Neutral Citation Number: [2023] EWCA Civ 720

Case No: CA2022000753

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATION COURT
MRS JUSTICE HEATHER WILLIAMS
CO/544/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2023

Before :

LADY JUSTICE SIMLER
LORD JUSTICE PHILLIPS
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

JASON KESSIE-ADJEI	**Appellant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**Respondent**

- -
- -

Hugh Southey KC (instructed by **Scott-Moncrieff & Associates Ltd**) for the **Appellant**
Tom Richards KC (instructed by **GLD**) for the **Respondent**

Hearing date : 8 June 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis:

Introduction

1. On 30 March 2022 Mrs Justice Heather Williams dismissed the appellant's challenge to the lawfulness of his detention from 15 January to 4 March 2021. The appellant had been recalled to prison after revocation of his licence. The recall was lawful as a matter of domestic law. The appellant's case was that his detention was in breach of Article 5(1) of the European Convention on Human Rights ("the Convention"). He also argued that HMPPS policy PSI 03/2015 did not conform with Article 5 of the Convention in respect of the discretionary power to disapply the effect of Section 49(2) of the Prison Act 1952.

2. The issues in the appeal are

   (a) whether the detention was incompatible with Article 5(1) because it was arbitrary in the sense of it being unforeseeable and/or because there was no causal link between the original sentence and the later detention; and
   (b) whether the policy applied in the appellant's case was incompatible with Article 5(1) because it failed to meet the requirement of legal certainty.

3. The judge found that there was no incompatibility with Article 5(1) on any of the bases put forward by the appellant. He argues that she fell into error.

Factual background

4. The appellant was born in May 1995. In May 2016 in the Crown Court sitting at Inner London he was sentenced to a period of 24 months' imprisonment for an offence of robbery. The sentence was suspended for two years. On 9 February 2018 he appeared in the Crown Court sitting at Southwark. For an offence of possessing a bladed article in a public place he was sentenced to 12 months' imprisonment. That offence had been committed during the operational period of the suspended sentence. The suspended sentence was activated in part. The appellant was ordered to serve 18 months of that sentence to run consecutively to the sentence imposed for possessing a bladed article. The total sentence was 30 months' imprisonment.

5. On 3 April 2019 the appellant was released on licence. He was provided with the written terms of that licence. Amongst other things he was required to be of good behaviour and not to commit any other offence. He was told that failure to comply with any requirement would mean that the licence would be liable to be revoked. The appellant had a supervising probation officer allocated to him. This was a Mr Haddow. Mr Haddow had only been in post for a few weeks before assuming responsibility for supervising the appellant.

6. On 12 November 2019 the appellant was arrested for an offence of having a bladed article in a public place. He was charged with that offence. He appeared at the Medway Magistrates' Court. His case was adjourned for a trial early in 2020. The appellant did not tell Mr Haddow about these events. Mr Haddow found out about the new charge on 17 December 2019 from a Probation Service computer database. He arranged to meet the appellant on 31 December 2019. At the meeting the appellant made it clear that he was aware of the possibility of recall to prison. Mr Haddow said

that no decision had been made. That was because it required consideration by more senior colleagues in the Probation Service.

7. On 10 January 2020 Mr Haddow was told to initiate the recall process. He did so. The process was completed by a senior colleague. On the same day the Public Protection Casework Section of the Probation Service confirmed that the appellant's licence had been revoked. Mr Haddow received a written notification which stated that the revocation order had been sent to the police with a request that the appellant be arrested.

8. On 9 March 2020 the appellant was sentenced in respect of the offence he had committed the previous November. He was sentenced to a period of imprisonment suspended for 2 years with an unpaid work requirement. Mr Haddow had a face to face meeting with the appellant shortly after the sentence was imposed. That was the first contact between them since the meeting on 31 December 2019. Thereafter, Mr Haddow had regular telephone contact with the appellant by way of supervision. The available computer records kept by Mr Haddow show that there were four telephone conversations between 17 April 2020 and 28 May 2020. The frequency then reduced to monthly contact, the last record of contact being at the end of September 2020. The computer records indicate that the supervision was in relation to the suspended sentence.

9. At no point did Mr Haddow inform the appellant that his licence had been revoked. His evidence was that, because the appellant had not told him of the arrest in November 2019, he was concerned that the appellant would abscond were he to do so. At some point in the weeks leading up to what would have been the date of the expiry of the appellant's licence in July 2020, Mr Haddow made a comment to the appellant that it was good news that his licence was coming to an end. This apparently was in response to a remark made by the appellant about the expiry of his licence. Mr Haddow at that time was not thinking about the fact that the clock on the licence had stopped because it had been revoked yet the appellant was still at large. The judge found that Mr Haddow did not act in bad faith. There was no deliberate attempt by him to mislead the appellant.

10. On 15 January 2021 the appellant was arrested by the police. They did so in reliance on the revocation of licence dated 10 January 2020. That gave them the power to apprehend the appellant without a warrant. There is no evidence about why the police acted in January 2021. Nor is there any evidence as to why they did not arrest the appellant at some earlier stage.

11. Because the appellant had not surrendered when his licence was revoked, he was deemed to have been unlawfully at large since 10 January 2020. That was so even though he had not been informed of the revocation of his licence, there being no requirement under the relevant procedure for someone in the appellant's position to be so informed. The usual effect of someone having been unlawfully at large was that any time so spent would be left out of account in calculating the outstanding sentence. In the appellant's case that meant that he had 174 days remaining on his sentence with a release date of 7 July 2021. However, the appellant's solicitors requested that the Secretary of State should exercise his discretionary power under PSI 3/2015 not to leave out of account the days when the appellant was unlawfully at large. The Secretary of State concluded that there were exceptional circumstances which

justified 58 days of the time spent unlawfully at large counting towards the sentence. Those circumstances were the appellant not being informed of the revocation and recall so that he was in that sense unknowingly unlawfully at large. That gave a release date of 10 May 2021.

12. The appellant also made representations in relation to his recall pursuant to section 254(2) of the Criminal Justice Act 2003. They were considered by the Parole Board. On 4 March 2021 the Parole Board decided that the test for release was met i.e. it was no longer necessary for the protection of the public that the appellant should be detained. The appellant was duly released on 8 March 2021.

The legal framework

13. The power to recall a prisoner appears in section 254 of the 2003 Act. The relevant provisions for our purposes are:

> *(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…..*
> *(6) On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, is to be treated as being unlawfully at large.*

The significance of the prisoner being unlawfully at large is to be found in section 49 of the Prisons Act 1952:

> *(1) Any person who, having been sentenced to imprisonment….is unlawfully at large, may be arrested by a constable without warrant and taken to the place in which he is required in accordance with law to be detained.*
> *(2) Where any person sentenced to imprisonment is unlawfully at large at any time during the period for which he is liable to be detained in pursuance of the sentence or order, then, unless the Secretary of State otherwise directs, no account shall be taken, in calculating the period for which he is liable to be so detained, of any time during which he is absent from the place in which he is required in accordance with law to be detained….*

In practical terms, once the licence has been revoked, the clock stops in respect of the sentence imposed. The legislation does not provide for any period of time within which the arrest must occur. The prisoner indefinitely remains liable to be detained, the reason for the detention being the original sentence.

14. There is a National Protocol concerning recall to prison. The Ministry of Justice and the National Police Chiefs' Council are signatories thereto. One of the stated objectives of the Protocol is to ensure the early apprehension of prisoners whose licences have been revoked. The responsibilities of the Probation Service include maintaining a database of those unlawfully at large with quarterly updates being sent to the police. (The evidence in this case is that such updates were sent and that the appellant appeared on the updates each quarter until his arrest in January 2021.) The

police via the Protocol undertook that, other than in cases of emergency recall (which did not apply to the appellant), offenders would be apprehended within 96 hours of the revocation order. The target identified in the Protocol was for that timescale to be met in 75% of cases.

15. The statutory provisions do not include any requirement that the offender must be notified of the revocation of the licence. There is an offence of remaining unlawfully at large after recall: section 255ZA of the 2003 Act. On indictment the offence is punishable with a term of imprisonment of up to 2 years. An element of the offence is that the offender has been notified of the recall whether orally or in writing. The consequence of failing to notify the offender will be that they cannot be prosecuted for the offence. His Majesty's Prison and Probation Service ('HMPPS') policy requires the issue of a letter notifying any prisoner who has been unlawfully at large for more than 28 days of their recall to custody. In practice such a letter will only be issued where proceedings for an offence under section 255ZA are anticipated.

16. The appellant did not seek to argue (whether in the court below or on appeal) that the statutory and procedural provisions were incompatible with the Convention, in particular Article 5(1).

17. Article 5(1) of the Convention provides (insofar as is relevant):

> *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…*

Deprivation of liberty is permitted, therefore, if the detention is a consequence of a criminal conviction so long as the procedures of the national law have been followed. As I have outlined, national law was followed in the appellant's case. The appellant was in breach of the requirements of his licence. Pursuant to section 254(1) of the 2003 Act the Secretary of State was entitled to revoke the licence and to recall the appellant to prison. The police were empowered to arrest and detain him. However, it is not enough that the deprivation of liberty is based on one of the exceptions set out in the sub-paragraphs of Article 5(1). The detention must be in keeping with the purpose of Article 5, namely the protection of the individual from arbitrariness. The domestic law must conform with the Convention, in particular it must provide legal certainty.

18. In *James v United Kingdom* (2013) 56 E.H.R.R. 12 the Grand Chamber identified some key principles in relation to arbitrariness. They were summarised at [192] to [195]:

> *192 First, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. Thus, by way of example, the Court has found violations of art.5(1) in cases where the authorities resorted to dishonesty or subterfuge in bringing an applicant into custody to effect his subsequent extradition or deportation.*

> *193 Secondly, the condition that there be no arbitrariness demands that both the order to detain and the execution of the detention genuinely conform with the purpose of the restrictions permitted by the relevant subparagraph of art.5(1)…*
> *194 Thirdly, for a deprivation of liberty not to be arbitrary there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and condition of detention…In the context of art.5(1)(a) a concern may arise in the case of person who, having served the punishment element of their sentence, are in detention solely because of the risk they pose to the public, if there are no special measures, instruments or institutions in place-other than those available to ordinary long-term prisoners-aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences…*
> *195 Fourthly, the requirement that the detention not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question. However, the scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. For example, in the context of detention pursuant to art.5(1)(a), the Court has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court. However…it has indicated that in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary…"*

The principle which it has been argued has particular significance in the appellant's case relates to "bad faith or deception". As I have said, the judge found as a fact that Mr Haddow had not acted in bad faith. There cannot be (and is not) any challenge to this finding.

19. The example of "deception" in Strasbourg jurisprudence to which our attention was drawn was *Čonka v Belgium* (2002) 34 E.H.R.R. 54. The authorities in Belgium sent a written notice to a group of asylum seekers inviting them to attend a police station "to enable the file concerning their application for asylum to be completed". In fact, the purpose of getting the group to the police station was to serve them with an order to leave Belgium and for their arrest in order to facilitate their removal. At [42] the court said:

> *The Court reiterates that the list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision. In the Court's view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5.*

20. In *Del Rio Prada v Spain* [2013] EHCR 307 the Grand Chamber considered the issue of foreseeability at [125]:

> *It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers*
> *essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see Kafkaris, cited above, § 116, and M. v. Germany, cited above, § 90). The "quality of the law" implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (see Amuur v. France, 25 June 1996, § 50, Reports 1996-III). The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail….*

This case concerned a woman serving a series of sentences for offences of murder. The total of the terms imposed was in excess of 3,000 years. Under the Criminal Code as it was at the time of sentence, the maximum term was fixed at a total of 30 years and remission was to be based on that term. By the time came for her release the Supreme Court had set a new precedent whereby remission was applied to the original individual terms, the effect of which was to increase the period of incarceration by almost 9 years. Applying the principles of foreseeability at [125], the Grand Chamber concluded that the prisoner's detention based on the new precedent was in violation of Article 5(1).

21. In relation to the term "after conviction" there must be a sufficient connection between the decision relied on and the deprivation of liberty. This was explained in *James v United Kingdom* at [189]:

> *…In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue. In this connection the Court observes that, with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong. Indeed, as the Court has previously indicated, the causal link required by subpara.(a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court or on an assessment that was unreasonable in terms of those objectives.*

This principle was re-visited to similar effect in *Del Rio Prada* at [214]:

> *….the "detention"must result from, "follow and depend upon" or occur "by virtue of" the"conviction". In short, there must be a sufficient causal connection between the two. However, with the passage of time the link between the initial*

> *conviction and the extension of the deprivation of liberty gradually becomes less strong. The causal link required under subpara.(a) might eventually be broken if a position were reached in which a decision not to release, or to re detain a person, was based on grounds that were inconsistent with the objectives of the sentencing court, or on an assessment that was unreasonable in terms of those objectives. Where that was the case a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with art.5.*

There may be cases where the gap in time between the original sentence and the return to custody was so great that the detention no longer had any link to the purposes of the sentence or otherwise the detention was unreasonable by reference to those purposes.

22. In relation to the specific issue of revocation of licence and recall to custody, the Divisional Court (Fulford LJ and Garnham J) conducted a detailed review of the authorities, both domestic and in Strasbourg, in *R(Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin). The principles to be drawn from the authorities were summarised at [121]:

> *(i) The early release arrangements do not affect the judge's sentencing decision.*
> *(ii) Article 5 of the Convention does not guarantee a prisoner's right to early release.*
> *(iii) The lawfulness of a prisoner's detention is decided, for the duration of the whole sentence, by the court which sentenced him to the term of imprisonment.*
> *(iv) The sentence of the trial court satisfies article 5.1 throughout the term imposed, not only in relation to the initial period of detention, but also in relation to revocation and recall.*
> *(v) The fact that a prisoner may expect to be released on licence before the end of the sentence does not affect the analysis that the original sentence provides legal authority for detention throughout the term.*

In *Khan* the court was concerned with changes to early release provisions during the currency of a sentence. The offender in that case had not been released prior to those changes coming into effect. As is apparent the principles enunciated were of wider application.

23. The most recent domestic authority of relevance is *Morgan v Ministry of Justice* [2023] 2 WLR 905. The judgment of the Supreme Court was handed down on 23 April 2023. Self-evidently it was not available to Mrs Justice Heather Williams. The case concerned changes to early release provisions in Northern Ireland which mirrored those considered in *Khan*. The issues were not on all fours with *Khan* because there is a difference in the regimes for release on licence in England and Wales on the one hand and Northern Ireland on the other. The parties in *Morgan* did not argue that *Khan* was wrongly decided. Rather, the position in Northern Ireland meant that different considerations applied.

24. *Morgan* was principally concerned with whether the change to the early release provisions violated Article 7 of the Convention. The Supreme Court drew two propositions from the authorities concerning Article 7 as set out at [104]:

> *(i) First, where a measure relates to the execution or enforcement of a penalty, it does not fall within the concept of "law" in article 7(1) of the ECHR and the requirement of foreseeability does not apply.*
> *(ii) Second, wherever a measure relates to a change in the penalty imposed and as such falls within article 7(1) of the ECHR, any such change falls within the concept of "law" within article 7(1) of the ECHR and is subject to the qualitative requirements that follow, including foreseeability.*

This is of relevance to the appellant's case since Article 5 also includes the concept of "law". By reference to those propositions, the Supreme Court determined that there had been no violation of the prisoners' Article 7 rights.

25. The Supreme Court distinguished the position vis-à-vis enforcement in relation to Article 5. Having cited *Del Rio Prada* the court said at [121/122]:

> *121 The qualitative requirements in respect of "law" in article 7 of the ECHR applies to (a) the offence with which the offender is charged and b) the penalty imposed by the sentencing court for committing the offence. By contrast, the qualitative requirement in respect of "law" in article 5 applies to the resulting detention; see para 127 of Del Rio Prada.*
> *Measures relating to the execution of a sentence can affect the right to liberty protected by article 5 of the ECHR.*
> *122 Accordingly, the distinction between the penalty and execution of the penalty is not decisive in connection with article 5(1)(a); see para 127 of Del Rio Prada. In other words, while a measure which affects the execution of a penalty is not subject to the qualitative requirements under article 7 of the ECHR, where the same measure involves a detention or deprivation of liberty, the measure will be subject to the qualitive requirements of "law" under article 5 of the ECHR.*

The Supreme Court then considered whether the change in release provisions had violated Article 5. The principles in *Khan* at [121](iii) and (v) were repeated. It was said that it was entirely foreseeable that the arrangements of the manner of the execution of a sentence might change during the currency of the sentence whether via policy or legislation. Thus, the challenge to the lawfulness of the detention by reference to Article 5 failed.

The judgment of Mrs Justice Heather Williams

26. The judge found that as a matter of national law the appellant's licence was lawfully revoked. Further, national law did not require him to be informed of the revocation. There were sound policy reasons for this. The appellant knew the requirements of his licence. He knew that he had breached those requirements by committing the offence in November 2019. For there to be a requirement that he should be notified of the revocation would provide him the opportunity to disappear.

27. The judge then considered the issue of causation i.e. whether there was sufficient connection between the sentence imposed in February 2018 and the appellant's arrest and detention in January 2021. She concluded that there was for six reasons:

- The appellant was detained so that he could serve the outstanding portion of the sentence imposed in February 2018.
- The lawfulness of a prisoner's detention is determined by the sentencing court for the duration of the whole sentence.
- Part of the appellant's sentence remained outstanding when he was arrested and detained.
- The period of detention from 15 January to 10 March 2021 did not exceed the unexpired portion of his sentence.
- There was no parallel to be drawn with the Strasbourg line of authority relating to bad faith.
- The period of detention from 15 January 2021 remained consistent with the objectives of the sentencing court i.e. the punishment of the appellant.

28. The judge concluded that, although circumstances might arise in which the passage of time severed the connection between the original sentence and the later deprivation of liberty, any such circumstances would be extreme. Whilst the facts of the appellant's case were unusual, the link between the sentence imposed in 2018 and his detention in 2021 was clear and unbroken.

29. In relation to foreseeability, the judge found that this requirement was met. The appellant knew that he had committed a further offence. He was aware that this constituted a breach of his licence. He appreciated that he was at risk of recall to custody to serve the outstanding portion of his sentence. The fact that he was given a misleading impression in or before July 2020 by Mr Haddow was not relevant to the question of foreseeability.

30. Finally, in respect of the appellant's arrest and detention, the judge held that no proportionality assessment was required prior to the appellant's detention. The detention was a consequence of the sentence imposed in 2018. It was not for the Secretary of State to examine the proportionality of that sentence.

31. The judge turned to the lawfulness of PSI 3/2105 whereby the Secretary of State has a discretion to allow a period spent unlawfully at large to count towards the outstanding sentence. The discretion is to be exercised in exceptional circumstances. It had been argued that this failed to meet the Convention requirements of accessibility and reasonable foreseeability. The judge rejected the argument. The policy did not supply the authority for the appellant's detention. There was no applicable Article 5(1) requirement for the policy to meet.

The issues raised on the appeal

32. Hugh Southey KC, who represented the appellant on the appeal, did not appear before Mrs Justice Heather Williams. He did not raise new arguments but the emphasis given to different aspects of the appellant's case was not the same as in the court below.

33. In his written submissions Mr Southey argued the following. First, the judge erred when she distinguished instances of bad faith of the kind identified in the Strasbourg jurisprudence and the unintentional communication of inaccurate information regarding detention. The focus should have been on foreseeability as emphasised in *Del Rio Prada*. Whilst there may not have been bad faith in the strict sense, Mr

Haddow had misled the appellant. That affected the foreseeability of the appellant's eventual arrest and detention.

34. Second, the requirement of foreseeability was not met. The appellant's recall was not foreseeable by him when it happened due to what he had been told by Mr Haddow. Had he sought advice at the time, the appellant would have been told (a) that he was entitled to believe what he was told by his probation officer, (b) that the legal framework implied that he could only be recalled if he presented a risk of serious harm, (c) that it is implicit that he would have been given notification of recall as a failure to surrender after such notice is a criminal offence and (d) there was no legal basis for failing to tell the appellant that he had been recalled.

35. Third, the detention in 2021 was inconsistent with objectives of the original sentencing decision. Those objectives were punishment and risk management. The objective of punishment had been met by the initial period of incarceration up to April 2019, that being what had been anticipated by the sentencing judge in February 2018. Risk management did not require detention since the appellant had been at liberty without any issue arising for a considerable period from April 2019.

36. Mr Southey went on to argue that Article 5(1) did apply to the policy PSI 3/2015. It was via the policy that the post recall detention purportedly was rendered proportionate. Thus, the policy determined whether the detention was in accordance with Article 5. Yet the terms of the policy meant that its application was not foreseeable. The use of the term "exceptional" gave no guidance as to how the discretion would be exercised. This offended the requirement of legal certainty.

37. In his oral submissions Mr Southey concentrated on the issue of foreseeability. He argued that the appellant's detention was not foreseeable because the appellant believed that he had completed his sentence and that he was no longer at risk of being detained. There were three factors which, taken together, demonstrated that the detention was not foreseeable: delay; what Mr Haddow had said to the appellant; the failure to send a letter in accordance with HMPPS policy. Mr Southey relied on *Čonka* to support the proposition that Mr Haddow's comment about the coming to the end of the licence amounted to deception. He submitted that *Morgan* had changed the landscape in terms of the domestic law. He relied on the phrase "measures relating to the execution of a sentence" at [121] of *Morgan*, arguing that this encompassed (for instance) interaction between a prisoner and a probation officer.

Discussion

38. The history of the appellant's recall is a sorry tale which reflects badly on the administration of licence revocation and recall. The appellant at no time made it difficult for the authorities to find him. When the licence was revoked he was on bail for the offence committed in November 2019. A condition of his bail was that he was electronically monitored. He remained at the same address throughout. After he was sentenced and was no longer on an electronic tag he was in regular contact with Mr Haddow. There is no explanation of why it took the police just over a year to arrest the appellant. The notice of revocation had been served on them. The appellant appeared on the quarterly updates of those unlawfully at large yet nothing was done. Mr Haddow knew that the appellant's licence had been revoked. He also realised that the appellant had not been detained. Whatever his reason for not telling the appellant

about the revocation, there is no explanation for his failure to chase up the issue of recall with his superiors and/or the police. In March 2020 the appellant was sentenced for the offence committed in November 2019. The sentencing court cannot have known that the appellant had been recalled to prison. Thus, it imposed its sentence in ignorance of a highly relevant circumstance. At some point close to the notional end of the appellant's licence period Mr Haddow said to the appellant that it was good news that his licence was coming to an end. As the judge found, this led the appellant to believe that the sentence imposed in 2018 would come to an end in July 2020. The issue is whether this catalogue of administrative incompetence engaged Article 5 of the Convention.

39. When he was sentenced in February 2018, the appellant knew the sentence which had been imposed. The judge who sentenced him inevitably would have explained the effect of the sentence, namely that he would serve half of the sentence before being released on licence. Whether the judge told the appellant what the effect would be were he to breach the terms of his licence is of no consequence. At the point of his release, the appellant was provided with a copy of his licence which told him that a breach of a requirement of the licence rendered him liable to recall to custody. One requirement was that he was not to commit any offence. In those circumstances the basis upon which the appellant was detained in January 2021 was entirely foreseeable. His sentence had not been altered. He had breached a requirement of his licence. The Secretary of State was entitled to revoke the licence. His recall to prison followed the revocation. All of this occurred as authorised by law.

40. When the Supreme Court in *Morgan* said that "measures relating to the execution of sentence" may attract Article 5 protection, this was not a reference to an administrative process. The closing words of [122] in *Morgan* demonstrate that the word "measures" involves the operation of law - "the measure will be subject to the qualitive requirements of "law" under article 5 of the ECHR." The factors relied on by Mr Southey in his oral submissions are factual matters particular to the position of the appellant. Subject to the question of bad faith or deception, they could not engage Article 5 since the detention was in accordance with law.

41. The judge's finding in relation to a lack of bad faith is not challenged. Mr Southey's argument was that there was deception by a public official, namely Mr Haddow, which led to a violation of Article 5. He accepted that he could not point to any authority which was on all fours with the facts in this case. Rather, he argued that there were parallels to be drawn between the appellant's case and the facts in *Čonka* . I can see no useful comparison between the appellant's case and the facts in *Čonka*. In the latter case the authorities had deliberately set a trap for those who in due course were detained. The execution of the plan led immediately to the detention of the prisoners. The deception was the cause of the detention. In the appellant's case Mr Haddow simply made a statement which led the appellant to believe that his licence had come to an end. However ill-advised it may have been to make the statement, it was irrelevant to the appellant's later detention.

42. The delay in acting on the notice of revocation remains unexplained. It had no apparent justification. But the passage of time between the sentence, the revocation of the licence and the appellant's detention fell far short of what would be required to break the link between the sentence and his detention. The judge said that the circumstances which would lead to a break in the causal link inevitably would be

extreme. In the context of a recall to prison on a lawfully imposed sentence, the judge was right. The appellant had breached the requirement not to commit a further offence. He was required to serve the balance of his sentence. That was wholly consistent with the objectives of the original sentence which had been imposed to punish the appellant. In argument it was observed that, by reference to the legislation, a revocation notice would be valid indefinitely. The question was raised as to how much time would have to pass before detaining a person subject to a revocation notice became arbitrary. That is not an issue capable of resolution on the facts of this case. The delay here did not break the causal link. In any event, any challenge to detention following a very long delay probably would be a conventional public law challenge based on irrationality or legitimate expectation.

43. The failure to send a letter to the appellant when he had been unlawfully at large for 28 days was in apparent breach of the Recall Policy issued by the Secretary of State. However, the practical operation of the policy meant that a letter would only be sent if a prosecution for an offence contrary to section 255ZA was anticipated. That is an understandable approach. Since there is no statutory requirement for a prisoner to be told that their licence had been revoked, the failure to send a letter to the appellant did not affect the foreseeability of his detention by reference to his breach of the licence requirement. It cannot be said that the appellant was misled when he did not receive a letter.

44. Although Mr Southey did not raise the point in the course of oral argument, his written submission was that the detention in 2021 was inconsistent with the objectives of the sentence imposed in 2018. This submission was based on a false premise. The sentence was imposed as punishment. Release on licence from a determinate sentence does not mark the end of the punitive element of the sentence. From the point of view of the judge who imposed the sentence, the sentence was one of 30 months' custody. The judge knew that release on licence would follow but that was not part of the sentencing process. The sentence imposed was not divided into a punitive element and an element involving risk management. When the appellant committed a further offence during the period of the licence, he was liable to serve the remaining part of the sentence imposed as punishment.

45. PSI 3/2015 is not a policy concerned with the execution of sentence. Rather, it provides the mechanism for the exercise of the Secretary of State's discretion as set out in section 49(2) of the Prisons Act 1952. A person in respect of whom the discretionary power might be exercised will have been recalled to prison having been unlawfully at large. That person's potential liability will be to serve the outstanding part of the sentence. If the discretionary power is exercised, the person will serve a reduced period in custody. For that period they will not be deprived of their liberty. Article 5 has no application to PSI 3/2015. The appellant was not detained pursuant to the policy.

Conclusion

46. The appellant was the victim of administrative incompetence. He was recalled to prison approximately 12 months after he should have been recalled by reference to the revocation notice. His detention was not caused by this incompetence. That resulted from the sentence imposed in February 2018 and from his clear breach of the licence

granted in relation to that sentence. His detention was foreseeable. It was not arbitrary. There was no violation of the appellant's Article 5 rights.

47. The policy in relation to leaving out of account days when the appellant was unlawfully at large was not the basis of his detention. No Article 5 rights could arise in relation to the policy. In any event, the policy identified that exceptional or very exceptional circumstances had to be present for days to be left out of account. This was sufficient to allow a prisoner to understand the basis on which the Secretary of State would apply the policy. The starting point was that a person who had been unlawfully at large had not been serving the sentence. There had to be something exceptional to depart from that position. The notion of "exceptional circumstances" is widely used in a variety of contexts, both in legislation and in government policy. For example, it applies when a minimum term of custody in relation to offences of prohibited firearms or domestic burglary falls to be imposed. The minimum term of custody may be disapplied if there are "exceptional circumstances". No further definition is given so as not to fetter the exercise of the discretion.

48. It follows that I would dismiss the appeal. It is appropriate, nonetheless, to repeat that there was an egregious level of administrative incompetence in the appellant's case. Someone in his position ought to have been arrested and detained within a few days of the revocation of the licence. The appellant's case would be a useful case study for the Public Protection Casework Section to review for the purpose of improving the practice in relation to recall.

Lord Justice Phillips

49. I agree.

Lady Justice Simler

50. I also agree.