Neutral Citation Number: [2019] EWHC 488 (Admin)

Case No: CO/3377/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2019

**Before** :

**THE HONOURABLE MR JUSTICE SUPPERSTONE**

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**Between :**

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| **THE QUEEN on the application of JERRY FOLEY** | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant** |
| **- and -** | |
| **SECRETARY OF STATE FOR JUSTICE** | **Interested Party** |

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**Philip Rule and Raza Halim** (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
**David Blundell and Julia Smyth** (instructed by **GLD**) for the **Defendant**
**The Interested Party was not represented**

Hearing dates: 19 & 20 February 2019

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# Approved Judgment

**Mr Justice Supperstone :**

## Introduction

1. The Claimant, Mr Jerry Foley, an Irish citizen, challenges the decision of the Defendant, the Secretary of State for the Home Department ("the Secretary of State"), dated 18 April 2017 refusing to deport him to the Republic of Ireland ("the decision").

2. On 11 August 2010 the Claimant received an indeterminate sentence of imprisonment for public protection ("IPP") for an offence of robbery in possession of an imitation firearm. The minimum term which he was to serve before consideration of release was four years. That period expired on 11 April 2014. He remains in custody because of the risk he poses.

3. The Claimant complains that the decision deprives him of removal from prison through the deportation scheme known as the "Tariff-Expired Removal Scheme" ("TERS"), operated by the Interested Party, the Secretary of State for Justice. That is a scheme that, he says, "other indeterminate-sentenced foreign national prisoners are entitled to and that enables removal from the UK at the point of tariff-expiry" (Detailed Statement of Facts and Grounds of Claim ("SFG"), para 1). The Claimant's liberty, he contends therefore, is also affected by the decision.

4. Permission to apply for judicial review was granted by Lambert J on 5 February 2018.

## Factual Background

5. The Claimant was born on 14 April 1975 in Cork in the Republic of Ireland.

6. Passing sentence in the Crown Court at Cardiff on 11 August 2010 HH Judge Stephen Hopkins QC referred to the Claimant's previous convictions and to "what can only be described as an appalling record". The judge continued:

> "You have two convictions in the United Kingdom, the second being dwelling-house burglary for which you received 18 months' detention in a Young Offender Institute as a sentence, but it is your convictions in the Republic of Ireland that are most significant. Since 1995 you have committed no less than ten offences of robbery or attempted robbery. Those, like any other of the offences which appear upon your long record result, it seems, from your dual addictions to alcohol and heroin." (Transcript 3B-D).

7. On 4 April 2012 the Claimant was notified that the Secretary of State was considering whether he ought to be deported. On the same day the Claimant completed the questionnaire attached to the notification letter.

8. On 16 July 2012 the Claimant was notified that the Secretary of State had decided not to take further action on this occasion.

9. On 7 January 2016 the Claimant's solicitors, Duncan Lewis, wrote to the Secretary of State requesting reconsideration of the decision not to deport the Claimant. They attached a letter dated 8 May 2014 from the Claimant's previous representatives

which stated that the Claimant met the criteria for deportation and should be subject to TERS.

10. On 19 January 2016 the Secretary of State notified the Claimant that the decision not to deport was maintained. The letter states:

> "Further consideration has been given to the decision not to deport Mr Foley, which was communicated to him in our letter dated 16 July 2012. Careful note has been taken of Mr Foley's offending and of his conduct while in custody. Nevertheless, the decision not to pursue deportation action against him on this occasion is maintained."

11. On 12 April 2017 the Claimant made further representations, seeking to persuade the Secretary of State to change his mind.

12. On 18 April 2017 the Secretary of State responded to Duncan Lewis, noting that the decision not to deport the Claimant had been reviewed and was maintained. The letter states, so far as is material:

> "1. I am writing with reference to your communication of 12 April 2017 in which you seek reconsideration of the decision not to deport Mr Foley.
>
> **Consideration**
>
> 2. You have referred to a 'blanket ban' against Irish nationals being eligible for the Tariff Expired Removal Scheme (TERS) because they are not liable for deportation.
>
> 3. It is acknowledged that the Home Secretary has decided the public interest is not generally served by enforcing the deportation of Irish nationals except in the most exceptional circumstances.
>
> 4. It is not accepted, as you have suggested, that this is a 'blanket ban'. Irish nationality does not provide automatic exemption from deportation. As a guide, deportation is still considered if an offence involves national security matters, or crimes that pose a serious risk to the safety of the public or a section of the public. For example, a person convicted and serving a custodial sentence of 10 years or more for:
>
> * a terrorism offence;
>
> * murder;
>
> * a serious sexual or violent offence.
>
> 5. It is not accepted, as you have suggested, that this policy is discriminatory. On the contrary, Irish nationals enjoy a more favourable position than nationals of other states with regard to

immigration control (e.g. the Common Travel Area) and deportation.

…

7. You have said that Mr Foley received a decision from the Home Office dated 12 July 2012 informing him that he was not liable to deportation. The decision letter incorrectly stated that he was serving a four-year sentence and not an IPP with a minimum tariff of four years. It is accepted that as a result of this conviction Mr Foley became liable to deportation and that the contents of our letter of 16 July 2012 may have been misleading.

8. You have said that in our letter dated 19 January 2016 it was stated that 'Mr Foley was not liable for deportation and wouldn't be eligible for the TERS scheme'. You have also said that one of the reasons given in that letter for Mr Foley not being considered for deportation was due to poor behaviour in prison. However, this is not the case. There is no reference in the letter to Mr Foley not being liable to deportation and no mention of TERS. Moreover, the letter does not state that Mr Foley's behaviour in custody was a factor in deciding not to deport him. It actually says:

'I am writing in response to your letter of 7 January 2016.

Careful note has been taken of Mr Foley's offending and of his conduct while in custody. *Nevertheless,* the decision not to pursue deportation action against him on this occasion is maintained.'

9. When assessing whether deportation was appropriate, and mindful of the very high threshold required under the terms of the agreement on deporting Irish nationals, careful consideration was given to Mr Foley's risk to the public. This included taking account of all relevant information pertaining to that risk such as his prior offending, his behaviour in custody and the views of the National Probation service. With regard to the latter, it was noted that although his offender manager considered that Mr Foley potentially presented a high risk of serious harm to the public, his likelihood of reconviction was assessed as medium.

10. It was concluded that despite the seriousness of his offending, and despite the fact that Mr Foley displayed behavioural problems in custody, the exceptional circumstances required for his deportation to be deemed to be in the public interest within the terms of the agreement on deporting Irish nationals were not present.

…

12. The decision not to deport Mr Foley has been reviewed. However, after careful consideration of all the available evidence it is not considered that exceptional circumstances exist in Mr Foley's case. It is considered that any continuing risk to public safety posed by your client is better managed in the UK under the formal offender management supervision which will take place on licence, in the community, during any non-custodial element of his sentence of imprisonment, and under any post-sentence or post-licence supervision in the community. …"

## Legal Framework

13. S.3(5)(a) of the Immigration Act 1971 ("the 1971 Act") provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. By s.5(1), where a person is liable to deportation, the Secretary of State may make a deportation order against him, that is, an order requiring him to leave and prohibiting him from entering the United Kingdom.

14. Section 32(5) of the UK Borders Act 2007 ("the 2007 Act") requires the Secretary of State to make an order for automatic deportation in respect of a foreign criminal in certain circumstances.

15. The right of EU citizens to move and reside within other Member States is provided for by Article 21 of the Treaty on the Functioning of the European Union ("TFEU"). The right of free movement is subject to the limitations and conditions set out in Directive 2004/38 ("the Directive"). The Directive is implemented in the UK by the Immigration (European Economic Area) Regulations 2016, which replaced the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The 2006 Regulations were in force when the Secretary of State made the decision not to deport the Claimant in July 2012. There is no material difference for present purposes between the two sets of Regulations ("the Regulations").

16. Articles 27 and 28 of the Directive deal with the substantive conditions that must be satisfied before a Member State may restrict freedom of movement and residence. They provide, so far as is material, as follows:

"Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> 3. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted…
>
> Article 28
>
> Protection against expulsion
>
> 1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
>  a. Have resided in the host Member State for the previous ten years…"

***The Regulations***

17. Regulation 23(6)(b) of the 2016 Regulations provides that an EEA national or the family member of an EEA national who has entered the UK may be removed if the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27.

18. Regulation 27(5) of the 2016 Regulations provides:

> "The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred

> by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision;
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person."

***Deportation and Irish Citizens***

19. Special provision has been made by Article 2 of the Protocol "*On the application of certain aspects of Article 26 TFEU to the United Kingdom and Ireland*", commonly referred to as the Protocol on the Common Travel Area. It states that the UK and Ireland "may continue to make arrangements between themselves relating to the movement of persons between their territories". It also provides that nothing in any provisions of the Treaty shall affect those arrangements.

20. On 19 February 2007 in a written ministerial statement (Hansard, column 4WS) the Secretary of State said as follows:

> "In my oral statement to the House on the prison estate, 9 October 2006, Official Report column 32, I explained the Department was considering treating Irish citizens as a special case in respect of pursuing their deportation from the United Kingdom. A number of hon. Members have asked me to review the Government's position on deporting Irish nationals in the light of the acknowledged close historic and political ties between the UK and the Irish Republic and I have done so.
>
> Since April last year, we have ensured that all nationals from European economic area countries who have received custodial

> sentences in the United Kingdom for two years or more have been considered for deportation. This has led to deportation action being pursued against a number of Irish nationals who have committed criminal offences here.
>
> > Irish citizens will only be considered for deportation where a court has recommended deportation in sentencing or where the Secretary of State concludes, due to the exceptional circumstances of the case, the public interest requires deportation.
>
> In reviewing our approach in this area we have taken into account the close historical, community and political ties between the United Kingdom and Ireland, along with the existence of the common travel area.
>
> Those Irish prisoners whose cases are not considered exceptional, whose sentences have expired and who are currently in custodial detention awaiting deportation will be released over the next week. I have already asked that the necessary arrangements be put in place to ensure that these prisoners receive proper supervision on their release from the probation service."

21. The Secretary of State's guidance on "EEA foreign national offender ('FNO') cases" (which no longer applies from 1 February 2017) reflected the special arrangements in place for Irish citizens. The relevant passages read as follows:

> "It is rare that Irish FNO cases will be considered exceptional enough to merit deportation. Irish nationality does not, however, provide automatic exemption from deportation regardless of individual circumstances.
>
> As a guide, deportation is still considered if an offence involves national security matters, or crimes that pose a serious risk to the safety of the public or a section of the public. For example, a person convicted and serving a custodial sentence of 10 years or more for:
>
> - A terrorist offence
> - Murder
> - A serious sexual or violent offence
>
> … Deportation of Irish nationals is only in the public interest in exceptional circumstances."

22. The current guidance (EEA decisions on grounds of public policy and public security, version 3, December 2017) states as follows:

> "The UK does not routinely deport Irish nationals. Irish nationality does not, however, provide automatic exemption from deportation. The Secretary of State may decide that, due to the exceptional circumstances of the case, deportation will be pursued, for example, where a person is convicted and serving a custodial sentence of 10 years or more for a terrorism offence, murder, or a serious sexual or violent offence. This includes anyone of dual Irish and another (non-British) nationality. It does not include non-EEA nationals who are the dependants of Irish nationals."

***The Tariff-Expired Removal Scheme ("TERS")***

23. S.199 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 inserted ss.32A and 32B of the Crimes (Sentences) Act 1997. S.32A materially reads:

> "**Removal of prisoners liable to removal from United Kingdom**
>
> (1) Where P—
>
> (a) is a life prisoner in respect of whom the minimum term order has been made, and
>
> (b) he 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).
>
> …
>
> (5) In this section—
>
> 'liable to removal from the United Kingdom' has the meaning given by section 259 of the Criminal Justice Act 2003;
>
> 'the relevant part' has the meaning given by section 28."

24. Accordingly, where a deportation decision is made it provides the Secretary of State for Justice with the power to order removal, once the FNO has served the minimum tariff, without authorisation from the Parole Board. All qualifying FNOs against whom a deportation decision has been made will be considered for TERS. The operation of the TERS system is provided for in Prison Service Instruction 18/2012 (as revised in October 2013).

**Grounds of Challenge**

25. The grounds for judicial review, set out at paragraph 31 of the SFG, are as follows:

> "(1) Failure to give adequate and sufficient reasons for the decision not to deport and/or failure to take into account all material considerations and/or failure to adopt a fair decision-making procedure at common law;
>
> (2) Failure to comply with section 32 of the United Kingdom Borders Act 2007;
>
> [And, *in the alternative to (2):*]
>
> (3) Fettering of the discretion to deport Irish prisoners by operation of a policy or practice of *de facto* blanket prohibition of deportation of the same;
>
> (4) Failure to exercise a discretion in the Claimant's case; and/or
>
> (5) Failure to apply the relevant published policy;
>
> (6) Violation of Article 8 of the European Convention on Human Rights ('ECHR') resulting from (i) inadequate procedural safeguards for protection of the right; (ii) the lack of foreseeability to the exercise of discretion; or (iii) the failure to conduct a balancing exercise of all relevant factors; or (iv) disproportionate or unnecessary interference with family life. In the further or alternative the corresponding provision of Article 7 of the European Union Charter of Fundamental Rights is breached.
>
> (7) Violation of Article 14 ECHR prohibition upon discrimination on the grounds of race or nationality: the starkly differential treatment of Irish national prisoners compared to other foreign-nationals, that, on consideration of all the evidence and circumstances, is entirely lacking in the objective justification that it is for the state to prove. In the further or alternative the corresponding provision of Article 21 of the European Union Charter of Fundamental Rights is breached."

26. The Claimant no longer pursues grounds 1 and 2. As for ground 1, I understand Mr Rule to accept that the Secretary of State has complied with the duty to give reasons as applied by this court in *R (Connell) v Secretary of State for the Home Department* [2017] EWHC 100 (Admin). As for the second ground, the Court of Appeal in *Connell* [2018] 1 WLR 3930 decided that the duty on the Secretary of State to make a deportation order under s.32(5) of the 2007 Act did not apply where the foreign criminal was an EEA national; that, rather, in such a case the issue of deportation was to be determined in accordance with the Regulations.

## The Parties' Submissions and Discussion

### *Ground 3: Fettering of the discretion to deport Irish prisoners by operation of a policy or practice of de facto blanket prohibition of deportation of the same*

27. The Claimant's case on this ground is that "The Defendant's policy or practice is an unlawful fettering of discretion by operation of a *de facto* blanket ban upon deportation of Irish nationals" (SFG, para 58).

28. The Claimant contends that the Secretary of State's own statistics (provided in response to a Freedom of Information Act request) demonstrate that no true discretion is being exercised in Irish national cases. Not one Irish prisoner was deported in the past three years despite at least around 100 prisoners being considered for deportation in each of those years.

29. I agree with Mr David Blundell, who appears for the Secretary of State, that it does not follow from the fact that there have been no deportations during a particular period that there is a blanket ban. The terms of the policy make clear that deportation will only be pursued exceptionally.

30. I have some difficulty in accepting that the legal principles relating to fettering of discretion are engaged in this case in any event. The fettering of discretion principle is that a policy should not preclude a decision maker from departing from it, or from taking into account circumstances which are relevant to the particular case (*R (Venables) v Home Secretary* [1998] AC 407 at 496-497, per Lord Browne-Wilkinson).

31. As Colton J observed in *Doherty's (Edmund) Application* [2016] NI QB 62 (at para 58), when considering this policy, "it is clear that the policy itself does not in any way unlawfully fetter the respondent's discretion".

32. In any event, the decision-making process in the present case wholly undermines the contention that there is a blanket ban on deportation of Irish citizens. Whatever criticisms Mr Philip Rule, on behalf of the Claimant, may make of that process, it is wholly inconsistent with there being a blanket ban. The internal e-mails within the Home Office (see paras 34 and 35 below) and the witness statement of Mr Stuart Beaton (SEO Senior Caseworker, Criminal Casework) (see paras 39 and 40 below) detail the consideration that was given to the individual circumstances of the Claimant when determining that his was not an exceptional case justifying deportation.

### *Ground 4: Failure to exercise a true and genuine discretion in the Claimant's case*

33. Mr Rule explained that this ground of challenge to the failure to properly exercise the discretion encompasses two complaints. First, that the submission put to the decision maker was not balanced and complete; and second, that the decision-making process did not meet the standards of procedural fairness by making due and sufficient enquiry or to take account of material considerations.

34. On 18 January 2016 (at 15:11) Mr Beaton wrote to Mr Brian Finnegan, Chief Caseworker, Criminal Casework:

> "On 11/08/10 Mr Foley was given a 2-year sentence for possessing an imitation firearm when committing an offence and an indeterminate sentence (minimum 4 years) for robbery. He had 3 prior convictions for 5 offences dating back to 1994, including 3 for burglary or theft. NOMS note that he is a heroin addict and in 2010 rated him as posing a medium risk of re-offending and a high risk of harm.
>
> In October 2015 he was moved from cat C to cat B conditions due to persistent behavioural problems in custody, including possession of a concealed weapon, possession of drugs, making threats, violence and a dirty protest.
>
> His indeterminate sentence meets the 10-year minimum sentence under the Irish policy. In 2012 David Hervey decided by that he did not meet the exceptional criteria for deportation and Mr Foley was issued a warning letter. The reps challenged this in 2014 and again on 7 January 2016, arguing that his assessment as posing a serious risk of harm brings him within the criteria.
>
> Although he claims his family is in Ireland, suggesting that he has some incentive to stay there, he has a history of offending in the UK and there is a real risk that if he is removed to Ireland he will return to the UK clandestinely, thus avoiding any conditions that would otherwise be placed upon his release and continuing to pose a risk of harm to the public in the UK.
>
> Are you content to maintain the decision not to deport and for us to send a short letter to the reps to that effect?"

35. Mr Finnegan replied on the same day (at 15:16):

> "On balance I believe monitoring by probation in the UK may be the most effective way to manage the real risk he presents.
>
> Proposal agreed not to pursue deportation although I believe Director authority is required if the sentence meets the 10-year threshold."

36. Mr Rule submits that Mr Beaton's submission is defective in its assessment of the relevant facts: first, reference is made to the assessment of risk made in November 2010, but there is no reference to his convictions in the Republic of Ireland, although it is clear from the sentencing remarks that they played a significant part in the decision to impose a sentence of IPP (see para 6 above). Second, there was no reference to the recorded threats he had made to staff and other inmates whilst in custody. Third, the records of his phone calls establish that his family is in fact in Ireland; it was not correct to describe it as a "claim" by him that they are in Ireland.

37. Mr Rule also criticises Mr Finnegan's response. Mr Finnegan agreed with Mr Beaton's proposal not to pursue deportation solely on the basis that "on balance" he

believed that monitoring by probation in the UK "may be the most effective way to manage the real risk [the Claimant] presents".

38. In support of his submission that there is a need for a balanced and complete picture to be presented to the decision-maker Mr Rule relies on the decision of this court in *R (Nezar Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (Admin) where Thomas LJ said (at para 73):

> "…in the circumstances of this case, fairness required that [the Secretary of State's] officials put the issues to him in a balanced way so that he could arrive at a decision that had a rational basis."

39. In his witness statement Mr Beaton states (at para 14):

> "I cannot now specifically recall dealing with Mr Foley's case, but our internal communications at the time show that we identified a wide range of relevant factors for consideration, including the nature of his offending; the risk he posed of re-offending and harm; the pattern and location of his offending; the location of his family; and the options for managing the risk he posed to the public. Advice had been sought (as usual) from the National Probation Service, who, while acknowledging that Mr Foley presented a high risk to the public, noted only a medium risk for recidivism."

Mr Beaton continued by referring to his e-mail to Mr Finnegan and Mr Finnegan's response. He stated that as no decision to deport was being taken, it was agreed that there was no requirement to obtain authority from a Director.

40. Mr Beaton concluded (at para 15):

> "On the basis of the available evidence, we believed, and continue to believe given our experience in such matters, that while Mr Foley may fall liable for deportation, he does not pose a significant enough risk to meet the exceptional circumstances threshold established in the guidance. The most effective way of managing the risk that Mr Foley presents to the public is by monitoring him under probation in the UK. While the Secretary of State continues to view Mr Foley as posing a risk of reoffending and harm, the risk is believed to be better managed under the formal offender management supervision to which Mr Foley will be subject on release on licence."

41. I do not accept that Mr Beaton's submission to Mr Finnegan was defective in its assessment of the facts. In my judgment all relevant factors were considered and there was a proper exercise of discretion when the decision was made not to deport the Claimant.

42. In his skeleton argument Mr Rule contends that procedural fairness required the Claimant to have sight of the material to be placed before the decision maker, and to

be permitted to make representations, including by way of oral hearing. Sensibly Mr Rule did not pursue this in his oral submissions. I agree with Mr Blundell that the fettering principle, if it applies, does not require that the decision maker actively call for representations, or cast around to work out what the Claimant might want to say. In any event, the Secretary of State could only properly take into account representations relating to the statutory power being exercised, namely a power to deport. The Secretary of State was under no obligation to consider representations that did not relate to the exercise of that power, such as the Claimant's family situation. In fact, the Claimant did make representations but they consisted of no more than his assertion that he should be deported and a challenge to the policy (see his solicitor's letter dated 12 April 2017).

***Ground 5: Failure to apply the relevant published policy***

43. Mr Rule submits that the policy has not been followed in that immaterial considerations have been taken into account in the decision not to deport the Claimant. The decision was taken on the basis of a real risk of the Claimant's return to the UK and that monitoring in the UK is the most effective way to manage the Claimant's risk, yet neither of these factors are within the published policy. Indeed, Mr Rule submits, the management of a risk in the UK is contrary to the policy to remove the risk outside the UK.

44. A decision maker must follow his published policy unless there are good reasons for not doing so (*R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at para 26, per Lord Dyson). Mr Rule submits that no good reason has been shown for departing from the policy. Further, the scales are heavily weighted in favour of deportation of foreign criminals and something very compelling (which will be "exceptional") is required to swing the outcome in favour of a foreign criminal whom Parliament has said should be deported (*Secretary of State for Home Department v CT (Vietnam)* [2016] EWCA Civ 488, per Rafferty LJ at paras 13 and 18). That, Mr Rule contends, should be the starting point even in relation to Irish citizens.

45. Mr Rule disavows a challenge to the policy (save under Art.14 ECHR, see below), but the policy is that Irish nationals will be considered for deportation only where the Secretary of State concludes, due to the exceptional circumstances of the case, that the public interest requires deportation. The critical question is what is in the public interest. The guidance gives examples of such exceptional circumstances (see para 21 above), but it does not require that deportation take place in such circumstances.

46. This ground of challenge is, in my view, unsustainable. Both factors which Mr Rule contends are outside the policy were referred to in the Ministerial Statement introducing the policy (see para 20 above).

47. First, the Ministerial Statement states that:

> "In reviewing our approach in this area we have taken into account the close historical, community and political ties between the United Kingdom and Ireland, along with the existence of the common travel area."

I agree with Mr Blundell that this makes clear that in deciding whether the public interest requires deportation, the Secretary of State is entitled to take into account the risk of clandestine return, which he did in the Claimant's case.

48. The Ministerial Statement continues:

> "Those Irish prisoners whose cases are not considered exceptional, whose sentences have expired and who are currently in custodial detention awaiting deportation will be released over the next week. I have already asked that the necessary arrangements be put in place to ensure that these prisoners receive proper supervision on their release from the probation service."

The Secretary of State was there concerned with a particular cohort of Irish prisoners, but this passage showed his concern that they received "proper supervision" on their release. That being so, I cannot accept the contention that better offender management is as a factor outwith the policy.

49. In her witness statement Ms Alia Khalid, of the Secretary of State's Migrant Criminality Policy Team, states:

> "15. The Secretary of State considers there to be a number of public interest justifications for the exceptional arrangements with respect to Irish FNOs.
>
> 16. First, due to the inherent flexibility of movement within the Common Travel Area, the risk to public safety in the UK and Ireland is often better managed by not deporting an Irish citizen. When a person is deported from the UK, there will be an almost complete cessation of any offender management supervision which takes place on licence, in the community, during the non-custodial element of a sentence of imprisonment. It also applies in relation to any post-sentence or post-licence supervision conducted by the police or other agencies in the community on an ad hoc basis. In non-Irish cases, UK public safety is maintained through such a break in supervision through the ability to prevent deported persons from re-entering the UK at the border.
>
> 17. A decision not to deport an Irish citizen allows the individual concerned to participate in the full suite of offender management programmes in the UK. This approach respects the close links enjoyed by the UK with Ireland, in particular by ensuring that an Irish citizen convicted in the UK is able to take advantage of the UK's offender management programmes, which will contribute to the rehabilitation of the person. In turn, this will contribute to the overall safety of the UK and Ireland, given the ease with which travel between the two territories may take place.

> 18. Second, where a person holding Irish citizenship is deported, it may be possible for that person effectively to bypass border controls by re-entering the UK illegally from Ireland through the Common Travel Area. In such circumstances, the UK may be faced with the clandestine return, in breach of a deportation order, of an individual who would have been subject to in-country offender management measures, had deportation not been pursued. Thus, there is a risk that deportation of Irish citizens will simply result in the individual concerned returning to the UK without the benefit of the in-country rehabilitation or offender management measures. This will entail enhanced risk to the public safety of the UK and Ireland.
>
> 19. Even taking into account the close historical relationship between the UK and Ireland, there are some offenders the UK is simply not willing to tolerate in its territory as a matter of public policy and public security. For the most serious offenders, in accordance with the Secretary of State's policy, considerations relating to in-country rehabilitation are also less likely to apply to the same extent. For example, those subject to a sentence of imprisonment of ten years or more are less likely to reform through in-country offender management programmes. Some individuals will always present a danger to the UK. Whilst there remains a risk that such persons will be able to re-enter the UK on a clandestine basis, being fewer in number, they are more likely to be subject to the bespoke attention and management of law enforcement and other agencies. This is considered on a case by case basis."

50. I do not accept the contention that the Secretary of State failed to apply the relevant published policy.

***Ground 6: Breach of Article 8 ECHR and/or Article 7 of the European Union Charter of Fundamental Rights***

51. The Claimant contends that the Secretary of State failed to consider his Article 8 ECHR rights and properly to take into account his family life when deciding whether, due to the exceptional circumstances of the case, the public interest required the Claimant's deportation.

52. Mr Rule submits that there is nothing in the policy, nor in the decision letter that refers to consideration of substantive Art.8 rights, and there is an absence of procedure to satisfy the requirements of Art.8.

53. Mr Blundell submits that Art.8 is not engaged in the current context for the reason that if the Secretary of State does not deport a person, there is no interference with his rights. This appears to me to be correct. Any interference with the Claimant's family and private life arises not as a result of the decision of the Secretary of State, which is the subject of the challenge, but by virtue of the lawful sentence that was passed on the Claimant's conviction (see *R (Francis) v Secretary of State for Justice and*

*Secretary of State for the Home Department* [2013] EWCA Civ 1200, per Pill LJ at para 38).

54. Support for this analysis, if required, is, in my view, to be found in the decision in *Doherty* where the judge reached a similar conclusion. Colton J at para 46 stated:

> "The reason why the applicant is not free to return to the Republic of Ireland and why there may be an interference with his Article 8/Article 7 rights is that he is subject to a lawful sentence imposed by the courts in this jurisdiction."

55. Mr Rule distinguishes *Doherty* on the basis that it did not consider proportionality or necessity in a decision taken within the existing policy, rather it was a challenge to the proportionality of the threshold set by the serious sentencing policy requirement. Further, he submits that *Doherty* was wrongly decided. However, none of Mr Rule's criticisms of the *Doherty* decision detract from the conclusion for the legal basis of the restriction of Mr Doherty's right to return to the Republic of Ireland, namely that it is not a decision of the Home Office but because he is subject to a lawful sentence. That is similarly the position in the present case.

56. If, contrary to my view, Article 8 is engaged, then it is necessary to consider whether any interference with the Claimant's rights was in accordance with the law, necessary and proportionate to the legitimate interests of the State.

57. Mr Rule submits that the evidence shows that the Claimant's private and family life is based in the Republic of Ireland; that he has suffered significant personal tragedy during his sentence with bereavement in the family, leading to his breakdown; and that there is no advantage to rehabilitation through time spent in open conditions in the UK as he has made clear his intention to return to the Republic of Ireland at the earliest opportunity.

58. Mr Blundell points out that the matters that the Claimant brought to the Secretary of State's attention in relation to his Article 8 rights were very limited. He sought deportation. On 8 May 2014 his then solicitors wrote challenging the decision of 16 July 2012 that he will not be subject to deportation stating that "his life is in Ireland". In their letter of 23 May 2016, maintaining that the Claimant should be subject to deportation, no more is said about Ireland or the Claimant's family. Again, in their letter of 12 April 2017 no details are given of the Claimant's family life in Ireland. No further information was provided by the Claimant or on his behalf to the Secretary of State that bore on any Article 8 issue before the decision was taken.

59. In his e-mail of 18 January 2016 to Mr Finnegan, Mr Beaton had regard to the Claimant's statement that his family is in Ireland (see para 34 above), so that was a matter that Mr Finnegan would have had well in mind.

60. It is only in his witness statement of 29 January 2019 in support of this claim that the Claimant provides detail of his family in Ireland and explains why he wishes to return to Ireland. However, in substance it adds little to his statement that "his life is in Ireland", of which the Secretary of State had been made aware at the time the decision was taken.

61. The Claimant is subject to a lawful sentence. No exceptional circumstances of the case have been shown to exist that would require the Secretary of State to conclude that the public interest requires deportation. I am entirely satisfied that if, contrary to my view, Article 8 is engaged, any interference with the Claimant's rights is in accordance with the law, necessary and proportionate to the legitimate interests of the State.

62. I agree with Mr Blundell that the Claimant's reliance on Article 7 of the Charter is misplaced. EU law permits special arrangements to be made between the UK and Ireland. The Claimant has no right under EU law; accordingly, the Charter is not engaged. If, contrary to my view, the Charter is engaged, then for the same reasons as those given in respect of Article 8, Article 7 of the Charter does not assist the Claimant.

***Ground 7: Breach of Article 14 ECHR and Article 21 of the Charter***

63. The Secretary of State operates a policy applied only to deportation of Irish nationals. The Claimant contends that there is unlawful differential treatment (discrimination) compared to other foreign national prisoners because Irish prisoners are singled out for different treatment, and that has the consequence that an Irish national prisoner is prevented from returning to his homeland, and it prolongs the detention of such prisoners who in consequence of not being deported are also not eligible for removal from custody.

64. The Claimant's essential complaint, as Mr Blundell observes, is that he is subject to unlawful discrimination because unlike other foreign national prisoners who are subject to TERS, Irish citizens are prevented from returning to their homeland and endure prolonged detention.

65. However, that complaint was dealt with and rejected in *Doherty*. Colton J noted that the Secretary of State accepted the current arrangements in place between the UK and Ireland do cause a difference in treatment between foreign national offenders from Ireland and those from other EEA States (para 35). However, having considered the arrangement and the arguments of the parties, the judge concluded (at para 50) that:

> "… if a Convention Right has been interfered with in this case as a result of the policy in relation to the deportation/removal of Irish FNOs then it is neither inherently disproportionate nor unfair. In my view it has an objective and reasonable justification for treating Irish FNOs differently from other FNOs from other EEA members states."

The judge continued (at para 56):

> "For all these reasons I would refuse the application for judicial review based on any argument that the policy complained of in this case is unlawful or discriminatory. If it has the effect of interfering with the Article 8 and Article 14 ECHR rights and Article 7 and Article 21 of the Charter rights of the applicant or of discriminating against him in my view this is a lawful, proportionate and justified interference."

66. In an attempt to avoid the *Doherty* decision, the Claimant attacks the decision not to deport him. He says that the sanction of deportation gives him "a practical benefit… the return home, and the removal from prison" (Claimant's skeleton argument, para 60). That is not so. I agree with Mr Blundell that a decision not to deport does not do those things. It has no effect on the Claimant's removal from prison, or his return to Ireland. It is TERS which has that effect.

67. So far as an Article 14 challenge to TERS is concerned, two cases of relevance are *R (Mihai Mormoroc) v Secretary of State for Justice* [2017] EWCA Civ 989 and the earlier decision in *R (Massey) v Secretary of State for Justice* [2013] EWHC 1950 (Admin).

68. The appellant in *Mormoroc* sought to challenge the policy of the Secretary of State contained in paragraph 2.47 of Prison Service Instruction ("PSI") 52/2011 that, in the case of a foreign prisoner who has been notified of liability to deportation, but no decision to deport has been made, the prisoner "shall be presumed unsuitable to be considered for release on Home Detention Curfew ("HDC") unless there are exceptional circumstances justifying release". In contrast, in the case of UK national prisoners and foreign prisoners who are not liable to deportation, eligibility for HDC is governed by PSI 6700 under which release on HDC will normally be granted "unless there are substantive reasons for retaining the prisoner in custody".

69. Having considered the relevant previous authorities which included *Brooke v Secretary of State for Justice* [2009] EWHC 1396 (Admin), *R (Francis) v Secretary of State for Justice and Secretary of State for the Home Department* [2012] EWCA Civ 1200 and *R (Serrano) v Secretary of State for Justice and Secretary of State for the Home Department* [2012] EWHC 3216 (Admin), and having considered the parties' submissions, Flaux LJ set out his conclusions:

> "58. … When one looks at the detailed facts of this case and, in particular, that UKBA has indicated to the prison that they were seeking to deport the appellant and would detain him under immigration powers upon his release, and had notified the appellant in the ICD 350 Form that he was liable to deportation, albeit no decision had yet been taken, it is clear that the policy in paragraph 2.47 that he would not be eligible for HDC unless he showed exceptional circumstances, was not discriminating against him on the grounds of nationality. Rather, the basis for the difference in treatment between someone like the appellant who was liable to deportation, albeit no decision had yet been made, and a prisoner (whether British or a foreign national) who is not so liable is, as Males J noted in [64] of *Serrano*, that only the latter is likely to be a person whose resettlement into the community needs to be managed.
>
> 59. In my judgment, that difference in treatment is based on liability to be deported or, as Mr Deakin 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'."

70. *Massey* concerned a claimant who on 15 May 2008 was sentenced to a sentence of IPP with a tariff period of two years and six months. This tariff period expired on 11 September 2010 but he was still not released. On two occasions, in 2010 and 2012, the Parole Board refused to direct his release or recommend his transfer to open conditions. In May 2012 TERS became operative (see paras 23 and 24 above). The Claimant complained that this was unlawful discrimination under Art.14, read with Art.5 ECHR, because the foreign national is not required to satisfy the Parole Board that he is no longer a risk to the public before release from imprisonment, whereas the burden to do so continues to be imposed on those who, like the Claimant, cannot be removed.

71. In relation to TERS Moses LJ stated:

> "15. … Any suggestion that TERS undermines the original purpose of an IPP, because it permits the release of prisoners who may still be dangerous into communities abroad, has nothing to do with Art.14 and does not assist this claimant.
>
> 16. For that reason alone I would dismiss this ground. But, in any event, I am not persuaded that the TERS scheme discriminates against those who are not [liable] to removal. Deportation in many cases may be just as severe a sanction as continued imprisonment pending the Parole Board's assessment of safety (*Brooke* [15]).
>
> 17. Nor does it seem to me that the system discloses discrimination on the grounds of nationality. The criteria for removal in section 259 of the CJA 2003 do not turn on nationality but on liability to deportation, on notification of a refusal of leave to enter, on being an illegal entrant and on being an overstayer. A foreign national may well not be liable to be removed. It is true that immigration status, even though conferred by law, may constitute 'other status' for the purposes of Art.14 (*Bah v UK* [2012] 54 EHRR 21 [45]-[46]). But it is not a foreign prisoner's immigration status which is relevant. What is relevant to the efficient use of the prison estate is the ability to remove a prisoner from a prison, without prejudice to the safety of the public in the United Kingdom. The relevant distinction is between those prisoners serving an IPP who can be removed without consideration of their dangerousness and those who cannot. That is not a distinction dependent on nationality or immigration status but on whether they are liable to removal."

72. In my judgment the Article 14 claim fails at the first hurdle. I agree with Mr Blundell that so far as an Article 14 challenge to TERS is concerned, the material difference is between foreign national offenders being deported, and those who are not being

deported. Those individuals are not in an analogous position and their situation is not comparable. There is no difference in treatment on nationality grounds.

73. If, contrary to my view, there is difference in treatment on nationality grounds, I consider that any difference in treatment would be justified. Even if Article 14 is engaged in relation to the decision not to deport him, I agree with the court in *Doherty* that the special policy on deportation of Irish citizens is lawful and proportionate, and has an objective and reasonable justification.

74. The same principles apply in relation to Article 21 of the Charter, with the same results.

## Conclusion

75. For the reasons I have given I do not consider any of the grounds of challenge advanced to be made out. Accordingly, this claim is dismissed.