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IN THE HIGH COURT OF JUSTICE

No. CO/2334/2019

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 2252 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 2 July 2019

Before:

HIS HONOUR JUDGE KEYSER QC

(Sitting as a Judge of the High Court)

Between:

THE QUEEN ON THE APPLICATION OF
MAURICIO ANTONIO KEISERIE — Claimant

\- and -

SECRETARY OF STATE FOR JUSTICE — Defendant

Mr Philip Rule (instructed by **BNG Solicitors**) for **the Claimant**

Mr Fraser Campbell (instructed by the **Government Legal Department**) for **the Defendant**

JUDGMENT

JUDGE KEYSER Q.C.

Introduction

1 In these proceedings, which were commenced by issue of a claim form on 17 June 2019, the claimant, a serving prisoner, seeks a declaration that the defendant's decision on 15 February 2019 to recall him to prison was unlawful and that his continuing detention thereafter is unlawful. He claims damages and an order for his immediate release from custody into approved accommodation. A claim for a writ of *habeas corpus* against the Governor of Her Majesty's Prison Thameside, where he is currently held, has been withdrawn and need not be mentioned further.

2 On 20 June 2019 Karen Steyn QC, sitting as a Deputy High Court Judge, directed that the application for permission be listed for hearing, with the substantive claim to be heard immediately afterwards if permission were granted. This has been that rolled-up hearing. The defendant, the Secretary of State for Justice, does not in fact contest the grant of permission, and I will grant permission, but the defendant does resist the substantive claim.

3 The matter was listed urgently because the claimant's release date has been fixed for Monday of next week, 8 July 2019, but he presses for immediate release into accommodation that is said to be suitable. The court was urged to list this matter for hearing yesterday, but, as an order of Mostyn J made clear, that was not possible. I have been invited to give an immediate decision on release and to reserve the statement of reasons and of decision on other points for judgment hereafter. However, I think it preferable to deal with the matter in its entirety now, although that will be at the cost of some brevity and much inelegance, the brevity at least in part because I am starting this judgment at 5.30 p.m.

Facts

4 In brief, the central facts are these. The claimant is now aged 30 years. On 23 March 2016 he was sentenced to six years' imprisonment for robbery, possession of an offensive weapon in a public place, attempted robbery and breach of a suspended sentence. He has been diagnosed (when is not clear) as suffering from a schizoaffective disorder and, since at least the date of his sentence, has been on medication. After the date of sentence, he spent about 13 months at one hospital and then about 15 months at another hospital, the latter being Hellesdon Hospital in Norfolk, which is the only one we need to concern ourselves with.

5 On 17 October 2018 the claimant was formally released from custody under the sentence of imprisonment under provisions that I shall refer to presently. At that date, however, he was being held at Hellesdon Hospital, and upon his release from custody he remained in hospital. He had already been informed in August 2018 that upon his release from custody he would continue to be detained in hospital as if he were subject to a hospital order. (This has been referred to as a notional section 57 disposition.) The result was that the claimant would remain in hospital until discharged by the treating clinicians, but that, contrary to the position before his release, his discharge would not require the consent of the defendant.

6 The claimant's release either was or ought to have been a release on licence. The defendant did not provide the claimant with a formal licence. A written document in the form of a licence was drawn up by HM Prison Bullingdon, where he was notionally detained at the time. The document was sent to the Probation Service, at its request, on 22 October 2018. It was not signed and it was not provided to the claimant and the evidence indicates that its terms were not communicated to him. It appears that it was intended that these steps would be taken at the point of his eventual discharge from hospital. But those good intentions were

overtaken by events, because his discharge took place peremptorily by the hospital's decision when he absconded from hospital; I shall come to this later.

7 At a meeting on 29 January 2019 the claimant was told that he would be subject to licence conditions upon his ultimate discharge from hospital. However, the evidence indicates that he was not told what those conditions would be.

8 The unsigned licence document is an exhibit to the statement of Nina Shuttlewood, who is employed by the Ministry of Justice as Head of Post-release Casework in the Public Protection Casework Section of HM Prison and Probation Service. Paragraph 2 read:

> "Your supervision commences on 17 October 2018 [that is the date of release] and expires on 16 October 2021, unless this licence is previously revoked."

Paragraph 4 read:

> "If on the date of this licence you are released to hospital or other suitable care on compassionate grounds, under section 248 of the Criminal Justice Act 2003 or if you are detained under mental health and/or immigration provisions or are subsequently so detained before your licence expires, your supervising officer will keep in touch with you. Otherwise, you must place yourself under the supervision of whichever officer is nominated for this purpose from time to time."

Paragraph 5 read in part:

> "While under supervision you must:
>
> (1) be of good behaviour and not behave in a way which undermines the purpose of the licence period.
>
> ...
>
> (3) Keep in touch with supervising officer in accordance with the instructions given by the supervising officer."

Paragraph 8 indicated the consequences of a breach of the terms of the licence.

9 I can pass over the detailed facts until 9 February 2019, when the claimant had a six-hour period of unescorted leave from hospital. At the end of that period of unescorted leave he failed to return. He contacted the hospital and declined to say where he was, though he did say that he was safe. He also said that he had used cannabis and alcohol and that he would contact the hospital again on 11 February.

10 At a MAPPA meeting on 12 February the claimant's treating consultant informed the National Probation Service that he was being discharged, apparently as he no longer had a medical need to be in the hospital's care. It is unclear to me, on the evidence before me, whether this was actually a genuine case of improvement or whether, rather, the hospital was taking the view that the claimant, by absconding, was failing to co-operate in treatment and indicating a willingness to go his own way, so that the hospital was concluding that, if he was happy to abscond, they were content to accept his own view that he did not require their help. Some support for this latter interpretation might, perhaps, be found in an MOJ document dated 13 February (page D162 of the bundle), which reads:

> "Confirmed that last week the recommendation of the consultant which was that Marley should not be discharged due to risks of doing so without his recourse to public funds and lack of accommodation in place and that this assessment changed at the end of last week when Freddy was told to look for emergency placements and was not told until an hour prior to the MAPPA meeting yesterday that Marley was AWOL and that they were going to discharge his Section without any hearing. Assessed that this was a dangerous decision due to the predicament that that it placed Marley in. Has not been able to get hold of Marley. Spoken to discuss recall agreement with him ..."

Whether that really does support the latter interpretation I have mentioned is unclear; however, there does seem to be a lack of evidence to indicate that there actually had been a significant improvement in the claimant's health. Whatever the true position, the evidence indicates that the claimant contacted his mother and it was she who told him that he had been discharged from hospital and advised him to contact his Probation Officer.

11 On the morning of 15 February 2019, the claimant did contact his offender manager (that is a Probation Officer) by telephone and told her that he was in London, although he was unable to explain where in London. After that telephone conversation, the Probation Officer made a recall request to the public protection casework section, and the decision to recall the claimant to custody was made that day. The claimant handed himself in at a police station, as his offender manager had asked him to do.

12 The reasons for recall are set out in a suite of documents, which includes a document headed "Secretary of State's reasons for licence revocation". This said that the claimant had been recalled because the Secretary of State was satisfied that he had breached the following conditions of his licence:

> "Condition 5(1): be of good behaviour and not behave in a way which undermines the purpose of the licence period.
>
> Condition 5(2): failed to keep in touch with the supervising officer in accordance with instructions given by the supervising officer."

The text then goes on to say:

> "In view of the offences for which you were originally sentenced, the risk suggested by your offending history and your behaviour as described in the Recall Report completed by the Probation Service and which is attached, the Secretary of State revokes your licence and recalls you to prison."

13 The Recall Report is in evidence. I refer in particular (though I shall not read it aloud) to section 21, headed, "Please describe the circumstances and behaviour leading to the recall which has led to an assessment that the risk is no longer manageable in the community." The second box within section 21 records that the claimant was currently effectively homeless, without mood-stabilising medication or support, and had resorted to substance misuse "and despite repeated attempts by myself and his forensic social worker to make contact with him, he has not contacted the office to re-engage with community services." In the box at the top of page 6 of the report the assessment was recorded that the claimant was not able to be managed safely in the community. The section ends:

> "Without knowing where Mr Keiserie is and with no guarantee of his return, the risks detailed remain imminent and, as such, we still assess that recall is the best course of action at this point."

14 I shall take subsequent events quickly. On 27 February 2019, the claimant's offender manager made clear that, although she had requested recall, she supported re-release, provided suitable accommodation were available to the claimant. That has been the view consistently taken since then. Towards the end of April accommodation deemed suitable was located at Joan Boag House in Norfolk, but it was only available from 8 July. On 16 May a decision was made that the claimant would be released on 8 July and then be required to reside at John Boag House. That decision, headed "Reasons for release by Secretary of State", is found at pages D127ff in the bundle. I refer in particular to paragraphs 30 and 34 – 38 but, in the interests of brevity, shall not read them out.

15 The evidence before me is that there are immediate spaces at two premises. One is John Boag House and the other is at The Cottage at Ipswich, where accommodation is available only until 8 July, the date at which release is scheduled. In paragraphs 25 and 26 of Ms Shuttlewood's statement explanations are given as to why the defendant does not consider that release at this stage into either of those available premises is appropriate. That is the issue that goes to the matter that I was asked to determine immediately.

Issues

16 The issues raised by the case concern the validity or existence of any licence subject to which the claimant was released, the legality of his recall and of his subsequent detention, and the question whether he ought now to be released six days before his scheduled release.

The licence and the conditions

17 The first issue is whether the claimant was subject to licence conditions upon his release. The principal legislative framework for consideration of this issue is in the Criminal Justice Act 2003. The claimant, as a person serving a sentence of imprisonment for a determinate term, is a fixed-term prisoner within the meaning of section 237(1). Under section 244(1), upon the claimant having served the requisite custodial period (which he had done on 17 October 2018):

> "It is the duty of the Secretary of State to release him on licence under this section."

Section 249(1) provides that upon release on licence:

> "the licence shall, subject to any revocation under section 254 or 255, remain in force for the remainder of his sentence."

18 Section 250 deals with licence conditions. Subsection (1) provides for the existence of “standard conditions”, which are such conditions as may be prescribed as such by the Secretary of State by order. Subsection (4) provides that any licence must include the standard conditions and may include what are in effect additional conditions imposed by the Secretary of State. I do not need to read out the provision. Subsection (8) provides:

> "In exercising his powers to prescribe standard conditions or the other conditions referred to in subsection (4)(b)(ii), the Secretary of State must have regard to the following purposes of the supervision of offenders while on licence under this Chapter—

> (a) the protection of the public
>
> (b) the prevention of re-offending, and
>
> (c) securing the successful re-integration of the prisoner into the community."

19 Section 252(1) provides:

> "A person subject to a licence under this Chapter must comply with such conditions as may for the time being be specified in the licence."

20 Section 254 provides in part:

> "(1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.
>
> (2) A person recalled to prison under subsection (1)—(a) may make representations in writing with respect to his recall, and (b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations."

Section 255ZA makes it an offence for a prisoner to remain unlawfully at large after recall.

21 Standard conditions of licence are set out in Article 3 of the Criminal Justice (Sentencing) (Licence Conditions) Order 2015, which reads in part:

> "(1) The conditions in paragraph (2) are the standard conditions that must be included in an offender's licence in accordance with section 250(4)(a) of the Act, whether or not any standard conditions in articles 4 to 6 are also included.
>
> (2) An offender must–
>
> (a) be of good behaviour and not behave in a way which undermines the purpose of the licence period;
>
> (b) not commit any offence;
>
> (c) keep in touch with the supervising officer in accordance with instructions given by the supervising officer."

22 Ground 1 of the challenge is that the recall, purportedly under section 254 of the 2003 Act, was unlawful. That is put on three different bases: first, there was no licence; second, if there was a licence, conditions in it were not notified to the claimant; third, if the claimant was subject to the terms of the draft licence prepared by the prison, there was nevertheless not a breach of the licence. The third of those ways of putting the argument does not require further consideration, as it is not the defendant's case that the paper licence applied.

23 The primary basis of Ground 1 was that there was no licence. Mr Rule's argument was that the provisions in Chapter 6 of Part 12 of the 2003 Act presuppose and, on a true construction, refer to and require the existence of a licence in the sense of a document. Various reasons are advanced for that conclusion, but what they really come to is, first, that the legislation (for example, section 252(1)) refers to the conditions being specified in

the licence, which is said to indicate the need for a document and, second, that that is indeed the way in which the defendant's own policies have understood and implemented the requirements of the 2003 Act. In that latter regard, reliance is placed on the instruction entitled "Licence conditions, licences and licence and supervision notices" issued on 23 March 2015 and, in particular, on the mandatory italicised provisions in paragraphs 2.36 and 2.37 relating to the issuing of licences, where it is clear that copies of a physical document are both envisaged and required and that licence conditions are to be explained to offenders prior to release; such explanation is noted to be "particularly important with additional and bespoke conditions." Reliance is also placed on the instruction entitled "Generic parole process for indeterminate and determinate sentence prisoners (GPP)" issued on 25 June 2015, where, again, in particular in paragraphs 13.31 to 13.33, there is a clear expectation and requirement of a written document.

24 Mr Rule also relies on the principle that penal statutes or statutory provisions that impact on the liberty of the subject are to be construed strictly—that is, so as to impinge as little as possible on the liberties of the subject.

25 In my judgment, and in agreement with Mr Campbell, the claimant's argument on this point is incorrect, and I reject it.

26 Mr Rule treats the closing words of section 244(1) ("the duty of the Secretary of State to release him [the is the fixed-term prisoner] on licence under this section") as imposing two distinct duties on the Secretary of State, the one to release the prisoner and the other to issue a licence. That disjunction seems to me be contrary to the scheme intended by the Act and by the provisions relating to conditions and the purpose of conditions in licences and recall. In my judgment, it is not a case of the Secretary of State doing two things—(1) releasing and (2) giving a licence—, as though a release under section 244 might be a release other than on licence if the Secretary of State complied with the first duty (release) but failed to comply with the second duty (licence). Release under section 244 simply *is* a release on licence. There is no doubt that the scheme for the inclusion both of standard conditions and of additional conditions means that something in the nature of a document is likely to be practical in the great majority of cases and necessary in many. However, the statutory provisions contain no particular requirement for any formality for the existence of the licence. This may be contrasted with the provisions of section 25ZA relating to the offence of remaining unlawfully at large after recall, where there are in fact provisions relating to notice. I will come later in the judgment to the practical importance that a written document or notification in some analogous way might have when it comes to recall, but, in my judgment, if there were a requirement for particular formalities simply so that release could be on licence, that would be specified.

27 Moreover, it is unnecessary to suppose that there is any such requirement, because as a matter of law, by reason of the provisions that I have referred to, certain standard conditions are automatically included in the licence. The inclusion of certain other standard conditions is discretionary, and there is the separate question of the imposition of additional conditions. But any release on licence will be subject to certain specified standard conditions set out in the order to which I have referred. There is no requirement, in my judgment, for those to be set out in a particular document in order to apply.

28 The policy documents to which I have referred are, as it seems to me, undoubtedly entirely appropriate policy documents and necessary in the sense that the operation of the licensing provisions could not work satisfactorily unless there were a method prescribed by policy for their general operation. That, however, is distinct from the question whether compliance with the policy is itself required for release on licence, which it seems to me it clearly is not.

29 Further, if the construction proposed by the claimant were correct, there would be a difficult question as to the effect if the Secretary of State released a prisoner without issuing him with a licence. Mr Rule suggested that, because the state of being released was a continuing state, the Secretary of State would have a power at any stage after release to correct his own mistake and impose a licence. However, although the state of *having been released* is an enduring state, the act of *releasing* (or, for the prisoner, of *being released*) is not an enduring or continuing state. It is a one-off: so to speak, the act of pushing (or being pushed) out of the prison doors. The only provision that relates to the imposition of a licence in and of itself is section 244(1): the duty of the Secretary of State "to release him on licence under this section." Therefore, if there were a release but no contemporaneous issue of a licence, it is entirely unclear to me where the supposed power in the Secretary of State to issue a licence subsequently would come from, unless it were invented in order to meet the necessity created by the previous construction of the statutory provisions to require a document. The notion (briefly mooted in argument) that the Secretary of State could again detain the prisoner in order to release him forthwith on licence would not answer the case, because the imposition of custody on the prisoner after the appropriate date under section 244(1) would itself be unlawful. This again tends to show that release under section 244(1) is necessarily on licence. There is not a release *and* a licence. There is a release *on* licence.

30 I do not think that the need for strict construction of penal legislation materially affects the position. Of course, Chapter 6 of Part 12 of the 2003 Act is part of a sentencing regime. But the basic position is that the prisoner has been sentenced to a term of imprisonment, from which he is given an early release on licence subject to the Secretary of State's discretion to revoke the licence and recall to prison under section 254(1). In my judgment, in respectful agreement with the obiter dicta at paragraph 21 of *R (on the application of Gulliver) v Parole Board* [2007] EWCA Civ 1386, [2008] 1 WLR 1116, that provision does not require the existence of a breach and cannot in itself be regarded as penal. The purposes for which the structure of conditions and recall exist are the three purposes that I have already read out.

31 In the circumstances, I reject the first way of putting Ground 1, namely, that there was no licence.

32 The second way of putting Ground 1, namely that the conditions were not notified to the claimant, is advanced in a stronger and a weaker way. The stronger way is by reference to paragraph 41 in the judgment of the Divisional Court in *DPP v T* [2006] EWHC 728 (Admin), [2007] 1 WLR 209, where there was citation from paragraph 33 of the judgment of Lord Bingham of Cornhill LCJ in *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340. That does not seem to me to be much to the point. The point there concerned the imposition of specific obligations by court order—injunctions in the *Chief Constable of Avon* case, and an anti-social behaviour order in the *DPP v T* case. It is trite law that a person made subject to an injunction must be given notification of its provisions, because the injunction only binds the persons restrained or obliged by it. Similarly, an injunction must not merely direct compliance with the law but must make it clear what acts or omissions are required for such compliance in the particular circumstances. In the present case, the conditions relied on by the defendant are standard conditions that are imposed as a matter of general law as a necessary and invariable condition of release.

33 What I have called the weaker way of putting the point about notification is made by reference to the law as set out by Silber J in *R (On the application of Jorgenson) v Secretary of State for Justice* [2011] EWHC 977 (Admin), at paragraphs 16 – 25:

"16. It is not every breach of his or her licence, which will justify a decision to recall an offender ... In my view, in every case where the Secretary of State could reasonably conclude there has been a breach, he or she must then proceed to consider as an important free-standing separate issue, which is what steps should be taken to deal with this breach. In other words, the mere fact that a prisoner released on licence is in breach of his or her licence or is reasonably believed to be in breach does not mean that recall must automatically be ordered. Of course, in many cases there will be no difficulty in concluding that the Secretary of State was entitled to order recall such as where the licensee has committed identical offences to those for which he was originally sentenced. Almost invariably, there will also have to be consideration of two relevant specific sub-issues.

17. First, a relevant issue will be if the offender acted intentionally in breach of his or her licence condition as this must be a material consideration in deciding whether to recall the licensee. This approach was established in the case of *R (Benson) v Secretary of State for Justice* [2007] EWHC 2055 (Admin) …

18. Second, it is crucial to bear in mind … that the decision to recall a prisoner entails important questions relating to the liberty of an individual. Indeed in a different context in the case of *Saadi v United Kingdom* (Application no. 13229/03), the Grand Chamber in Strasbourg said that:

> '70. ... the detention of an individual is such a serious measure that it is only justified as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require the person concerned to be detained.'

19. Any decision to recall a prisoner must be proportionate to the aim of avoiding risk to the public. Therefore, in the words famously used by Lord Clyde in giving the Opinion of the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, it is necessary that 'the means used to impair the right or freedom are no more than is necessary to accomplish that objective.'

20. The primary objective underlying the power to recall is the protection of the public. Lord Slynn of Hadley explained in *R (Smith and West) v Parole Board* [2005] 1WLR 350, 368, at [56], that 'Recall of a prisoner on licence is not a punishment. It is primarily to protect the public against further offences". Similarly more recently, Langstaff J stated in *R (McHale) v Secretary of State for Justice* [2010] EWHC 3657 (Admin), at [5], that: 'It is not in dispute before that the purpose which the provisions as to recall on licence seek to achieve is the protection of the public.'

21. The relevant statutory provision is section 254 of the CJA 2003, which provides, in so far as is material, that '(1) The Secretary of State

may, in the case of any prisoner who has been released on licence under this Chapter revoke his licence and recall him to prison.'

22. The statute does not provide a list of matters which should be considered. It is settled law that in those circumstances:

> 'Where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review" per Laws LJ in *R (Khatun) v London Borough of Newham* [2004] EWCA Civ 55 [35].'

23. In my view, in cases where a decision has to be made as to whether an offender should be recalled and the safety of the public is at risk if the offender remains out on licence, the Secretary of State is obliged to conclude in an appropriate case whether it is necessary to revoke the licence to protect the public.

24. …

25. So I consider that the legal position is that when faced with a challenge to a decision to recall a prisoner because of the risk to the public for breach of a condition of his or her licence, the court should consider:

> i) Whether there is 'evidence upon which he could reasonably conclude that there had been a breach': *R (Gulliver) v Parole Board* [2007] EWCA Civ 1386, [5] (Sir Anthony Clarke MR). Put slightly differently, the question 'is whether the Secretary of State could reasonably have believed on the material available to him that the claimant had not conducted himself by reference to "the standard of good behaviour"': *R (McDonagh) v Secretary of State for Justice* [2010] EWHC 369 (Admin), [28] (Judge Pelling QC). If the Secretary of State cannot satisfy that test, the recall is unlawful but if he or she can, it is necessary to progress to the next questions;
>
> ii) Whether there is the absence of any fault on the part of the prisoner so as not to justify recall *(R (Benson) v Secretary of State for Justice* (supra)) because if there is not any fault, this will probably be a crucial or at least a very material consideration militating against justifying recall;
>
> iii) Whether the decision to recall the prisoner can be justified on the basis that it is necessary in order to protect the public because of the dangers posed by the prisoner while out on licence *(R (West) v Parole Board(supra)* and *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing (supra))*;
>
> iv) Whether adequate reasons have been set out to justify that decision so that the prisoner is, in Lord Brown's words in the South Bucks case (*supra*), able 'to understand why the matter was decided as it was and what conclusions were reached on the principal important and controversial issues', which in this case means able to understand why his recall is justified;

v) It is not entitled to make the decision on whether the prisoner should have been recalled because of the limited nature and extent of its power to quash a decision on a judicial review application. … Indeed as was pointed out by Richards J (as he then was) in *Bradley v The Jockey Club* [2004] EWHC 2164 QB in passages which were expressly approved on appeal in that case by Lord Phillips M.R. [2005] EWCA Civ 1056 [17] when giving the judgment of the Court of Appeal that:

> '37 ... The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits…the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision maker, and so forth . . .' and that
>
> '43.. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests; and that

vi) 'It is essential that in exercising the very important jurisdiction to grant judicial review, the court should not intervene just because the reasons given, if strictly construed, <u>may</u> disclose an error of law. The jurisdiction to quash a decision only exists when there has <u>in fact</u> been an error of law. Moreover, the court should not approach decisions and reasons given by committees of laymen expecting the same accuracy in the use of language which a lawyer might be expected to adopt': *per* Lord Browne-Wilkinson giving the only reasoned speech in *Reg. v. Bishop Challoner School, Ex p. Choudhury* (emphasis added) [1992] 2 AC, 182,197E.

34 As I have mentioned, it appears that the claimant was, at least initially, unaware that he was on licence rather than detained in hospital. In my judgment, on the particular facts of the case, that fact does not assist the claimant. The defendant's point is not that there was wilful non-compliance with licence conditions but rather that, as set out in the recall documentation from which I have read, there was a pattern or sequence of behaviour that, first, was inconsistent with the purposes of the release on licence and, second, was such as to indicate risk to the public of re-offending and to the claimant himself while in vulnerable circumstances and lacking necessary support. I do not consider that the non-notification of conditions is a significant factor in the present case or one that in anyway suggests that it was not properly open to the Secretary of State to recall the claimant.

35 Mr Rule placed some reliance on the decision of the Court of Appeal in *Rodgers v Governor of HMP Brixton* [2003] EWHC 1923 (Admin). In that case, there was a written licence in which it was stated that the supervision period expired in 2002 whereas it should have said 2005. The defendant's agents had repeatedly told the claimant that the supervision ended in

2002. It is not difficult in these circumstances to see why the Court of Appeal concluded that the Secretary of State was not able to recall for breach of the relevant conditions which were dependent on the ongoing existence of supervision (see paragraph 30 of Hale LJ's judgment). Paragraph 31 of the judgment shows that legitimate expectation and rationality might have been relied on, but did not form the basis of the court's conclusion. It appears from that that the court concluded simply that the express statement that supervision ended in 2002 was itself sufficient to preclude reliance on any other date when that was expressly set out in the document. I do not think that this assists the claimant in the present case. It appears from paragraphs 20 – 23 of the judgment that the Court of Appeal proceeded on the basis that the shorter supervision period specified on the licence was not *ultra vires* and so was properly regarded as effective. In the circumstances, it is not difficult to see why the Court reached its decision in the *Rodgers* case; indeed, with respect, it is hard to see how any other decision could have been reached. In the present case, however, the only licence conditions in operation are those required by statute.

Legality of detention

36 Ground 2 is that detention since recall has been unlawful. The first way in which this ground is put is that because of the unlawful recall all subsequent detention is automatically unlawful. In the circumstances of the case, I hold that the recall was not unlawful on public law grounds and was not subject to any invalidity under the Act. That is sufficient to dispose of the first way in which this ground was put.

37 The second way in which Ground 2 is put is that it is for the defendant to justify ongoing detention and, in particular, to establish that the ongoing detention is lawful and reasonably required. It is submitted that the detention, even if it commenced lawfully, cannot remain lawful if it continues for a period which is not reasonably justified. These are principles that are set out in numerous authorities, including the decision of the Supreme Court in *R (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245. In the present case, the detention began on 15 February 2019. It had been ongoing for three months before an executive release decision was made on 16 May, and it still continues nearly two months later in circumstances where it is accepted that the claimant ought to be released, provided that suitable accommodation is available. It is said that the failure to release him into suitable accommodation for this entire period or for either part of it is unreasonable and, in particular, that there has been unlawful delay in releasing the claimant after the executive decision to release him.

38 The defendant, through both social workers and probation officers, has at all material times accepted that release is appropriate, provided there is suitable accommodation. His position has been that, in order to secure both the objectives of release on licence and, in particular, the welfare of the claimant, it is necessary that the claimant be released into suitable approved housing. John Boag House has been identified as the available and suitable accommodation. The evidence of Ms Shuttlewood, together with the documentary evidence in section D of the bundle, shows that careful consideration has been given to the circumstances that would make release appropriate and that those who have given the matter consideration have judged that those circumstances cannot be achieved until the accommodation becomes available on 8 July. If accommodation deemed suitable had become available before 8 July, it would clearly have been inappropriate to stand on the executive decision on 16 May and insist that release could not take place before then. That, however, is not the position.

39 In my judgment, it is wrong to start from the premise that release should have been immediate upon the executive decision in May. That depends on the basis of the decision

for release in May. If the decision then had been that the claimant could go anywhere immediately, delay would of course have been inappropriate. However, the basis of the decision was in fact that he could appropriately be released when the expected accommodation became available. Therefore the mere fact of lapse of time since the executive decision is not itself a ground of criticism.

40 It is clear that prior release to one of the two premises that I have mentioned (that is, John Boag House at this stage, and the premises in Ipswich as an interim measure) would be possible. That in itself takes the matter nowhere. No one doubts that prior release *per se* would have been possible; if the ability to effect prior release were the only question, there would have been no reason not to release the claimant immediately. The issue concerns the judgment as to what is *suitable* accommodation to which, consistently with the requirements of release on licence, the claimant can as soon as possible be released. In the passage to which I have referred, Ms Shuttlewood explains the reasons why the judgement has been formed that the two premises are not currently suitable. In my judgment, those reasons sufficiently justify the continued detention for the further short period required. I should say that I do not think that the characterisation of those reasons advanced by the claimant as turning on matters of administrative or staff convenience is at all fair; rather the defendant's concerns relate to the available level of support and the exposure of the claimant to potential adverse circumstances, given the vulnerabilities to which he is subject.

41 The period of delay is it seems to me regrettable. It would have been desirable that the claimant be released at an earlier date had that been possible. However, in my judgment, the period of delay is not such as to be beyond rational justification or to make the continued detention unlawful by virtue of unreasonable delay. Accordingly, I reject Ground 2.

Human Rights

42 Ground 3 of the claim is that continuing detention infringes the claimant's rights under Article 5 of the European Convention on Human Rights. Article 5(1) provides:

> "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;
>
> (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

43 Taken by itself, Article 5 seems to me to add nothing substantively to the English common law, at least in the circumstances of this case, although the form of analysis is different. The first question under Article 5 is whether the detention in accordance with domestic law. The second question is whether, even though it is in accordance with domestic law, it is arbitrary. For present purposes at least, arbitrariness is a matter that falls to be considered within judicial review grounds. Accordingly, I cannot see how Article 5, by itself, adds anything to the common law challenge.

44 However, the claimant also relies on Article 5 in conjunction with Article 14, which is parasitic on other provisions of the Convention:

"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."

It is common ground that the prohibited bases of discrimination include disability. The claimant's argument is that he has been discriminated against because of a disability consisting in his mental health condition, because he would have been given a place in the approved accommodation in question were it not for his mental health condition. The claimant does not allege that there has been deliberate discrimination against him because of a mental health disability, but rather that he has suffered a difference in treatment as compared with a notional comparator in an analogous situation who does not suffer from a mental health disability.

45 In *R (On the application of Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831, Lady Black said at paragraph 8:

"In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or 'other status'. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173. He observed that once the first two elements are satisfied:

'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint

> is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'"

46 In my judgment, Article 14 does not avail the claimant.

47 First, in agreement with the submission of Mr Campbell, I consider that the claimant identifies an inappropriate comparator. What one must consider, I think, is someone who is judged to require accommodation in relevantly confined particular approved premises, but on account of matters not related to mental illness (whether those matters relate to unfortunate past associations or the need for community support in circumstances where one is not in proximity to unhelpful connections from one's past or where one is near to family, or whatever). The evidence in the case does not establish on the facts that there is a difference of the enjoyment of the Article 5 rights by reason of a mental health disability.

48 Second, if I were wrong as to the first point, I should nevertheless consider that there was an objective justification for the difference in treatment. The objective justification for any difference in treatment there might have been stems from the professional judgments made as to the specific requirements of this particular claimant and, accordingly, any difference in treatment is not to be considered as a discriminatory denial of a right that would enjoyed by others.

49 Accordingly, I reject Ground 3.

Conclusion

50 In the circumstances, I grant permission but refuse the claim.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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