (irrationality: paragraphs 121-124).

Ground 1: Article 14 Ambit

57. Mr Squires submits that rule 7(1A) falls within the ambit of both the right to liberty under article 5 and the right to respect for private and family life under article 8.
58. In respect of article 5, it is common ground that the core value (or “essential aim”) of the article is “to confer protection against arbitrary or unjustified deprivation of liberty” (Brown at [2] per Lord Reed).
59. As we have explained (see paragraph 16 above), the Claimant’s right to liberty under article 5 has been lawfully curtailed by the life sentence imposed upon him: there can be no question of the deprivation of his liberty being arbitrary, and therefore unlawful, until after the expiry of his tariff in September 2021. Mr Squires, rightly, accepts that there can be no substantive breach of his article 5 right to liberty at this stage.
60. However, he submits that:

- i) The Claimant has an interest in securing his liberty once his tariff expires in September 2021.
 - ii) That interest is affected by rule 7(1A) because he is less likely to secure his liberty in September 2021 if he does not have the opportunity to have his reduction of risk “tested” in open conditions.
 - iii) That interest is sufficiently connected to the core values that are protected by article 5 – protection from arbitrary or unlawful detention – so as to fall within the ambit of article 5 for the purpose of triggering the provisions of article 14.
61. Mr Squires also submits that the prohibition on consideration of open conditions adversely impacts on his personal autonomy and his ability to develop relations, including with his family; and that this falls within the broad ambit of the right to respect for private and family life under article 8, so as to trigger the application of article 14 by that separate route.
62. To the contrary, Mr Watson for the Secretary of State submits that, whilst he is within his tariff period, an offender does not have any right to liberty; and there can therefore be no infringement of an interest close to the core of, and thus in the ambit of, article 5. In support of that proposition, he relied upon the following passage from Lord Reed’s judgment in Brown (at [39]). Having referred to Kaiyam v United Kingdom (2016) 62 EHRR SE13 at [67], which confirmed the proposition that there can be no breach of article 5 before the expiry of an ISP’s tariff, Lord Reed continued:
- “... [The approach of the European Court of Human Rights [“the ECtHR”]] reflects the logic of locating the obligation in article 5.1(a): it is only after the tariff has expired that any question can arise whether the detention is arbitrary, and therefore not ‘lawful’ within the meaning of article 5.1(a).”
- Therefore, Mr Watson submits, during the tariff period, no issue can arise under article 5, so that a prohibition on transfer to open conditions is incapable of falling within the ambit of article 5.
63. In support of that proposition, he relied upon two further authorities.
64. In R (Bonner) v Secretary of State for Justice [2018] EWHC 2819 (Admin), the claimant alleged unlawful delay in transferring him from closed to open conditions, in breach of the Secretary of State’s obligations at common law and under article 5. Despite that delay, however, the claimant was in fact assessed by the Parole Board at the date of his tariff expiry, and the Board directed his release. King J, having referred to the Supreme Court judgment in Brown (which had been handed down between the hearing and judgment in Bonner), said (emphasis added):
- “Since the hearings before me, in a major judicial development, the Supreme Court in November 2017 in [Brown] has departed from the decision in Kaiyam. It was held *there is no ancillary duty implicit in article 5 and any article 5 claim for breach of duty to provide a real opportunity for rehabilitation to those serving indeterminate sentences can apply only to detention*

post-tariff expiry – not the position here where the claimant suffered no such detention, having been released on or about tariff expiry. This is because, on proper analysis, the duty is an aspect of the duty to ensure detention does not become arbitrary under article 5(1)(a).”

65. Second, he relies on the observations of Davis LJ in R (Ryder) v The Lord Chancellor [2015] EWHC 1857. The issue in that case was whether a refusal of legal aid for the purpose of a pre-tariff Parole Board review fell within the ambit of article 5 so as to support a complaint under article 14. That issue proved not to be determinative – the claim failed for other reasons – but it appears to have been the subject of argument as the claimant’s main ground of challenge, and Davis LJ considered it in his judgment with which Stewart J agreed. Davis LJ said (at 43) he was “not inclined to accept” that the circumstances of the case showed a sufficiently close relationship with the “core values” which article 5 was designed to protect and thus they fell outside the ambit of Article 5. He said (at [42]):

“... 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 (see the remarks of Keith J in [Yusuf]) that is neither a legal pre-condition nor an invariable de facto pre-condition: as the above cited evidence, recording an average of around 15% of mandatory life prisoners achieving release from closed conditions, shows.”

66. Mr Watson submits that no separate issue arises under article 8, because any curtailment of the Claimant’s private and family life is the necessary consequence of his lawful imprisonment. The article 8 claim does not therefore add to that relying on article 5.
67. In our view, Mr Squires’ submissions on this issue – save those regarding article 8 – are essentially correct.
68. It is well-established that the application of article 14 does not require a breach of one of the other, substantive rights within the ECHR: if it were otherwise and article 14 only applied where there was a breach of a substantive right of the Convention, it would of course be an effectively empty, or at most a mere reinforcing, provision. Citing authority going back to Abdulaziz v United Kingdom (1985) 7 EHRR 471 at [71], in Stec v United Kingdom (2005) 41 EHRR SE18 the Grand Chamber of the ECtHR put it this way:

“38. The Court recalls that article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to the ‘enjoyment of the rights and freedoms’ safeguarded by those provisions.... The application of article 14 does not

necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more of the Convention articles....

39. The prohibition of discrimination in article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each state to guarantee. It applies also to those additional rights, falling within the scope of any Convention article, for which the state has voluntarily decided to provide...”.

69. The Grand Chamber thus identified two possible ways in which the article 14 ambit issue might arise. First, it may arise in the context of the negative obligation on the state to desist from conduct that will infringe or impair the Convention right, or the core values which are the essence of that right which the substantive ECHR obligations are intended to protect. In that case, it is necessary for an article 14 complainant to show that he has suffered an adverse impact as a result of the conduct. Second, it might arise in circumstances in which the state takes a positive measure, which it is not obliged by the Convention to take, but is a measure by which the state shows respect for a core value (i.e. is “a modality of the exercise”) of one of the substantive Convention rights. In those circumstances, it is not necessary for an article 14 complainant to show that the measure has had any adverse effect upon him; only that the measure has more than a tenuous connection with the core values protected by one of the Convention rights (see Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916; [2018] QB 804 at [55] per Sir Terence Etherton MR, with whom McCombe LJ and Sir Patrick Elias agreed, explaining the observations of Lord Bingham in M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 WLR 637 at [4] and in R (Clift) v Secretary of State for the Home Department [2006] UKHL 54; [2007] 1 AC 484 at [13]).
70. Many situations in which the application of article 14 arises can be equally cast in terms of a positive measure or negative obligation; but, in the case before us, it is more obviously a case of a positive measure, i.e. the implementation of rule 7(1A). In those circumstances, the test of ambit is simply 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.
71. But Mr Squires and Mr Watson disagreed as to the extent to which it is necessary to show a close connection between the interest that the Claimant is seeking to advance and the core of a particular Convention right. Mr Watson relied upon the observations of Lord Bingham in Clift at [13] that:
- “... expressions such as ‘ambit’, ‘scope’ and ‘linked’ used in the Strasbourg cases... denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a *right* is infringed” (emphasis added);
- and the fact that, until the expiry of his tariff, an ISP has no right to liberty, and therefore cannot have an interest close to such a right.
72. However:

- i) In contradistinction to the narrower “scope” of Convention rights for the purpose of their substantive application, the ECtHR takes a broad and generous approach to the “ambit” of Convention rights for the purpose of applying article 14. This is illustrated by Adami v Malta (2007) 44 EHRR 3, which concerned the prohibition of forced or compulsory labour under article 4. By article 4(3) of the ECHR, “work or service which forms part of normal civic obligations” is expressly excluded from the prohibition under article 4. Nevertheless, an obligation to serve as a juror (“a normal civic obligation”) was found to come within the ambit of article 4 for the purposes of triggering the application of article 14. Sir Nicolas Bratza (at [O-I5]) observed in his concurring judgment that this raised a question “as to how compulsion to perform work or services forming part of ‘normal civic obligations’, which are expressly excluded from the protection afforded by article 4, can at the same time be said to fall ‘within the ambit’ of that provision so as render article 14 applicable”. He explained (at [O-I7], to which the Master of the Rolls referred in Smith at [62]):

“The central question which arises is what constitutes ‘the ambit’ of one of the substantive articles, in this case article 4. It has been argued that ‘even the most tenuous links with another provision in the Convention will suffice’ for article 14 to be engaged (see Grosz, Beatson and Duffy, ‘The 1998 Act and the European Convention’ (Sweet & Maxwell, 2000), para C14–10). Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the Court to the term ‘within the ambit’. Thus, according to the constant case law of the Court, the application of article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the article. This is best illustrated by the fact that article 14 has been held to cover not only the enjoyment of the rights that states are obliged to safeguard under the Convention but also those rights and freedoms that a state has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention (see, e.g. The Belgian Linguistics Case (No 2) (Merits) (A/6) (1979–80) 1 EHRR 252 at [9]; [Abdulaziz] at [71]). This would indicate in my view that the ‘ambit’ of an article for this purpose must be given a significantly wider meaning than the ‘scope’ of the particular rights defined in the article itself. Thus, in the specific context of article 4 of the Convention, the fact that work or service falling within the definition of ‘normal civic obligations’ in paragraph 3 are expressly excluded from the scope of the right guaranteed by paragraph 2 of that article, in no sense means that they are also excluded from the ambit of the Article seen as a whole.”

The breadth of ambit in this context has been repeatedly emphasised by not only the ECtHR but also our domestic courts (see, e.g., Smith at [62]). In our view, that provides a helpful backdrop against which to address the issue of ambit in this case.

- ii) Mr Watson relied on the reference to “core of a right” being “more appropriate language” in connection with an infringement of a substantive Convention right, submitting that the use of this phrase by Lord Bingham in Clift shows that, at least in some contexts, it remains necessary to demonstrate an infringement of an interest that is close to the core right. However, we consider this reliance is mis-placed. As the Master of the Rolls made clear in Smith, the phrase “the core of [a Convention] right” as used by Lord Bingham in Clift is to be understood as nothing more than requiring that there is an interference with the core values that are protected by the right in question. At [46], the Master of the Rolls said:

“... Lord Bingham’s reference to a ‘core value’ (in paragraph [4] of M) is more apposite than his reference to ‘the core of ... a right’ (in paragraph [13] of Clift) when considering whether the facts fall within the ambit of one of the substantive Convention provisions, for the purposes of article 14. Infringement of the ‘core of a right’ is more appropriate language in connection with an infringement of one of the provisions of the Convention conferring a substantive right rather than a positive modality which engages article 14 because it is discriminatory....”

As we have explained, the case before us is essentially a “positive modality” case; but, in any event, the Master of the Rolls was talking about the mere use of language, and not the substance of the article 14 ambit test.

- iii) In our view, Mr Watson’s focus on the relevant substantive Convention right – as opposed to the core value underpinning the right – effectively introduces, for the application of article 14, the requirement for a breach of that substantive right by the back door. There is no such requirement.
- iv) His reliance on Bonner is also, in our view, misplaced. The reference to “Kaiyam” in the quoted passage upon which he relies (see paragraph 64 above) is to R (Kaiyam) v Secretary of State for Justice [2014] UKSC 66; [2015] AC 1344 in which it was held that the obligation to provide ISPs with a real opportunity for rehabilitation arose, not out of article 5.1 of the ECHR, but as a duty throughout the custodial term ancillary to article 5. The Supreme Court construed the obligation thus to avoid the consequence, which they feared, of a state having an obligation to release a dangerous offender if he was not afforded a proper opportunity to engage in rehabilitative courses etc. However, Mr Kaiyam subsequently made an application to the ECtHR, complaining of violations of article 5.1 (see paragraph 62 above). That court rejected the complaint as manifestly unfounded but, in doing so, denied the existence of such an ancillary duty, concluding that the obligation to provide ISPs a real opportunity for rehabilitation arose out of article 5.1 itself: without such an opportunity, it held that, post-tariff, detention would be arbitrary and thus in

breach of article 5.1. The court thus applied the general principle established in cases such as James v United Kingdom (2012) 56 EHRR 12 (which concerned a category of ISPs who, post-tariff, had been unable to access courses recommended by the Parole Board) that article 5.1 requires conditions of detention to be consistent with the purpose of the detention. That analysis was adopted by the Supreme Court in Brown (at [44]). Bonner did no more than confirm that to have been the case.

- v) Thus, there can be no breach of article 5.1 as a result of a failure to provide an opportunity to rehabilitate until after tariff expiry; in that sense, article 5.1 strictly speaking does not require such an opportunity during the tariff period. But it does not mean that what happens pre-tariff is irrelevant because, in considering whether a delay in access to required courses resulted in a (post-tariff) violation of article 5.1, the court “must have regard to the detention as a whole”; and “the applicant’s general progression through the prison system must be assessed in the light of the particular circumstances of the case” (James at [201], quoted by Lord Reed in Brown at [20]).
- vi) We have carefully considered Davis LJ’s observations on this issue in Ryder. He was undoubtedly right to say that the claimant in that case had “no right under domestic law to seek early release” and that he had “no right to liberty at this stage” and that he had “no legal right to such a transfer”. But it is his observations as to ambit of substantive Convention rights for the application of article 14 with which we are concerned, and which are contentious. They were of course obiter. Further, Mr Squires submitted that the cases are distinguishable, because in Ryder the only issue was whether he was entitled to legal aid for an oral hearing before the Parole Board; and the differential treatment (being deprived of legal aid) was not intrinsically connected to the core value of liberty as is the Claimant’s case here where he is prevented from having his case for transfer to open conditions considered at all. However, insofar as Davis LJ focused exclusively on the article 5 right, as opposed to the core value underlying that right, we respectfully consider that it is not in line with the later case of Smith and the general flow of the European and domestic jurisprudence as to ambit; and we would decline to follow it.
- vii) Given the above, and the generally wide interpretation given to “ambit” by the ECtHR and the domestic courts, we consider that access to facilities pre-tariff which are aimed at rehabilitation (i.e. at reducing risk, and evidence that reduction) fall within the ambit of article 5. That is clearly so post-tariff; but we consider such facilities pre-tariff, when aimed at reducing risk sufficiently to allow release at or after tariff, whilst not capable of founding a claim for breach of article 5, fall within the ambit of article 5 for the purposes of the application of article 14. There is of course a different scheme that is generally applied to ARE prisoners (i.e. TERS) from that applied to all other prisoners (under section 28 of the 1997 Act). However, as Dr Bennett frankly accepts, there 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. Under that scheme, if the Claimant is not removed at his tariff expiry, then he is entitled to seek his release. 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. We note that the bar on ARE prisoners being transferred to open conditions is absolute, and not restricted merely to the pre-tariff expiry period. 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.

- viii) Even though the Claimant has no right to liberty before his tariff expires, in our view there is more than a tenuous connection between this interest and the core values that are protected by article 5, namely protection from arbitrary or unjustified deprivation of liberty: the connection is clear and coherent. Accordingly, the application of rule 7(1A) falls within the ambit of article 5, and thereby triggers the protection of article 14.
- ix) We consider that this construction of ambit in this context at least sits easily with the domestic authorities to which we have referred (see paragraph 30 above) to the effect that, as the withholding of transfer prevents progress towards release, a transfer to open conditions is “to do with [the prisoner’s early] release” for the purposes of the jurisdiction of the Parole Board.
73. We therefore turn to the ambit of article 8 in this context.
74. It is, of course, possible for conduct to fall within the scope of more than one Convention right. Article 8, in particular, has a broad reach which may overlap with other rights, including article 5: a prisoner who is lawfully deprived of his liberty retains a right to respect for private and family life. Moreover, such retained rights may be regarded as having enhanced importance by reason of the loss of liberty (see R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 at [5] per Lord Bingham, and Munjaz v United Kingdom [2012] MHLR 351 at [80]). Thus, matters such as interference with prisoner correspondence and searching of prisoners may raise issues under article 8 (see Golder v United Kingdom (1975) 1 EHRR 523 and Wainwright v United Kingdom (2007) 44 EHRR 40).
75. However, article 8 covers interests that are distinct from those that are protected by other Convention rights. Although its field of coverage is broad, there are limits. It is important to observe those limits in order to prevent its use becoming “overblown” (see R (Wood) v Commissioner of Police of the Metropolis [2010] 1 WLR 123 at [22] per Laws LJ). In particular, just because a complaint narrowly fails to fall within the scope of another Convention right does not mean that it will meet the criteria for an article 8 claim (see R (ASK) v Secretary of State for the Home Department [2019] EWCA Civ 1239 at [74]-[75] per Hickinbottom LJ). Further, the ECtHR has consistently emphasised that the choice of the means by which article 8 rights are secured is essentially a matter for a contracting state’s margin of appreciation (see, e.g., Söderman v Sweden (2013) ECtHR Application No 5786/08 at [76]). It is therefore frequently the case that article 8 rights are considered adequately protected by the protection of other Convention rights which are engaged in the same circumstances.
76. There seems to us little doubt that the transfer of the Claimant into open conditions would afford him better opportunities for interaction with others (including his family

members) of an extent, nature and quality that is simply not possible in a closed prison. However, the denial of those opportunities is an inevitable consequence of his imprisonment. If his imprisonment is lawful under article 5, then we do not consider that these are values that are capable of falling within the ambit of article 8. It is clear that any increase in family contact or enhancement of private life as a result of being in open conditions is purely incidental to the assessment of continuing risk – and, if necessary, the reduction of any residual risk – that open conditions are primarily designed to accomplish. In our view, to get within the ambit of article 8, it would be necessary for the Claimant 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). He has not done so.

77. Accordingly, in our view, the Claimant’s complaint does not fall within the ambit of article 8 so as to engage, by that distinct route, the protection of article 14.
78. However, for the reasons we have given, the Claimant has satisfied us that his complaint does fall within the ambit of article 5 for these purposes.

Ground 1: Article 14 Status

79. The second question is whether the difference in treatment of which the Claimant complains is on the ground of a “status” covered by article 14. We do not find this a simple issue.
80. Article 14 prohibits 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”. However, as Leggatt LJ indicated recently in R (SC) v Secretary of State for Work and Pensions [2019] EWCA 615 at [61]-[62], this formulation is not straightforward, because it gives, as examples of “status”, a series of characteristics without any obvious common factor such that it is impossible to formulate a clear or coherent test of what constitutes “status” in this context.
81. Nevertheless, even if it cannot be defined as such, certain propositions concerning “status” relevant to this case can be identified from the recent authorities, notably Stott (in which, following a review of the authorities, Lady Black at [56]-[63] discussed the propositions that could be drawn from the cases) and SC (especially at [60]-[69]), as follows:
 - i) Whilst the wording of article 14 makes clear that the possible grounds for discrimination under the article are not without limit, “other status” must be interpreted generously.
 - ii) As a result, cases in which an applicant has been held not to have a status falling within article 14 are rare. Nevertheless, there are some recent examples. In Minter v United Kingdom (2017) EHRR SE6, the ECtHR held that article 14 did not apply to a difference in treatment resulting from the application of a different sentencing regime introduced to offenders sentenced after a particular date; and, in the domestic context, in Sanneh v Secretary of State for Work and Pensions [2017] UKSC 73; [2017] 3 WLR 1486, the Supreme Court held that article 14 did not apply to a non-EU citizen who is the primary carer of an EU citizen (a “Zambrano carer”).

- iii) Whilst “status” has often been said to derive from a “personal characteristic”, it need not be an inherent or immutable aspect of an individual’s personality: it can be based on a ground which is more a matter of personal choice or circumstances. As a result, rather than “personal characteristic”, “identifiable characteristic” (“... a phrase which assumes rather than provides a criterion for telling whether a ground of discrimination should be regarded as an ‘other status’...”: SC at [62] per Leggatt LJ) now tends to be the phrase of choice in the ECtHR. Characteristics which have been accepted by the ECtHR as providing “status” for the purposes of article 14 have therefore included, for example, country of residence (Carson v United Kingdom (2010) 51 EHRR 13, followed by the House of Lords in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173 and by the Supreme Court in R (A) v Secretary of State for Health [2017] UKSC 41; [2017] 1 WLR 2492), and the nature of a custodial sentence in the form of a determinate sentence of more than 15 years (Clift v United Kingdom (13 July 2010) (Application No 7205/07), accepted by the Supreme Court in Stott).
- iv) A further characteristic accepted as providing “status” for the purposes of article 14 is immigration status (Bah v United Kingdom (2012) 54 EHRR 21 at [45], accepted without argument by the Supreme Court in R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57; [2015] 1 WLR 3820 and by the Court of Appeal in SC). In Bah, which particularly concerned the category of those granted leave to enter the UK without recourse to public funds, the ECtHR noted that (a) a wide range of legal and other effects flow from a person’s immigration status (see [46]); and (b) it did not matter that immigration status was a status conferred by law, as opposed to being an inherent or immutable personal characteristic such as gender or race (see [47]).
82. Pausing there for a moment, whilst this does not assist in identifying what characteristics will be sufficient to found status for the purposes of article 14, it is also important to note that these authorities make clear that not every status falling within article 14 is treated the same when it comes to the last criterion, i.e. justification. In Bah (at [47]), it was said:

“The Court recalls that the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States. As observed above at [45], immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. In the applicant’s case, while she entered the United Kingdom as an asylum seeker, she was not granted refugee status. She cannot therefore be described as a person who was present in a contracting state because, as a refugee, she could not return to her country of origin. Furthermore, she subsequently chose to have her son join her in the United Kingdom. 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. Furthermore, given that the subject matter of this case - the provision of housing to those in need - is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide.”

That theme was picked up recently in SC, where Leggatt LJ said (at [66]):

“In [R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63; [2009] 1 AC 311], at [5], Lord Walker depicted the grounds covered by article 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 article 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 WLR 3250 at [21].”

We shall return to this aspect when we deal with justification (see paragraphs 93-120 below).

83. Mr Squires submits that being subject to a deportation order and ARE is an “immigration status” – and, indeed, an immigration status with particularly significant consequences, in that a person who falls into that category has no lawful basis for residence in the UK such that he is liable to immediate removal and, in the meantime, is unable to work or have access to the health service or housing. He submits that the consequences of being in the category are an important factor in concluding that it is a status for article 14 purposes.
84. Mr Watson accepts that Bah confirms that immigration status may be a status for the purposes of engaging article 14 – and, without conceding the point, accepted that it might be difficult for him to argue that being the subject of a deportation order would not be a status for these purposes – but he submits that the distinction between those who are subject to deportation orders and fall within rule 7(1A), and those who are the subject of such orders who do not fall within that rule, is based upon the merely

procedural circumstance of whether or not an individual's appeal rights have been exhausted. That is insufficient to create a status for those who are the subject of a deportation order and who are ARE.

85. The authorities on this issue are not entirely consistent. Indeed, despite Mr Watson's reluctance to argue that being the subject of a deportation order is not a "status" for these purposes – a reluctance which, following Bah, we fully understand – there are several domestic authorities suggesting that it is not.
86. R (Brooke) v Secretary of State for Justice [2009] EWHC 1396 (Admin) is one of several authorities involving the different treatment of FNPs for the purposes of the HDC scheme, which allows the Secretary of State to release on HDC a prisoner who is the subject of a determinate prison term before the custodial part of the term has expired, upon which Mr Watson relies on the issue of justification. The purpose of HDC is to "manage more effectively the transition of offenders from custody back into the community" (PSO 6700 Home Detention Curfew, as quoted in R (Francis) v Secretary of State for Justice and Secretary of State for the Home Department [2012] EWCA Civ 1200 at [15]). In Brooke, at [15], Blake J (with whom Sir Antony May PQBD agreed), held that 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 by way of deportation at the end of their minimum custodial term. The two groups are not analogous, and, so it was held, the latter did not have a status within the meaning of article 14.
87. That was approved by the Court of Appeal in Francis, and R (Mormoroc) v Secretary of State for Justice [2012] EWCA Civ 1200, which concerned essentially the same issue. In Mormoroc, Flaux LJ (with whom Gross and Lindblom LJJ agreed), considering the difference in treatment of FNPs and other prisoners for HDC purposes, said this:

"59. In my judgment, that difference in treatment is based on liability to be deported or, as [Counsel for the Secretary of State] put it, eligibility to be removed. That this and not nationality was the true basis for the difference in treatment was correctly identified by Sir Anthony May P in Brooke at [30]... and by Pill LJ in Francis at [40]-[42].... As Lindblom LJ put it in argument, this difference in treatment is in fact 'nationality blind'.

60. It follows that [the Claimant's] submissions about discrimination all fail at the first hurdle, whether framed under section 13 of the Equality Act or article 14 of the ECHR. The policy in paragraph 2.47 of PSI 52/2011 is not drawing a distinction on the grounds of nationality, but on the basis of liability or eligibility to deportation. In those circumstances, the submissions which [the claimant] advanced in relation to the test for causation in discrimination cases are of no avail. Whichever test is applied, the reason for the difference in treatment in this case was not nationality.

61. ... In my judgment, both Francis and Sorrano were correctly decided and establish that the difference in treatment

under the HDC policy is not based on nationality but on immigration status, so that no question of unlawful discrimination arises.”

88. It is not now suggested that a difference in treatment for those the subject of deportation order is based on nationality; but that does not detract from the proposition of Flaux LJ that being the subject of a deportation order (as an immigration status) does not confer a status for article 14 purposes. We note that Bah (in which judgment was handed down on 27 September 2011) does not appear to have been cited to the court in either Francis or Mormoroc; at least, there is no reference to it in those judgments.
89. It is true that both parties before us stressed that the group into which the Claimant fell, as those suffering treatment that was the subject of the alleged discrimination, was not in their view simply those the subject of a deportation order, but rather those who were ARE prisoners, i.e. who were the subject of a deportation order *and who were ARE*. However, we are not entirely convinced by that distinction. In our view, when looked at realistically, the essential feature of ARE prisoners in this context is that they are the subject of a deportation order, the relevant regulations doing no more than exempting those who are the subject of deportation orders but who have an appeal or potential appeal against that order from the significant consequences of such an order by giving them the benefit of the doubt by assuming the appeal will be successful.
90. Mr Watson accepted generally that status need not be an inherent or innate aspect of an individual’s personality but may reflect a person’s circumstances from which legal consequences flow, and particularly that immigration status (including having leave to remain on conditions which have a legal consequence) may be a status for article 14 purposes. Following Bah, that acceptance was inevitable. As Flaux LJ accepted in Mormoroc, being the subject of a deportation order – and, in our view, equally being an ARE prisoner – is essentially an immigration status; and, as Mr Squires submitted, an immigration status with significant legal consequences. Leaving authority aside for one moment, once those concessions are made, it seems to us that on principle it inexorably follows that being subject to a deportation order – and, equally, being the subject of a deportation order and ARE – is a status. Bah appears to support that analysis and conclusion
91. Therefore, although Mormoroc – an authority binding on us – may be against this as a proposition, we consider that, on principle and on the basis of Bah, the status test is met in this case. However, for the reasons given below, we do not consider that this issue is determinative in this case; and, in the circumstances, we decline to determine it. In favour of the Claimant, we will simply proceed on the basis that an ARE prisoner is a status for the purposes of article 14 so that discrimination on that ground is prohibited by that article.
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 (see paragraphs 94-121 below).

Ground 1: Article 14 Justification

93. The last, and often vital, question for the determination of an alleged breach of article 14 is whether there is an “objective and reasonable justification” for the difference in treatment to which the measure (i.e. in this case, rule 7(1A)) gives rise. It is well-established and uncontroversial that this requires the measure to be in pursuit of a legitimate objective, and that the means employed to realise that objective (including the adverse effects of those means) are proportional.
94. In Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700 at [74], Lord Reed JSC formulated the test in four questions, as follows:
- “(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
 - (2) whether the measure is rationally connected to the objective;
 - (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
 - (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.”
95. As Leggatt LJ observed in SC (at [84]), put more shortly, the justification question can be framed in terms of whether the impact of the right’s infringement is disproportionate to the likely benefit of the impugned measure (Bank Mellat at [74] per Lord Reed); or whether a fair balance has been struck between the rights of the individual and the interests of the community (Bank Mellat at [20] per Lord Sumption JSC).
96. In applying this test, it is also well-settled that a state has a “margin of appreciation”, or rather “margin of judgment”, helpfully discussed by Leggatt LJ in SC at [85] and following. In particular, he said:
87. ... [T]here are compelling reasons for according the full area of judgment allowed to the UK under the [ECHR] in matters of social and economic policy to the legislature and the executive. Within the UK’s constitutional arrangements, the democratically elected branches of government are in principle better placed than the courts to decide what is in the public interest in such matters. Those branches of government are in a position to rank and decide among competing claims to public money, which a court adjudicating on a particular claim has neither the information nor the authority to do. In making such decisions, the legislature and the executive are also able and institutionally designed to take account of and respond to the

views, interests and experiences of all citizens and sections of society in a way that courts are not. Above all, precisely because decisions made by Parliament and the executive on what is in the public interest on social or economic grounds are the product of a political process in which all are able to participate, those decisions carry a democratic legitimacy which the judgment of a court on such an issue does not have. For such reasons, in judging whether a difference in treatment is justified, it is now firmly established that the courts of this country will likewise respect a choice made by the legislature or executive in a matter of social or economic policy unless it is ‘manifestly without reasonable foundation’.

88. ...

89. Although it is not immediately obvious how the ‘manifestly without reasonable foundation’ test relates to the assessment of proportionality that the court must undertake, the explanation may be that the court is required to ask whether the difference in treatment is manifestly disproportionate to a legitimate aim. This would accord with the statement of the European Court in Blečić v Croatia (2005) 41 EHRR 13 at [65], that it will accept the judgment of the domestic authorities in socio-economic matters ‘unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued’ (emphasis added). It also reflects how the Supreme Court applied the test in the recent case of In re McLaughlin [2018] UKSC 48; [2018] 1 WLR 4250, at [38]-[39] (Baroness Hale) and [83] (Lord Hodge)”.

97. In SC, the relevant issue before the court was whether the limit of two on the number of children in respect of whom child tax credit (and its replacement, universal credit) is payable, imposed by the Welfare Reform and Work Act 2016, was incompatible with article 14 of the ECHR taken with articles 12 and 8 (the right to marry and found a family). As is well-established, that clearly fell within the category of socio-economic policy.
98. Before us, there was some debate as to whether rule 7(1A) fell within that same category; but, in our view, that is not a binary question. The “area of judgment” referred to 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.

99. As we have already described (see paragraph 38 above), although the changes including rule 7(1A) were apparently triggered by a specific case of an FNO whose prospective transfer to open conditions was opposed by his victim's family, the policy background and aims of rule 7(1A) ("What is being done and why") were set out in paragraph 7 of an Explanatory Memorandum to the draft 2014 statutory instrument which accompanied the 6 August 2014 submission to the Secretary of State for approval and paragraph 2.6 of PSI 37/2014 (quoted at paragraphs 38 and 39 above respectively); and, in paragraph 28 of his statement, Dr Bennett set out what he considered to be the main strands of reasoning for the change (quoted at paragraph 40 above).
100. Pulling these sources together, the reasons for introducing rule 7(1A) can be seen to be effectively two-fold.
- i) IFNPs who are expected to be deported at tariff expiry do not require the opportunities for resettlement in the UK that are an inherent part of open conditions. Open prisons are a valuable but limited resource, which must be managed to ensure that spaces are used efficiently for those who will gain the most from them. For IFNPs to be prioritised for regime opportunities that support resettlement in the UK would be inconsistent with the Secretary of State's policy to remove ARE prisoners from the UK pursuant to TERS at the earliest opportunity, i.e. at tariff expiry.
 - ii) Allocation to open prison (or ROTL) always carries a risk of absconding. ARE prisoners may have an additional motivation to abscond due to the prospect of deportation. It would be inappropriate and unnecessary to introduce that risk for prisoners who have no need for the resettlement opportunities that open prison or ROTL offer.
101. Mr Squires submitted that these reasons do not justify rule 7(1A). The starting point, he submits, is to identify the mischief that the measure was intended to address; but, here, there is no evidence of any mischief. Prior to the introduction of the bar, ARE prisoners, like any others, could have been transferred to open conditions if they satisfied the applicable risk/benefit test. One factor that was then weighed in the balance was that a prisoner was in fact the subject of a deportation order (and, if it be the case, that the individual was ARE) which, in an individual case, may have affected the risks he posed (e.g. by absconding) and/or the benefits he might obtain (e.g. in terms of resettlement). There is no evidence, he submits, that this approach caused any difficulties, or created any "mischief". There was therefore no legitimate aim in the measure.
102. Looking at the particular aims upon which the Secretary of State relied, first, Mr Squires accepts that removing FNP from the UK at the first opportunity is a legitimate aim, particularly where a FNP poses a real risk of offending in the future and particularly given that keeping an offender in prison is expensive. But, he submitted, the release of an ARE prisoner at tariff expiry would not occur more quickly, or be made easier, if he

is barred from open conditions. Indeed, the opposite is likely to be the case as it would make it more difficult for an ARE prisoner to show that his risk had been reduced to an acceptable level; and therefore make it more likely that his release would be delayed. The measure therefore positively undermines the Secretary of State's stated aim of removing FNPs at the first opportunity.

103. Second, Mr Squires accepts that it is a legitimate aim for the Secretary of State to seek to conserve public resources in the way that prisoners are allocated to different prisons; but again, he submits, the measure constrains him in this regard. Relying on evidence put together by the Claimant's solicitor Daniel Guedalla in a statement dated 20 September 2019, Mr Squires submits that (i) it is more expensive to detain a prisoner in closed conditions than in open conditions, and (ii) there is less pressure on capacity in open condition than closed condition prisons, the latter being heavily overcrowded. The introduction of rule 7(1A) requires a certain category of prisoners (some of whom would otherwise be eligible for open conditions on the usual risk/benefit test) to be detained in closed conditions which are both more expensive and over-capacity. Rule 7(1A) therefore does not rationally pursue the aim of ensuring the most efficient use of prison estate.
104. Third, Mr Squires submits that it is simply wrong to proceed on the basis that prisoners who may be expected to be deported do not require resettlement opportunities. FNPs have no less a "need" for open conditions than any other prisoner; and someone in the position of the Claimant, who was convicted of a terrorist offence, may well require open conditions more than other prisoners given the need for him to establish that his risk, and susceptibility to influence and radicalisation, has reduced sufficiently on tariff expiry to secure his release. He will also benefit no less than other prisoners in being able to see his family more, and in better circumstances, than a prisoner in closed conditions.
105. The cases upon which the Secretary of State relies in support of the proposition that the courts have repeatedly upheld the legality of distinctions drawn between prisoners who are liable to deportation and those who will remain in the UK after completion of their custodial term (notably Brooke, Francis, R (Serrano) v Secretary of State for Justice and Secretary of State for the Home Department [2012] EWHC 3216 (Admin) which followed Brooke, and Mormoroc) all concern HDC which is, uncontroversially, a "scheme designed to promote resettlement in the UK community" (see Francis at [40]). Mr Squires submitted that they do not support the Secretary of State here, because open conditions are not designed only "to promote resettlement in the UK community" but also to ensure that an offender has a proper opportunity to evidence a reduction in risk sufficient to allow for his release after the expiry of his tariff period. He emphasised that, under the category of PSI 18/2012 which sets out the criteria for IFNPs convicted of terrorist offences who are not presumed suitable for TERS (see paragraph 27 above), one of the factors which the Secretary of State has to take into consideration is "the significant risk that such prisoners might present both in the UK and abroad".
106. Fourth and finally, Mr Squires accepts that it may be that some ARE prisoners pose a high risk of absconding or committing further offences, and thus will be unsuitable for open conditions; but others (including, perhaps, the Claimant) do not pose such a risk and would benefit substantially from the opportunities of further reducing the risks posed, and of evidencing reduced risk, given in open conditions.

107. Mr Squires submits that, in response to questions (1) and (2) posed by Lord Reed in Bank Mellat (see paragraph 94 above), rule 7(1A) is therefore not pursuing any legitimate aim in a rationally connected way.
108. However, insofar as it is, then, in response to questions (3) and (4) in Bank Mellat, he submitted that rule 7(1A) was not the least intrusive measure in the sense the scheme for the transfer to open conditions available to other prisoners could be applied to ARE prisoners without unacceptably compromising the achievement of the objectives of the rule; and, balancing the severity of the measure's effects on the rights of ARE prisoners to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. In making that submission, Mr Squires essentially relied on the same factors as those upon which he relied in submitting that to show the rule did not pursue any legitimate aim in a rationally connected way, e.g. the consequence of the rule was that ARE prisoners are more likely to spend more time in prison, at greater expense to the state and without the benefit of being better able to show that their risk has been reduced to an acceptable level and at a cost to their family life. It both increases the harm to the community, and reduces the benefits for individual ARE prisoners including the Claimant. He emphasised that, in individual cases where the risks outweighed the benefits, an ARE prisoner would not be transferred to open conditions under the scheme for other prisoners in any event.
109. Those submissions were admirably put; but we are not persuaded by them. In our judgment, the Secretary of State has provided adequate justification for rule 7(1A).
110. As indicated in Bah (see paragraph 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.
111. We agree with Mr Watson's overarching submission that, as the HDC cases indicate, 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. For the reasons we have given, contrary to the indication in Brooke and later cases, we are proceeding on the basis that that difference is such that those who fall within the latter category have a "status" for article 14 purposes. However, even in Brooke, Blake J made clear that, in any event, the 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”.

112. Similarly, in Francis (at [40]-[41]), Pill LJ (with whom, on this issue, Lloyd and Lewison LJ agreed) said:

“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.”

In subsequent cases, such as Serrano, that has been consistently followed.

113. Mr Squires submitted that this claim was distinguishable from the HDC cases, because the aim of the HDC scheme is to promote resettlement within the UK community. He disputes the Secretary of State’s assertion in relation to rule 7(1A) that that is also a main aim of open conditions. He contends that none of the reasons for transfer to open conditions (i.e. (i) to enable the risk posed by a prisoner to be tested in conditions most closely resembling those they would face if released, and to enable them to evidence risk reduction, (ii) to assist a prisoner preparing for resettlement after release and (iii) to ensure that a prisoner is not subjected to a more restrictive regime than is necessary to keep the public safe) is applicable only to those who are to resettle in the UK after release. They also apply to someone in the Claimant’s position.
114. However, as we have described (paragraph 86 above), the purpose of HDC is to “manage more effectively the transition of offenders from custody back into the community”; and that appears to us to be similar to the underlying aim of open conditions. The essential purpose of both HDC and open conditions is to manage the transition from custody to living in the community, but particularly living in an identified community (including identified family) into which the prisoner is likely to resettle upon release. We consider the HDC cases analogous to this case; and we find the conclusion in the HDC cases as to justification, which is not challenged by Mr Squires and with which we agree, is strongly supportive of the Secretary of State’s submission that rule 7(1A) is justified in article 14 terms.
115. As Lord Reed said in Brown (at [29]), to avoid a violation of article 5, what is required by the state is that:

“... an opportunity must be afforded to the prisoner which is reasonable in all the circumstances, taking into account, among all those circumstances, his history and prognosis, the risk he presents, the competing needs of other prisoners, the resources available and the issue which has been made of such rehabilitative opportunity there has been”.

116. However, in determining when and how a real opportunity to rehabilitate is provided, the state has a wide margin of appreciation, management of a prisoner being essentially a matter for the Secretary of State (see paragraph 7 above). In particular, so long as the opportunity afforded to every prisoner is reasonable in all the circumstances, the Secretary of State need not afford identical opportunities to each category of prisoner.
117. As we have described, there are different regimes for ARE prisoners and ISPs who are not, i.e. TERS and the section 28 regime respectively. One difference is, of course, the non-availability of open conditions in the former case, which lies at the heart of this claim. However, we consider that difference is justified. In coming to that conclusion, we have taken into account, in particular, the following.
- i) For the majority of ARE prisoners, TERS provides for mandatory removal from prison and the UK at tariff expiry; and TERS therefore has distinct advantages over the scheme applying to other ISPs, notably in not requiring a prisoner to show reduced risk to an acceptable level to get out of detention. For many ARE prisoners, that will mean getting out of detention earlier than otherwise would be the case.
 - ii) Those under the section 28 regime have opportunities to evidence reduced risk, and reduce any remaining risk, in open conditions including ROTL. Those the subject of TERS do not have those particular opportunities; but they do have different opportunities to reduce their risk and to evidence it, i.e. through courses etc which take place in closed conditions and through Progression Regimes in closed conditions. The express purpose of Progression Regimes is to be an effective alternative to open conditions for those (like ARE prisoners) who are excluded from open conditions (see paragraph 45(i) above).
 - iii) For the majority of ARE prisoners who are able to leave custody without evidencing any particular level of reduced risk, the primary purpose of open conditions (i.e. to enable prisoners to evidence risk reduction, and further reduce any remaining risk) does not apply.
 - iv) The only ARE prisoners who will not be removed at tariff expiry, and whose risk in the future will be assessed before removal or release, are those who have been convicted of terrorist offences. Even they will be removed under TERS at the expiry of their tariff period unless the PPCS on behalf of the Secretary of State considers “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” (paragraph 2.3 of PSI 18/2012 quoted at paragraph 27 above). They will only be refused TERS if they have committed terrorist offences which, even in the context of such offences, are “very serious”; and they pose a significant risk in the UK and abroad. It seems to us that the Secretary of State is fully entitled to have a different regime for the reduction and assessment of risk posed by IFNPs who have committed “very serious” terrorist offences in the UK.
 - v) In respect of such prisoners, the risk assessment is in respect of whether the individual poses a significant terrorist threat to the UK or abroad. We do not consider that it is irrational for the Secretary of State to reserve the assessment of that risk to himself, in consultation with the NOMS Extremism Unit, rather

than delegating it to the Parole Board. Any decision of the Secretary of State could of course be the subject of challenge by way of judicial review.

- vi) Otherwise, if they are not removed at tariff, such ARE prisoners will fall within the section 28 regime. We accept that a prisoner who may be required to show that he does not pose a terrorist risk to the UK or abroad under TERS, or pose a risk above an acceptable risk for the purposes of a Parole Board assessment under the section 28 scheme, will not have the benefit of open conditions which might give him a better opportunity than the opportunities within closed conditions to show that he does not pose such a risk. However, we consider that such a difference is justified.
- vii) In respect of showing an appropriate level of risk under either scheme, the prisoner will have access to the main means of reducing risk in terms of courses, treatment etc which are available in closed conditions (where the main facilities for risk reduction are provided: see paragraph 31 above); and access to Progression Regimes which are specifically designed to evidence level of risk in closed conditions. The Claimant has had the opportunity of applying for such a regime, which he has not enthusiastically pursued, apparently (and understandably) placing a higher value in being close to his family who live in the UK and who can visit him than in seeking to reduce his risk (or evidence such a reduction) in another prison in circumstances in which it is likely that he will be removed to Italy at tariff expiry in any event.
- viii) In respect of the further aim of open conditions, namely to assist with the resettlement of an offender, “resettlement” has to be seen in the context of risk reduction, i.e. resettlement without any significant increase in risk; but risk is not a criterion for removal under TERS.
- ix) In our view, the Secretary of State is fully entitled to take a different public policy stance towards the “resettlement” of IFNPs who are ARE prisoners who will very probably be removed on tariff expiry from that taken in respect of national prisoners who will, upon release, almost certainly be required to resettle into a UK community. For example, one of the express aims of ROTL under open conditions is to help the offender build links with both family and local communities into which he is likely to resettle upon release, including staying overnight at his resettlement address (see paragraph 11 above). For those who are not going to be released into a UK community but rather removed from prison and the UK, whilst open conditions may have some benefits in terms of increasing the ability to enjoy family and private life, they will not give a prisoner an opportunity to build such links in the community in which he is likely to resettle. As we have already noted (see paragraph 7 above), a state has a wide margin of judgment as to both the management of prisoners (including different categories of prisoners) and how a real opportunity to rehabilitate is provided.
- x) The benefits in terms of increasing the ability to enjoy family and private life etc, of which detention under a lawful sentence to a substantial extent deprives an individual, are at most peripheral to the aims of open conditions.

- xi) We are unimpressed by the argument that, in making rule 7(1A), the Secretary of State acted irrationally, by proscribing open conditions for individual ARE prisoners whose risk profile would warrant transfer under the section 28 scheme, because closed conditions are oversubscribed and more expensive than open conditions. 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-capacity; but the Secretary of State does not act irrationally simply because he places a particular category of prisoner in particular conditions.
 - xii) Nor does the fact that the cost per prisoner place is significantly greater for closed than open prisons prevent the Secretary of State from rationally concluding that the efficient use of the prison estate favours keeping ARE prisoners in closed conditions. He is entitled to conclude that the finite resource of open prison places should be prioritised for national prisoners who are, as a class, far more likely to be released into the local community once they have proved themselves in open conditions, than for ARE prisoners who are, as a class, more likely to be removed from the UK without having to demonstrate any reduction in risk.
 - xiii) Mr Squires sought to show that, once a prisoner has been assessed as suitable for open conditions, the “waiting time” for transfer to open conditions has remained reasonably constant, and short; and that it did not significantly reduce when rule 7(1A) was introduced. So, the argument goes, rule 7(1A) has not led to any quicker access to open conditions for national prisoners; and its removal would not be detrimental to national prisoners. However, even if that were so, it is not to the point. The Secretary of State is entitled to reach the policy conclusion that open conditions should be prioritised for those in respect of whom the policy aim is to secure safe release into the community within the UK. In any event, we do not think that it can safely be concluded that rule 7(1A) has no limiting effect on the pressure on open prison resources. The evidence shows that, as we have said, open prisons are operationally full. 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.
 - xiv) It is also not irrational or otherwise unlawful for the Secretary of State to take into account that, by giving ARE prisoners the opportunity to enjoy ROTL, the risk of those prisoners absconding necessarily increases. It is not to the point, if it be the case, that it may not increase as much as for non-ARE prisoners.
 - xv) Accordingly, 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.
118. Mr Squires had a backstop point: even if it might be justified to treat ARE prisoners differently – perhaps by introducing a higher threshold before they could achieve a transfer to open conditions – the Secretary of State was not justified in depriving himself

entirely of a residual power to consider such transfer, perhaps exceptionally, on a case-by-case basis. We do not agree. For the reasons we have given, ARE prisoners are in a materially different position from national prisoners such that it is generally justified to treat them differently when affording access to open conditions. The material differences (including, primarily, that the policy aim is to secure removal from the UK rather than release and resettlement within the UK) apply as a matter of generality. There are unlikely to be highly fact-sensitive differences between many individual ARE prisoners which impact significantly on this material difference. In our view, the Secretary of State is therefore entitled to exclude them, as a class, from consideration for transfer to open conditions. There is no legal requirement to give individualised consideration to every single ARE prisoner with the consequential resourcing requirements, and the raising of a (likely unrealistic) expectation of transfer to open conditions. In any event, for those ARE prisoners who are not removed at tariff expiry (which is likely to be very much the exception), there is scope for individualised consideration on the issue of release.

119. Therefore, in summary:

- i) We consider that rule 7(1A) has a legitimate aim. It is legitimate for the Secretary of State to treat ARE prisoners as a category differently from other prisoners by not allowing them access to open conditions, because he can, as a matter of policy, legitimately favour those who are overwhelmingly more likely to resettle in a UK community after release than be removed to another state on tariff expiry. He can also legitimately take into account the risk of absconding posed by ARE prisoners if they are allowed in open conditions.
- ii) We consider that rule 7(1A) is rationally connected to that aim.
- iii) We do not consider that a less intrusive measure could be used without unacceptably compromising that aim. In particular, if ARE prisoners were able 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. That assessment for most would be wasteful and unnecessary, and would result in both the deprioritisation of domestic prisoners and in an increased risk in ARE prisoners absconding.
- iv) Rule 7(1A) will have no effect on most ARE prisoners. In respect of those convicted of terrorist offences, we accept that it may have some adverse effect; but we consider that its effects on those prisoners looked at as individuals are outweighed by the extent to which the measure will advance its legitimate aims.

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.

Ground 2: Rationality

121. Ground 2 was, from the Claimant's point of view, something of an insurance policy against a finding in the Secretary of State's favour on the issues of "ambit" and/or

“status”. In that event, Ground 1 would have failed because article 14 would not have been triggered. The Claimant would then have sought to raise much the same points that were argued on the question of justification in support of a contention that rule 7(1A) was irrational, and therefore outside the scope of the rule-making power afforded by section 47 of the Prison Act 1952.

122. As it is, so far as article 5 is concerned, we have determined the question of “ambit” in the Claimant’s favour, and we have proceeded on the assumption that the Claimant has a relevant status for the purpose of article 14. We therefore considered the question of justification within the context of Ground 1. Mr Squires realistically recognised that Ground 2 did not add to his arguments on justification.
123. Having concluded that the discriminatory effect is justified for the purpose of article 14, it necessarily follows, for essentially the same reasons, that the rationality challenge also fails. The effect of the rule is rationally connected to its aim (see paragraph 117 above), and the Secretary of State was entitled to exclude ARE prisoners, as a class, from consideration for transfer to open conditions without reserving a power to do so on a case by case basis (see paragraph 118 above).
124. Ground 2 consequently also fails.

Conclusion

125. For those reasons, we dismiss the claim.