Neutral Citation Number: [2020] EWHC 800 (Admin)

Case No: CO/1001/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2020

**Before:**

**THE PRESIDENT OF THE QUEEN'S BENCH DIVISION**
**LORD JUSTICE HOLROYDE**

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**Between:**

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| **THE QUEEN on the application of X** | **Claimant** |
| **- and -** | |
| **THE EALING YOUTH COURT (sitting at Westminster Magistrates' Court)** | **Defendant** |
| **THE SECRETARY OF STATE FOR JUSTICE** | **Interested Party** |

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**Richard Thomas and Daniel Clarke** (instructed by **Sonn Macmillan Walker**) for the **Claimant**
**Rosemary Davidson** (instructed by **the Government Legal Department**) for the **Interested Party**
**The Defendant** did not appear and was not represented

Hearing dates: 16th March 2020

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# Approved Judgment

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on the 3rd April 2010.**

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**The President of the Queen's Bench Division and Lord Justice Holroyde:**

1. The Claimant was sentenced to a detention and training order (a "DTO") for 18 months. By section 102(5) of the Powers of Criminal Courts (Sentencing) Act 2000, a youth court has power to make an order, the effect of which is to delay (by one month or two months, depending on the length of sentence) the date when a young offender is released from the custodial part of a DTO. Such an order was made in the case of this claimant, delaying his release by 2 months. He claimed judicial review, contending that the order was unlawful. His claim came before the court for an urgent rolled-up hearing of the application for permission and, if permission be granted, of the claim. At the conclusion of the hearing we announced that permission to apply for judicial review was refused, and that we would give our reasons in writing at a later date. These are our reasons.

2. The application to the youth court was heard by the Senior District Judge ("the judge"). She granted an application for the claimant's name to be withheld from the public, on the grounds that the proceedings were before the youth court and that, because of the circumstances of the case, publication of his name may attract adverse attention which would disrupt the supervision part of his sentence. We were satisfied that the order was made for good reason, and should continue. We accordingly refer to the claimant as X, and direct that nothing may be included in any report of these proceedings if it would be capable of revealing his true name and identity to the public.

   The facts:

3. The relevant facts relating to X's offending, conviction and sentence can be briefly summarised.

4. X was convicted of two offences of encouraging terrorism, contrary to section 1(2) of the Terrorism Act 2006. He had published messages on social media which were indicative of an extreme right-wing ideology and were likely to be understood by members of the public as encouraging the commission of acts of terrorism. He was aged 17 when he committed the offences and when he pleaded guilty to them, but 18 when he was sentenced on each count concurrently to a DTO for 18 months. As a result of his convictions he is subject to the notification requirements under Part 4 of the Counter-Terrorism Act 2008.

5. Shortly after his arrival at the prison where he is serving the custodial part of his sentence, X was advised in writing of his sentence expiry date, his mid-term date, and his earliest and latest term dates which were, respectively, two months before and two months after the mid-term date. He was told:

> "Unless there are exceptional circumstances as to why you should be released at your earliest or latest release date, you will be released at the mid-point …The offender management unit will look at your case and make a decision about whether you will be released earlier or later than that date. This will be undertaken nearer to your earliest release date."

6. One month before the mid-point of the custodial term, X was advised by letter that the Secretary of State intended to apply to a youth court, pursuant to section 102(5) of the Powers of Criminal Courts (Sentencing) Act 2000 ("the PCC(S)A") to delay his release by two months. He was provided with a copy of guidance published by the Youth Justice Board which stated that such an application may be made where there has been particularly bad custodial behaviour. The letter went on, however, to say this:

> "In your case, the Secretary of State is making an application outside of the guidance based on exceptional circumstances because the National Probation Service assess you to pose a high risk of harm to yourself and to the public should you be released [at the mid-point]. This is because it is assessed that you are vulnerable to grooming due to your psychological risk factors, in light of in combination with [sic] your conversion to Islam, your previous association with TACT offender Sudesh Faraz/Amman, and the recent terrorist attacks at Fishmongers' Hall, Whitemoor Prison and in Streatham.
>
> The National Probation Service have prepared a detailed training plan for the additional two months you would spend in detention if the application is granted. This includes: (a) the Desistance and Disengagement Programme; and (b) the Healthy Identities Intervention."

7. It is convenient, before coming to the application which was made to the judge, to set out section 102 of the PCC(S)A and to refer to guidance which has been published in relation to it.

Section 102 of the PCC(S)A:

8. The sentence of a DTO was introduced with effect from 1st April 2000 by the Crime and Disorder Act 1998. The current provisions, for offenders aged 12-17, are to be found in the PCC(S)A, as amended by the Offender Management Act 2007. The sentence can only be imposed for fixed terms of 4, 6, 8, 10, 12, 18 or 24 months. It comprises a period of detention and training and a period of supervision in the community. The length of the former period is specified in section 102 of the PCC(S)A, which in the respects material to this application is the same as its predecessor provision, section 75 of the 1998 Act.

9. We set out the section in full:

> "(1) An offender shall serve the period of detention and training under a detention and training order in such youth detention accommodation as may be determined by the Secretary of State.
>
> (2) Subject to subsections (3) to (5) below, the period of detention and training under a detention and training order shall be one-half of the term of the order.

> (3) The Secretary of State may at any time release the offender if he is satisfied that exceptional circumstances exist which justify the offender's release on compassionate grounds.
>
> (4) The Secretary of State may release the offender –
>
> (a) in the case of an order for a term of 8 months or more but less than 18 months, at any time during the period of one month ending with the half-way point of the term of the order; and
>
> (b) in the case of an order for a term of 18 months or more, at any time during the period of two months ending with that point.
>
> (5) If a youth court so orders on an application made by the Secretary of State for the purpose, the Secretary of State shall release the offender –
>
> (a) in the case of an order for a term of 8 months or more but less than 18 months, one month after the half-way point of the term of the order; and
>
> (b) in the case of an order for a term of 18 months or more, one month or two months after that point.
>
> (6) An offender detained in pursuance of a detention and training order shall be deemed to be in legal custody."

10. It will be noted that the structure of that section sets the usual period of detention and training, namely one-half of the term of the order; gives the Secretary of State power to release early at any time on compassionate grounds; and gives the Secretary of State a general power to release no more than one month or two months early (depending on the term of the order). Where one of those powers is exercised, the custodial part of the order is shortened and the period of supervision in the community is commensurately lengthened. So far as delayed release is concerned, subsection (5) gives the court a power, on application by the Secretary of State, to make an order requiring the Secretary of State to release the offender one month, or two months, after the half-way point. When such an order is made, the period of supervision in the community is commensurately reduced.

11. It appears that, before the application to the youth court in the present case, section 102(5) of the PCC(S)A had been used very rarely, if indeed at all.

The published guidance:

12. The Home Office and Youth Justice Board issued a circular on 9th February 2000, shortly before the relevant provisions of the 1998 Act came into effect. The guidance was addressed to, amongst others, Clerks to the Justices, HM Stipendiary Magistrates and Crown Court Managers, and it was said to be for use by, amongst others, courts in England and Wales. In relation to the provisions for early and late release it noted that the legislation set no specific criteria, but said (at paragraph 2.65) that the scheme

was intended to recognise particularly good or bad progress measured against an offender's training plan. At paragraph 2.77 it said:

> "Late release is a serious sanction – extended loss of liberty – and should logically be less frequent than early release. It should result from particularly poor progress against the training plan; not be used as a means of supplementing disciplinary sanctions. Where poor progress results from bad behaviour, it must be the poor overall progress that prompts a proposal for late release."

13. The guidance went on to say, at paragraph 2.94:

> "The decision whether to authorise late release, which will need to be made before the half-way point of the sentence, is entirely a matter for the courts; the criteria they apply will become established as applications are considered."

14. That guidance was revised by a circular issued by the Home Office on 23rd May 2002 to the same addressees as the 2000 guidance. This 2002 circular established a presumption in favour of early release in most cases. At paragraph 12 the circular indicated that (subject to those exceptions) early release should be granted to all trainees serving 8 months or more unless –

> "(a) the trainee has exhibited violent or dangerous behaviour to other trainees or staff within the secure facility;
>
> (b) the trainee has exhibited destructive behaviour that has led to serious damage to the fabric of the secure facility, or the property of others;
>
> (c) the trainee has made exceptionally bad progress against the training plan as a result of consistent failure to co-operate or failure to take responsibility for his/her behaviour."

15. At paragraph 17, the circular stated:

> "Trainees who are denied early release will normally be released at the halfway point of the sentence. However, in the case of trainees who fall into the negative behaviour categories set out at 12(a), (b) and (c) above, consideration may also be given to applying to the courts for late release in the case of a pattern of particularly bad behaviour."

16. It will be noted that neither the 2000 guidance nor the 2002 circular purported to state any criteria to be applied by a youth court considering an application for an order under section 102(5) of the PCC(S)A or its statutory predecessor. The 2002 circular contained nothing which contradicted or qualified the statement at paragraph 2.94 of the 2002 guidance (see [13] above) that criteria would become established as applications were considered.

17. The court was also referred to guidance for the Youth Justice Board Casework Team contained in an agreement of December 2009 between the Youth Justice Board Placement and Casework Service and the National Offender Management's Young People's Team. This document referred to the presumption in favour of early release and to the statutory provisions for late release, which it said should only be used in the most exceptional circumstances and would require an order of the youth court. It indicated that the procedure for late release was currently being reviewed by the Joint Youth Justice Unit on behalf of the Secretary of State. The current, interim guidance, pending that review, stated at paragraph 1.2:

> "When considering whether late release is appropriate it must be borne in mind that it should only be used in the most exceptional circumstances. The late release procedure is not appropriate if the young person has merely failed to perform satisfactorily against their training plan, or has been involved in disruptive behaviour. These concerns should be reflected by the young person not being granted early release, with the late release procedure being reserved for when the young person has displayed 'a pattern of particularly bad behaviour'."

18. It does not appear that any substantive guidance has been published to replace that interim guidance. It is in any event guidance to the Casework Team and, again, does not purport to identify any criteria to be applied by the youth court.

The hearing before the judge:

19. The application was made by the Secretary of State on the basis which had been indicated to X (see [6] above). It was submitted that the application was justified because of the increased risk to the public posed by X and the urgent need for further offending behaviour work to be carried out before his release. It was acknowledged that the published guidance did not contemplate an application in such circumstances, but submitted that the application was consistent with the purposes of the DTO (namely, X's rehabilitation and the reduction in the risk he poses to the public) and was necessary and proportionate in that the appropriate offending behaviour work was most likely to be effective if carried out in custody.

20. The Secretary of State called as a witness Mr Robert Davis, the Governing Governor of the prison at which X is held. In his statement, about which he was cross-examined, Mr Davis referred to a pre-sentence psychological assessment. X had told the psychologist that he had committed the offences after spending a lot of time on the internet immersing himself in extreme right-wing ideas. The psychologist's opinion was that X was emotionally and psychologically damaged and vulnerable to being groomed into doing something significantly more serious than the offences of which he had been convicted.

21. Mr Davis also referred to an assessment of X's future risk of extremist-motivated offending, in which three risk factors were identified: if X developed a peer group who held extremist views; if X had difficulty engaging with professionals and in developing appropriate relationships which would support him; and if X developed an extremist-related interest and was unable to discuss to with an appropriate person. Mr Davis indicated that X had told the prison authorities that he had considered himself a

Muslim since early March 2019, which was only a month after X had told the author of a pre-sentence report that no one would ever change his extreme right-wing world view. He expressed concern, not about X's Muslim faith as such, but about the speed and fervour with which he had immersed himself in that new faith, coupled with his known psychological vulnerability and other risk factors.

22. Mr Davis acknowledged that X's behaviour in custody had been good, with no adverse adjudications and no negative entries in his case notes. However, X had been assessed at the start of his sentence as posing a high risk of serious harm to the public, and recent events had led to an assessment that the risk had increased as a result of –

    1. intelligence that X may be practising an extreme form of Islam, was associated with the Streatham attacker Sudesh Faraz/Amman and may pose a threat to the public on release;

    2. psychological factors, including X's vulnerability, his search for identity and his desire for acceptance by a particular group as a powerful motivator in his extremist offending; and

    3. the wider threat context and the risk that X had been, or would be, inspired to violent offending by the recent escalation in low sophistication terrorist attacks committed by serving and recently-released terrorist offenders.

23. In relation to the first of those three factors, Mr Davis included in his statement what he described as a "form of words" produced by HM Prison and Probation Service, which provided a gist of the relevant intelligence, but he declined to give further information about it or to disclose the source material. In cross-examination, he accepted that whilst X might on occasions have been able to greet Sudesh Faraz/Amman through a fence, there was no evidence that they had ever been together in a class or service.

24. Mr Davis went on to say that the combination of the three factors meant that a vulnerable and high-risk young offender was shortly to be released into a high risk environment. There was, he said, an urgent need to undertake further work in custody to reduce that risk and to maximise the prospect that X would successfully complete the supervision period of his sentence and thus reduce the risk of his reoffending. He gave details of the programme of work which would be completed in custody if X's release was delayed. The interventions which were planned were based on strong personal relationships built up over a period of several weeks and could be better delivered in a controlled environment in prison.

25. X did not give evidence.

26. The application was resisted by Mr Thomas, then as now appearing for X, on the grounds that there was no evidential basis for it, in particular because the court could not properly place any weight on the intelligence gist; that there was no justification for an application which was not merely outside the published guidance, but contradictory of it; and that the application was neither necessary nor proportionate. Mr Thomas accepted that the presumption of early release did not apply to X, because one of the exceptions to that general presumption relates to those like X who have been convicted of terrorist offences. He nonetheless relied on the published guidance

as showing that the late release procedure was reserved for those who had shown a pattern of particularly bad behaviour, whereas X's behaviour in custody had been good. He criticised the intelligence gist as containing unattributable hearsay, and submitted that the evidence was too weak to justify delaying X's release.

27. The judge in a written judgment said that Mr Davis had given what she called "double hearsay evidence", and that she had to consider the weight to be given to that evidence. She summarised his evidence relating to the three factors which he had identified, his conclusion and the nature of the planned work if release was delayed. She said, at paragraphs 17 and 18:

> "17. There is no guidance about how I should approach this application save for that made shortly after the implementation of the Act and is confined to prisoners' bad behaviour in custody. I do not find myself bound by the guidance, this is an exceptional case. The guidance is not statutory, it is not a tramline and there is nothing in the Act which prevents me from considering the risk to the public and the rehabilitation of X when considering the application. The guidance is dated and does not take into account the risks now posed by potentially radicalised young offenders.
>
> 18. The section is silent as to how I should approach this decision but it seems to me that I should consider whether the order is necessary and proportionate in the particularly unusual circumstances in this case."

28. The judge recognised that X is aged 18 and had an expectation of release at the mid-point of his custodial term. On the other hand, she said,

> "… the application is made in these exceptional circumstances of a young man who was a right-wing extremist who has espoused a different religion with information that he has become an extremist combined with his vulnerabilities."

29. The judge said that she had given some weight to the intelligence: it would have been helpful to have had more detail, but it was the combination of the intelligence and the other factors which was striking. She said that X's views "have veered from one extreme to another", that he had a deep-seated need to feel part of a group and that there was intelligence that he was a risk to the public. She bore in mind the principal aim of the youth justice system, namely to prevent offending, and the welfare of X. She concluded that the order which was sought was necessary and proportionate to the risks about which she had heard, would prevent further offending and would focus on the rehabilitation of X. She therefore granted the application and made an order requiring the Secretary of State to release X two months after the mid-point of the custodial part of his sentence.

The possible avenues of appeal:

30. Section 108 of the Magistrates' Courts Act 1980 gives a general right of appeal against sentence. Subsection (3) defines "sentence" as including, for this purpose, "an

order made on conviction by a magistrates' court". It is common ground between the parties, and the court accepts, that an order pursuant to section 102(5) of PCC(S)A is not a sentence within that definition. Counsel have not been able to identify any other relevant statutory provision, and the court accepts the submission that there is no right of appeal to the Crown Court. Thus the courses which may be open to a young offender aggrieved by such an order are limited to an appeal by way of case stated, or an application for judicial review. In principle, an appeal by way of case stated is the appropriate remedy if it is contended that the decision of the youth court is wrong in law. We accept however the points made by Mr Thomas as to the practical difficulties of commencing such an appeal in a case of this nature: the application to state a case casts a burden upon the youth court (in this case, the judge with her particularly heavy workload), which may result in some unavoidable delay before the Case Stated is drafted; and the Criminal Procedure Rules (35.2 and 35.3) provide opportunities for representations to be made by another party both in response to the application to state a case and in response to the draft Case Stated. In this case, it would not realistically have been possible for this court to hear an appeal by way of case stated before the mid-point of X's period of detention and training. Such an appeal would therefore have carried a risk that, even if successful, it would result in X serving an additional period in custody beyond the mid-point of his custodial term. In those circumstances, we accept the submission that the appropriate course, if proper grounds existed, was a claim for judicial review. We also accept that the appropriate defendant to the claim was the youth court, though in accordance with usual practice, the youth court has played no part in this hearing.

The grounds for judicial review:

31. Three grounds for judicial review were pleaded. One was not pursued, and we need say no more about it. The two grounds argued before us are:

    1. The youth court erred in law by admitting evidence that was not provided to the court or to X;

    2. The court took into account an irrelevant consideration and/or exercised its power for a purpose extraneous to the statutory purpose.

    The remedy sought is an order quashing the decision of the judge and granting such other remedy as the court sees fit.

32. The second ground is based on a broad submission that the youth court has no power to make an order under section 102(5) in any circumstances other than those contemplated by the published guidance. If that general challenge fails, the first ground makes a specific challenge to the exercise of the power in the circumstances of this case. We therefore think it convenient to summarise first the written and oral submissions relating to the second ground.

The submissions: Ground 2:

33. It is submitted on behalf of X that the 2000 guidance was intended to reflect the will of Parliament in enacting section 102(5) of PCC(S)A, namely that the power to order late release should be used as a response to bad progress, measured against the young offender's sentence plan. The 2002 guidance established a presumption in favour of

early release, but did not alter the framework in relation to late release. The 2009 interim guidance again maintained that framework, and stated plainly that the power to order late release should only be used in the most exceptional circumstances, again measured against the sentence plan. Mr Thomas relies on passages in Bennion on Statutory Interpretation (7th edition) in support of his submission that, in order to supply context or to identify the mischief which legislation was intended to remedy, it is legitimate to look any official report which had led to the introduction of the legislation and at Hansard. On that basis, he invites the court to consider Parliamentary material which, like the published guidance, refers to the late release procedure as a response to bad progress.

34. Mr Thomas then submits that, in going outside the framework set by that guidance and making a decision based on a new risk assessment, the judge took into account irrelevant considerations and/or exercised the power for a purpose other than its statutory purpose. He acknowledges that section 102(5) contains no express limitation on how the court's discretion is to be exercised, but submits that does not mean the judge had a completely free choice as to what matters she should take into account: the proper framework for her decision was that set out in the guidance. Describing the case as exceptional could not justify using the power for an extraneous purpose. Whilst some minor departure from the published guidance might have been lawful, it was not lawful to exercise the power in the circumstances of this case, in particular because bad behaviour in custody - which Parliament intended as the basis for any order delaying release - was acknowledged to be absent and it was accepted as a fact that X's behaviour in custody had been good.

35. For the Secretary of State, Miss Davidson submits that the purpose for which the application was made was consistent with the purposes of the DTO, namely the rehabilitation of X and the consequent reduction in the risk he poses to the public. The published guidance cannot and does not constitute a blanket policy which limits the youth court's exercise of discretion. Case law shows that the extent to which a decision-making body may depart from guidance depends on the nature of the guidance. In particular, Miss Davidson relies on *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148.

36. In that case, the House of Lords considered a seclusion procedure at a high security hospital which departed from a Code of Practice issued by the Secretary of State for Health under section 118 of the Mental Health Act 1983. The Code of Practice contained guidance for hospitals and medical staff. The claimant, a psychiatric patient compulsorily detained under the 1983 Act, claimed judicial review, contending that the hospital's procedure was unlawful because, amongst other things, it provided for less frequent reviews of a secluded patient by a doctor than were required by the Code. The House of Lords held that the authority had carefully considered the Code and had been entitled to depart from it. Lord Bingham at [21] said:

> "It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free

> to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so. Where, which is not this case, the guidance addresses a matter covered by section 118(2), any departure would call for even stronger reasons. In reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires."

37. In the present case, Miss Davidson submits that the published guidance is non-statutory, is no more than advisory, and is not addressed to the court. The judge was entitled to depart from it, for the reasons given in her judgment (see [27] above). In any event, the guidance cannot alter the true meaning of the statute, and the absence of any statutory criteria for the exercise of the power under section 102(5) shows that Parliament did not intend the power to be limited to cases of very poor progress in custody.

The submissions: Ground 1:

38. Mr Thomas submits that, when considering an application under section 102(5), the youth court is not reviewing an exercise of discretion by the Secretary of State: it is making its own decision as to whether to order late release, and must therefore make its own findings of fact. It follows in this case that, even if the judge had the power to order late release on the basis of an increased risk, she could only do so if she found as a fact that the increased risk existed. Mr Thomas submits that there was no sufficient evidential basis for the finding, which the judge must have made, that X currently holds extremist views. The judge was in error in saying that Mr Davis had given double hearsay evidence: he had not provided any evidence at all of what anyone had said, he had merely put forward a gist, and there had been no disclosure of the material underlying the gist. In an application of this kind, Parliament has not provided for anything in the nature of a closed material process, which would allow a proper evaluation of the material underlying the gist. In those circumstances, no weight should have been given to the gist, because it was impossible for either X or the court to examine its credibility. An application of this nature is not to be equated with a bail application, or proceedings before the Parole Board, in which hearsay evidence may be relied upon; and in any event, there was here no hearsay evidence, only a gist. By making a finding in accordance with the contents of the gist, the judge had in effect relied on material which had not been disclosed to the parties, contrary to the common law principle that, with limited exceptions, no material can be put before a court in criminal or civil litigation without being disclosed to the parties: see, for example, *Belhaj v DPP* [2018] UKSC 33.

39. Mr Thomas submits, alternatively, that even if some weight could be placed on the unparticularised assertion that X "may" hold an extremist Islamic view, it was irrational for the judge to regard that as sufficient to establish an increased risk when there was documentary evidence before the court in which the prison imam had recorded that X's behaviour and attitudes in the weekly Muslim service and Islamic classes had always been upright, and that X had always asked the imams for the mainstream Islamic viewpoint on issues.

40. Miss Davidson in her response argues that the judge did not rely on evidence which was not before her: rather, she admitted the evidence of Mr Davis, including the gist of intelligence, and rightly recognised the need to consider what weight could be given to that gist. She submits that an application under section 102(5) of the PCC(S)A is *sui generis* and that material which would not be admissible as evidence in a criminal trial can properly be considered. She draws an analogy with bail hearings and proceedings before the Parole Board, in which a predictive assessment of future risk has to be made. Case law, including *R v Liverpool City Magistrates' Court ex parte DPP* [1993] QB 233 and *R v Mansfield Justices ex parte Sharkey* [1985] QB 613, establishes that in such proceedings hearsay evidence may be given, and facts may be related second-hand by a police officer, though the defendant must of course have an opportunity to respond to the allegations.

41. Miss Davidson relies in particular on *R (DPP) v Havering Magistrates' Court* [2001] 1 WLR 805, in which the court was concerned with section 7 of the Bail Act 1974 in relation to persons who have been released on bail. Section 7(3) provides a power of arrest if a constable has reasonable grounds for suspecting that a person has broken any of the conditions of his bail. Section 7(5) provides that when a person so arrested is brought before a justice of the peace, he may be remanded in custody if the justice is of the opinion that he has broken any condition of his bail. Issues arose as to the application of articles 5 and 6 of the Convention. Of relevance to the present case, the court held that when considering his discretion under section 7(5), a justice was not restricted to considering admissible evidence in the strict sense. At [41], Latham LJ (with whom Poole J agreed) said:

> "What undoubtedly is necessary is that the justice, when forming his opinion, takes proper account of the quality of the material upon which he is asked to adjudicate. This material is likely to range from mere assertion at the one end of the spectrum, which is unlikely to have any probative effect, to documentary proof at the other end of the spectrum. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity to comment on and answer that material. If that material includes oral evidence from a witness who gives oral testimony clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to. The ultimate obligation of the justice is to evaluate that material in the light of the serious potential consequences to the defendant, having regard to the matters to which I have referred, and the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion."

42. Miss Davidson also relies on the decision of the High Court in *R (Ajab) v Birmingham Magistrates' Court* [2009] EWHC 2127 (Admin), in which a Deputy District Judge considering an application to vary bail conditions had relied on the evidence of a police officer as to information, received from an informant whom he was unwilling to identify, which led the police to believe that the defendant was a flight risk. The

court rejected submissions by the defendant to the effect that he had no information about, and therefore could not address, the basis for the officer's belief that he was a flight risk, and to the effect that the Deputy District Judge had used information which was not available to the defendant. Dobbs J held that the defendant knew the essence of the allegation, namely that the defendant was liquidating his assets, and could make submissions and give evidence if he wished; and he knew as much as the Deputy Judge did, and could make submissions about the weight to be given to the information.

43. Miss Davidson submits that the judge was entitled to take into account the intelligence gist and to give it such weight as she thought appropriate. She was not wrong in law to do so, and she rationally concluded that the combination of the intelligence and the other factors showed an increased risk of harm to the public.

44. We are grateful to counsel for their submissions.

Discussion: Ground 2:

45. We have already referred (at [10] above) to the structure of section 102 of the PCC(S)A, which sets out a general rule as to when an offender is to be released from the custodial part of his sentence, and then sets out a number of exceptions. Subsection (5) is expressed in unqualified terms. No restriction or limitation is placed upon the power of the youth court to order late release, other than the requirements that the order must be made on an application by the Secretary of State for that purpose, and that the order must delay release by either one month or (in the case of longer DTOs) two months. If Parliament had wished to set specific criteria for the exercise by the youth court of that power it could, and in our view would, have done so. In particular, if it had wished to confine the use of that power to cases in which the offender had demonstrated exceptionally poor progress and/or exceptionally bad behaviour whilst in custody, it could have said so. In the absence of any express qualification or limitation, Parliament has in our judgment conferred on the youth court an unfettered discretion to make an order for late release. That being so, resort to external aids to the interpretation of section is neither necessary nor appropriate.

46. We are unable to accept the submission that the exercise of the power must be restricted to cases of exceptionally poor progress in custody. In *Munjaz*, to which we have referred at [36] above, it was held to be permissible for the hospital to depart from guidance which had been issued pursuant to a statutory duty placed upon the Secretary of State for Health to issue, and from time to time revise, such guidance for medical practitioners. Here, in contrast, the guidance on which X relies is non-statutory. It is guidance, not instruction. It is subject to change, and the 2000 guidance expressly recognised (see [13] above) that the criteria adopted by the court would develop as applications were heard. Although it refers only to cases of very poor progress, none of the iterations of the guidance expressly excludes any other circumstance in which an application for an order can be made or granted. Most importantly, it does not purport to set any criteria for the independent decision-making of the youth court. We conclude that the guidance places no fetter upon the youth court's discretion in this regard.

47. The youth court must of course act rationally, and we anticipate that applications and orders pursuant to section 102(5) will continue to be rare. In the present case,

however, the judge was not prevented from hearing and granting the application merely because it was explicitly made for reasons not expressly referred to in the guidance. She was, unarguably, entitled to have regard to the material before her showing both an increased risk to the public and a realistic prospect that the risk would be reduced by further rehabilitative work which could most effectively be carried out in custody.

48. The statutory purposes of sentencing identified in section 142 of the Criminal Justice Act 2003, which include the protection of the public, do not apply to an offender who is aged under 18 when convicted: the criminal court must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young persons, and must also have regard to the offender's welfare. It does not follow that the protection of the public is irrelevant to the exercise of the power to make an order for late release.

49. Recent well-publicised terrorist incidents show that a person who has appeared to make good progress in custody towards his rehabilitation, and who has behaved well and ostensibly done all that was required of him, may in fact be concealing a firm intention to commit very serious crime. The restriction for which X contends, requiring as it does a focus solely on whether the offender could be said to have made exceptionally bad progress against his sentence plan, would in our view be capable of producing surprising and undesirable results in such a case. Mr Thomas suggests that if there is good cause to assess the offender as posing a serious risk to the public, the Secretary of State may be able to take appropriate action under the Terrorism Prevention and Investigation Measures Act 2011; but even if that were so in some circumstances, it would not answer the general point and it could be of no assistance where the risk did not arise from terrorism-related activity.

50. We conclude that there is no arguable basis on which the second ground of appeal could succeed.

Discussion: Ground 1:

51. The youth court, when hearing an application for an order pursuant to section 102(5), is not confined to receiving formal evidence which would be admissible in a criminal trial. The material which the court considers must be relevant, and the court must give careful consideration to the weight which can properly be given to information and material which would not satisfy the requirements of admissibility in a criminal trial. In doing so, the court must have in mind the consequences of an order: a further period in custody for the offender in circumstances where had hoped, if not expected, to be released at the mid-point of his custodial term; and a commensurate reduction in the period for which he will be supervised in the community. The offender must be given an opportunity to respond to the allegations made against him to and to give evidence if he wishes to do so. The analogy which Miss Davidson draws with bail proceedings and proceedings before the Parole Board is in our view apt, and the words of Latham LJ in the *Havering Magistrates' Court* case, which we have quoted at [41] above, can be applied to the youth court when hearing an application of this kind.

52. We are unable to accept the submission that the judge was wrong to have any regard to the gist. The intelligence which was summarised in the gist was obviously relevant

to the application for an order for late release. The judge had no more information than did X. The limitations of the gist were obvious, and X could make submissions about that. The judge was clearly, and correctly, conscious of the need to give careful thought to the weight she attached to the gist. X could if he wished have given evidence contradicting or explaining the contents of the gist. The judge was in those circumstances unarguably entitled to take the gist into account in reaching her decision.

53. In the event, the judge gave only "some weight" to the intelligence summarised in the gist. She made it clear that she reached her decision on the basis of the combination of the gist and the other factors about which Mr Davis had given evidence. The combination of features which the judge identified in her judgment was striking and worrying. There was a clear basis for assessing X as presenting a risk to the public, notwithstanding that he had behaved well in custody, and a clear basis for assessing that further rehabilitative work in custody would likely reduce that risk. The judge concluded that an order for late release was necessary and proportionate. That conclusion was rationally open to her on the basis of the evidence and information she considered, and there is no arguable basis on which she could be said to have made any error of law.

Conclusion:

54. It was for those reasons that we refused permission to apply for judicial review.