



Neutral Citation Number: [2021] EWHC 3114 (QB)

Case No: CO/3369/2020

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/11/2021

**Before:**

**LORD JUSTICE LEWIS**  
**THE HONOURABLE MRS JUSTICE MCGOWAN**

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**Between:**

**THE QUEEN (on the application of ROWAN)**  
**- and -**

**Claimant**

**(1) THE GOVERNOR OF HER MAJESTY'S  
PRISON BERWYN**  
**(2) SECRETARY OF STATE FOR JUSTICE**

**Defendants**

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**Philip Rule** (instructed by **Instalaw**) for the **claimant**  
**Hugh Flanagan** (instructed by **Government Legal Department**) for the **defendants**

Hearing date: 2 November 2021  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
*In accordance with the Covid-19 protocol for handing down judgments, this judgment has been handed down by Lord Justice Lewis remotely by circulation to the parties' representatives by way of e-mail, by publishing on [www.judiciary.uk](http://www.judiciary.uk) and by release to Bailii. The date and time for hand down will be deemed to be Tuesday 23 November 2021 at 10:30.*

## **LORD JUSTICE LEWIS:**

### **INTRODUCTION**

1. The claimant, Norman Rowan, was sentenced to a term of imprisonment on 2 March 2006. He was released on licence but failed to comply with the terms of the licence and he was recalled to prison. This is a claim for judicial review challenging (1) the lawfulness of the detention of the claimant following his recall to prison and (2) the calculation of the date of re-release on licence and the length of any remaining licence period.
2. In brief, the claimant contends that it is a pre-condition of a lawful detention that a warrant of imprisonment exists. In the present case, the warrant has been destroyed and the claimant contends that no lawful authority exists for any detention. He further contends that his release on licence was governed by the provisions of Part 2 of the Criminal Justice Act 1991 (“the 1991 Act”) and that the second defendant has incorrectly calculated his release date, and licence period, by reference to the provisions of the Criminal Justice Act 2003 (“the 2003 Act”). He submits, further, that that gives rise to breaches of Article 5, 7 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).
3. The defendants contend that authority for the detention is provided by section 12 of the Prison Act 1952 (“the 1952 Act”) and section 254(6) of the CJA 2003. A warrant of imprisonment is not a precondition of the lawfulness of the detention. Further, the provisions of the CJA 2003 governing release on licence applied to sentences for offences committed on or after 4 April 2005. As the claimant’s offences were all committed after that date, the provisions of the 2003 Act did apply in his case and his subsequent release on licence and the length of that licence accord with the relevant statutory requirements. Consequently, there has been no breach of Article 5, 7 or 14 of the Convention.
4. Stacey J ordered that there be a rolled-up hearing, that is a hearing where permission to apply for judicial review would be considered and, if permission were granted, the substantive hearing would follow immediately. In the event we received full written and oral argument on the issues that arose. We grant permission to apply for judicial review on grounds 1 and 2 as set out in the detailed grounds of claim.

### **THE FACTUAL BACKGROUND**

#### *The Offences*

5. On 26 January 2006, the claimant pleaded guilty to three offences, namely unlawful wounding contrary to section 20 of the Offences Against the Person Act 1861 (“the 1861 Act”), assault occasioning actual bodily harm contrary to section 47 of the 1861 Act and common assault.
6. There is limited information available about the three offences. They occurred in the context of domestic violence inflicted by the claimant on his then partner. The assault occasioning actual bodily harm occurred on 14 October 2005. The unlawful wounding was committed on 15 October 2005. The common assault occurred between 1 May and 30 June 2005.

7. On 2 March 2006, the claimant was sentenced to an extended sentence of 48 months for the unlawful wounding comprising a custodial element of 18 months and an extended licence period of 30 months. He was sentenced to 10 months' imprisonment for the assault occasioning actual bodily harm to be served consecutively and two months' imprisonment for the common assault to be served consecutively to the other sentences. Time spent on remand – 136 days – counted towards the custodial element of the sentence.

### *The Issue Concerning the Basis of Sentence for the Unlawful Wounding*

8. The claimant in his submissions raised an issue as to whether the extended sentence for the unlawful wounding was correctly imposed. The issue arises out of the fact that the court record records that the extended sentence was imposed under section 85 of the Powers of the Criminal Courts (Sentencing) Act 2000 (“the 2000 Act”). There is also a reference to section 85 in a certificate of conviction but that is dated 26 February 2020. It is not a contemporaneous document. In fact, the relevant provisions of the 2000 Act had been repealed in respect of offences committed on or after 4 April 2005. As the claimant's offences were committed after that date, any extended sentence would have needed to be imposed under section 227 of the 2003 Act. Further, an extended sentence under section 85 of the 2000 Act could only have been imposed if the custodial element was for at least four years (here it was 18 months) whereas there was no such requirement under the 2003 Act between 4 April 2003 and 13 July 2008. The sentence imposed, therefore, could only have been imposed under section 227 of the 2003 Act.
9. There are two possibilities. One is that the judge erred when imposing the sentence. The other is that the Crown Court clerk erred when completing the record and erroneously recorded that the sentence was imposed under section 85 of the 2000 Act when, in fact, it was imposed under section 227 of the 2003 Act. The likelihood is that the associate erred. If the judge had erroneously referred to section 85 of the 2000 Act, counsel would have been likely to have drawn attention to the fact that the extended sentence could not be imposed under that Act either at the time of sentencing or within the time permitted under the slip rule. Alternatively, if the claimant had considered the sentence to have been unlawfully imposed, he could have sought permission to appeal to the Court of Appeal (Criminal Division). He did not do so.
10. In any event, the question of which Act the sentence was imposed under is not a matter for this Court. Mr Rule for the claimant accepted that the extended sentence of 48 months – comprising a custodial element of 18 months and an extended licence of 30 months – remained in force and valid unless and until set aside by the Court of Appeal (Criminal Division) whatever power the sentencing judge acted under.

### *The Claimant is Released on licence*

11. On 18 October 2007, the claimant was released on licence. Paragraph 1 of the licence document states that:

“1. Under the provisions of Chapter 6 of the Criminal Justice Act 2003 you are being released on licence.....”.
12. The terms of the licence required the claimant to remain in contact with his supervising officer. He attended one appointment with the officer but failed to attend the next

appointment. He left the United Kingdom and went to the Republic of Ireland. He was in breach of the terms of his licence.

13. On 25 October 2007, the second defendant revoked the claimant's licence and recalled him to prison. The notice of revocation stated that that action had been "taken under Section 254 of the Criminal Justice Act 2003".
14. The claimant did not return to prison. He remained unlawfully at large for over 11 years. He returned to custody in the United Kingdom on 17 June 2019. The circumstances in which that occurred are not clear from the limited material before us.

### *The Calculation of the Remainder of the Sentence*

15. On 14 July 2020, the claimant was informed that his sentence would end on 7 June 2022. That was confirmed again by an official in the sentencing calculation policy team of the second defendant by e-mail dated 31 July 2020. That e-mail said that the writer had requested a copy of the original warrant of imprisonment:

"but the Prison Service were unable to provide the document on account of the record having been destroyed".

16. The e-mail confirmed that any further release on licence before the end of the sentence would depend on a decision by the Parole Board to direct release. The e-mail also confirmed that *if* the provisions of the 1991 Act had applied (which the writer said was not the case), then there would have been a duty on the Secretary of State to release at the point when the claimant had spent a period in custody equal to  $\frac{3}{4}$  of the custodial element plus the 30 month period of extended licence. The claimant has calculated that that would have resulted in his automatic release from custody on 25 October 2021.

### *The Parole Board Directs Release*

17. In fact, the Parole Board directed that the claimant be released on 13 September 2021. He was duly released on licence on 13 September 2021.

## **THE LEGISLATIVE FRAMEWORK**

### *The Prison Act 1952*

18. Sections 12 and 13(1) of the 1952 Act deal with the place of confinement of prisoners. They provide, so far as material:

"12 Place of confinement of prisoners.

(1) A prisoner, whether sentenced to imprisonment or committed to prison or remand or pending trial or otherwise, may be lawfully confined in any prison.

(2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct; and may by direction of the Secretary of State be removed during the term of their

imprisonment from the prison in which they are confined to any other prison.

(3) A writ, warrant or other legal instrument addressed to the governor of a prison and identifying that prison by its situation or by any other sufficient description shall not be invalidated by reason only that the prison is usually known by a different description.

“13.— Legal custody of prisoner.”

(1) Every prisoner shall be deemed to be in the legal custody of the governor of the prison.

.....”

19. Section 49 of the 1952 Act provides that any time spent unlawfully at large is not to be taken into account in calculating the period that a person is to be detained.

### ***The 1991 Act***

20. The 1991 Act included provision governing release on licence. The provisions were complex. Different provisions applied to ‘long term prisoners’, i.e. those sentenced to four years’ imprisonment or more, and ‘short-term prisoners’, i.e. those sentenced to less than four years’ imprisonment. In essence, long term prisoners had to be released on licence two-thirds of the way through the sentence. The licence remained in force until the date when the prisoner would have served three-quarters of the sentence. If released but recalled to prison, the prisoner would be re-released when he had served three-quarters of the sentence. See sections 33(2), (3) and 37(1) of the 1991 Act.
21. Short-term prisoners sentenced to imprisonment for 12 months or more had to be released on licence when they had served one-half of their sentence. The licence period would continue for a period equal to three-quarters of the sentence. If released but recalled to prison, they would be re-released on licence when they had served three-quarters of the sentence. See sections 33(1), (3) and 37(1) of the 1991 Act. In the case of prisoners sentenced to less than 12 months’ imprisonment, they would be released unconditionally half-way through the sentence, that is they would be released and not be subject to any licence.
22. In the case of prisoners serving an extended sentence imposed under section 85 of the 2000 Act, they had to be released on licence at the appropriate stage during the custodial period of their sentence (which depended on the length of the custodial element of the sentence). The licence would continue until the end of the extension period. See sections 33(1), (2) and 44(2) and (3) of the 1991 Act. The net effect of the complex provisions on release appears to be that if a prisoner serving an extended sentence of more than 12 months were released on licence but then recalled, he had to be re-released on licence at the end of the period equal to three-quarters of the custodial element plus the extension period. The licence would continue for the duration of the whole sentence. See sections 33(3A), 37(1A) and 44(5) of the 1991 Act. The Parole Board could also direct his release on licence: see section 44A of the 1991 Act. If the second defendant released the prisoner under section 44A(5) of the 1991 Act, it may be that the licence

would continue in force for a period equal to three-quarters of the custodial element and the extension period by reason of section 37(1) of the 1991 Act (rather than for the whole sentence by reason of section 37(1A) of the 1991 Act as that sub-section appears to apply to release under section 33(3A) of the 1991 Act).

23. Section 51(2) of the 1991 Act deals with circumstances where consecutive sentences are imposed on the same occasion. Such sentences are to be treated as a single term.

*The 2003 Act.*

24. The 2003 Act introduced new provisions governing release on licence. One purpose of this change was to increase the period spent on licence so that it was co-extensive with the period of the sentence (see the observations of Lord Phillips in *R (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30, [2010] 1 WLR 1743 at paragraph 12).
25. The Criminal Justice Act 2003 (Commencement No. 8 and Transitional Savings Provisions) Order 2005 (“the Order”) brought the relevant provisions of the 2003 Act into force on 4 April 2005: see article 2 and paragraph 19 of Schedule 1 to the Order. Article 2 is, however, expressed to be “Subject to” Schedule 2 of the Order. Paragraph 19 of that Schedule introduced a saving provision in respect of sentences imposed for offences committed before 4 April 2005. Release in respect of such sentences continued to be governed by the 1991 Act. Paragraph 19 of Schedule 2 to the Order provided, so far as material, that:

**“Savings for prisoners convicted of offences committed before 4<sup>th</sup> April 2005**

**19.** The coming into force of–

(a) sections 244 (duty to release prisoners), 246 (power to release prisoners before required to do so), 248 (power to release on compassionate grounds) 249 (duration of licence) and 250 (licence conditions)

.....

is of no effect in relation to a prisoner serving a sentence of imprisonment imposed in respect of an offence committed before 4<sup>th</sup> April 2005.”

26. Section 244 of the 2003 Act imposes a duty on the defendant to release a prisoner on licence once he has served one-half of the requisite custodial period. Similar provisions for release on licence apply in respect of extended sentences imposed under section 227 where release is at one-half of the custodial period: see section 247(3) of the 2003 Act (as originally enacted). The licence remains in force for the duration of the sentence: see section 249 of the 2003 Act. Section 254 of the 2003 Act provided, so far as material, that:

“254. Recall of prisoners while on licence

- (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.

.....

- (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”.

27. Section 264 of the 2003 Act also deals with consecutive sentences. In essence, that provides for the aggregation of the custodial periods of such sentences. The defendant is not under a duty to release a prisoner on licence until he has served a period in prison that is equal in length to the aggregate of the custodial periods of all of the sentences: see section 264(2) of the 2003 Act.
28. There was an issue as to how the commencement provisions operated in relation to sentences of less than 12 months’ imprisonment. The Supreme Court subsequently interpreted paragraph 14 of Schedule 2 to the Order as meaning that where sentences of less than 12 months’ imprisonment were imposed at the same time as a sentence of imprisonment for 12 months or more, section 264 operated to aggregate the custodial period of all the sentences. Therefore, the custodial periods for sentences less than 12 months were aggregated with the custodial period for sentences of 12 months or more: see *Noone*.
29. There is provision for the second defendant to release on licence a prisoner previously recalled to prison where the Parole Board recommends such release. See sections 254, 255A, 255C and 256 of the 2003 Act.

#### *Subsequent Amendments*

30. Further provisions governing release were made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the 2012 Act”). That Act inserted a new Schedule 20B into the 2003 Act with effect from 3 December 2012. The provisions are, again, complex. There are definitions of a “1991 Act sentence” and a “2003 Act sentence” in paragraph 1 of Schedule 20B. There is also a general provision concerning the application of Part 1 of Schedule 20B in paragraph 3 which provides so far as material that:

“3 (1) This Part applies to certain persons serving a 1991 Act sentence.

(2) This Part also applies to a person serving a 2003 Act sentence which is—

.....

(b) an extended sentence imposed under section 227 or 228 before 14 July 2008.

(3) But this Part does not apply to a person who—

- (a) has been released on licence under Part 2 of the 1991 Act,
- (b) has been recalled to prison, and
- (c) (whether or not having returned to custody in consequence of that recall) is unlawfully at large on the commencement date.”

31. Thereafter the provisions preserve the position for certain persons who were released on licence under the 1991 Act but alters the position for other persons. For present purposes, the material provisions are paragraphs 13 and 14 of Schedule 20B to the 2003 Act which provide:

“13 (1) This paragraph applies to a person who—

- (a) has been convicted of an offence committed on or after 30 September 1998 but before 4 April 2005,
- (b) is serving a section 85 extended sentence imposed in respect of that offence,
- (c) has been released on licence under Part 2 of the 1991 Act, and
- (d) has been recalled before 14 July 2008 (and has not been recalled after that date).

(2) But this paragraph does not apply if the person has been released and recalled more than once.

14 (1) If a person to whom paragraph 13 applies is serving a sentence with a custodial term of less than 12 months, it is the duty of the Secretary of State to release the person on licence as soon as the person would (but for the earlier release) have served the period found by adding—

- (a) one-half of the custodial term, and
- (b) the extension period.

(2) If a person to whom paragraph 13 applies is serving a sentence with a custodial term of 12 months or more, it is the duty of the Secretary of State to release the person on licence as soon as the person would (but for the earlier release) have served the period found by adding—

- (a) three-quarters of the custodial term, and
- (b) the extension period.”

32. One of the effects of paragraph 3(2) of Schedule 20B to the 2003 Act is to draw a distinction between those who were unlawfully at large on the commencement date and so could not continue to benefit from the application of the release provisions in the



1991 Act (if they were otherwise applicable) and those who were in custody on that date whose position was preserved.

## **THE CLAIM FOR JUDICIAL REVIEW**

33. A claim for judicial review was issued on 18 September 2020. That claim challenged (1) the sentence calculation dated 14 July 2020/31 July 2020 (2) the application of Schedule 20B of the 2003 Act to the claimant and (3) the present unlawful detention of the claimant without a warrant of imprisonment. It is clear reading the claim form as a whole that the claim is a challenge to the lawfulness of the detention from 17 June 2019 when the claimant returned to custody. It is not, in terms, directed to the period of detention between 2 March 2006 (when the claimant was sentenced) to the 18 October 2007 (when he was released on licence). In oral submissions, Mr Rule expressly accepted that the claimant would not be able to bring any claim for damages for false imprisonment for the earlier period by the operation of the Limitation Act 1980. More than six years had passed since the end of that earlier period of detention and he could not bring a claim in respect of any part of that earlier period of detention.
34. There are two grounds of claim. First, it is said that the detention from 17 June 2019 was unlawful as there was no warrant of imprisonment in existence authorising the detention.
35. Secondly, it is said that the 1991 Act provisions governing release on licence applied to the claimant and the failure to comply with those provisions was unlawful. It is said that the effect of the failure to apply the 1991 Act provisions were two-fold. The claimant should have been entitled to automatic release on 25 October 2021 and any licence should have ended on that date. Further, the release in respect of the sentences of 10 months and 2 months should have led to unconditional release at the half-way way stage of each of those two sentences (i.e. 5 months and 1 month respectively) with no further licence period in respect of that total period of 6 months. Thus, the sentence, and any licence, would end on 7 December 2021 not 7 June 2022 in any event. The failure to apply the 1991 Act provisions was, it was said, a breach of the common law principle that legislation should not be applied retrospectively, and Articles 5, 7 and 14 of the Convention.

## **THE FIRST ISSUE – THE WARRANT OF IMPRISONMENT**

### ***Submissions***

36. Mr Rule for the claimant submitted that it was a precondition for the lawful detention of the claimant that there be in existence a warrant for his imprisonment. On the evidence, that warrant had been destroyed at some stage. Therefore, the defendants could not demonstrate lawful justification for the detention of the claimant following his return to prison in June 2019. Mr Rule relied upon the decision of the House of Lords in *R v Governor of Brockhill Prison, Ex p. Evans (No. 2)* [2001] 2 AC 19 as demonstrating the importance of a warrant of imprisonment. He relied, in particular, upon the decision of *Demer v Cook* *The Times* July 11, 1903, (1903) 88 LT 629, as establishing that a conviction is insufficient to amount to lawful authority for a detention and that there must be in addition a warrant of imprisonment.

37. Mr Flanagan for the defendants submitted that the sentence of the Crown Court provides the lawful justification for the detention in the present case. There is no statutory requirement that a warrant for imprisonment be in existence as a legal precondition to the lawful detention of a prisoner. Furthermore, if the warrant had existed but had been destroyed by fire or flood or some other event, the consequence of the claimant's submissions would be that the detention ceased to be lawful. Mr Flanagan also submitted that any error in relation to the statutory powers under which the extended sentence was passed would not invalidate, or remove, the ability or obligation to comply with the order as pronounced by the court. Mr Flanagan relied, in this respect on *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2021] 1 WLR 1075, and *R (GJD) v Governor of HMP Grendon* [2015] EWHC 350 (Admin).

### *Discussion*

38. The basis for the lawful detention of the claimant is the sentence of imprisonment pronounced by the Crown Court and the provisions governing his recall to prison. The Crown Court imposed a total sentence on the claimant of 60 months, comprising 10 months' imprisonment for the section 47 assault, 2 months' imprisonment for the common assault, and an extended sentence of 48 months for the unlawful wounding (comprising a custodial element of 18 months' imprisonment and a further 30 months extended licence period). Sections 12 and 13 of the 1952 Act further confirm that a person sentenced to imprisonment may lawfully be detained in prison. Detention during the period of imprisonment, subject to the operation of the relevant statutory provisions governing release, is lawful. Furthermore, on the revocation of a person's licence and his recall to prison, that person may again be lawfully detained pursuant to the sentence (and provided that any statutory provisions governing re-release on licence are observed): see section 254(6) of the 2003 Act. There is no statutory precondition that a lawful detention is dependent upon the existence of a warrant of imprisonment.
39. The issuing of a warrant for the imprisonment of a prisoner may serve a number of purposes. An order of the court directing that a person be kept in custody may itself justify the lawful detention of the individual. Thus, where a warrant was issued requiring a governor to keep an accused person in prison until delivered to the court, that warrant itself provided lawful justification for the detention of the person for the purposes of a claim for damages for false imprisonment, notwithstanding the fact that the time-limits for bringing the claimant to trial had passed: see *Olotu v Home Office* [1991] 1 WLR 328. A warrant may also provide a defendant, in appropriate circumstances, with a defence to a claim for false imprisonment. As Lord Alverstone CJ put it in *Demer v Cook* "where a gaoler receives a prisoner under a warrant which is correct in form, no action will lie against him if it should turn out that the warrant was improperly issued or that the court had no jurisdiction to issue it".
40. Furthermore, the issuing of a warrant of imprisonment is routine, and clearly sensible, as it will provide the governor of a prison with clear authority that he is to detain the individual to whom the warrant relates and, usually, will provide information which will be necessary to calculate the prisoner's release date. If the governor does not release a person in accordance with the statutory provisions governing release, he may be liable for false imprisonment: see the decision of the House of Lords in *Evans*. There may be other practical, and legal consequences of the issuing of a warrant of imprisonment. We had limited argument, and no evidence, on the practice relating to

issuing warrants of imprisonment. The description above is not intended to be exhaustive.

41. None of that, however, indicates that the existence of a warrant is a precondition of the lawfulness of detention pursuant to a sentence of imprisonment imposed by a court, or following a revocation of a licence and a recall to prison. Nor does the decision in *Demer v Cook*, on analysis, dictate a different result.
42. In *Demer v Cook*, the claimant was convicted on 10 January 1902 before the magistrates' court of being a vagabond and a rogue and was sentenced to two months' imprisonment with hard labour. A warrant for imprisonment was drawn up and he was sent to Pentonville Prison. He appealed and was released on bail. On 18 April 1902, his appeal was heard by a recorder at the quarter sessions. The recorder convicted the claimant of one offence of indecently exposing himself on two occasions and sentenced him to two months' imprisonment (without hard labour). The record of the original conviction was altered accordingly. The claimant was returned to Pentonville with a copy of the original conviction as amended and the original warrant for his detention of 10 January 1902. No fresh warrant of imprisonment in relation to the sentence imposed by the recorder was drawn up. The claimant was detained between 18 and 29 April 1902. On that later date, the conviction was quashed as it was bad for duplicity and the claimant was released. He sued for false imprisonment for the period of 18 to 29 April 1902. The Divisional Court found that the prison governor had no lawful justification for that period of detention. The warrant of imprisonment issued on 10 January 1902 was insufficient to justify the detention in April 1902 as the warrant related to the original conviction and had expired. The conviction of 10 January 1902 could not authorise the detention in April 1902 as that conviction had been varied on appeal and, as Lord Alverstone CJ put it, the conviction on 18 April 1902 "is a new conviction for a new punishment". The conviction of 18 April 1902 could not, itself, justify the detention as that sentence had been quashed by the Divisional Court on 29 April 1902 and was of no legal effect. In those circumstances, the governor was not justified in detaining the claimant in the absence of a fresh warrant issued in relation to the 18 April 1902 conviction.
43. The position in the present case is different. There was in place a sentence of the Crown Court which has not been appealed. The claimant had been released on licence but that licence had been revoked and he had been recalled to prison. In the circumstances, the detention was justified and was lawful.

## **THE SECOND ISSUE – THE CALCULATION OF THE RELEASE DATE**

### ***Submissions***

44. Mr Rule submitted that the claimant was subject to an extended sentence for the unlawful wounding offence which, on the available documentary evidence, was imposed under section 85 of the 2000 Act. That meant that the provisions in the 1991 Act governing release must also apply to him. He submitted that that meant that the defendant was under a duty to release the claimant once a period equal to three-quarters of the custodial element of the extended sentence, together with the extension period, had been served in custody. He submitted that that required the claimant to be released on 25 October 2021. That release, even though expressed to be on licence, in fact, brought the sentence for that offence to an end. He further submitted that the two

sentences for the section 47 assault and the common assault were each for less than 12 months' imprisonment and the release provisions in the 1991 Act applied to those. Consequently, the claimant should have been released after serving one-half of the ten months' and two months' imprisonment imposed for those two offences respectively. There should be no licence period of six months for those offences. Consequently, the end of the claimant's sentence should, in any event, be 7 December 2021 not 7 June 2022. In a post-hearing note, Mr Rule submitted that treating the sentence for those offences as a single term in accordance with section 51(2) of the 1991 Act (or paragraph 21 of Schedule 20B to the 2003 Act) with the result that they were treated as a single term of 12 months' imprisonment for the purposes of the release provisions of the 1991 Act was not "possible or proper".

45. Mr Rule submitted that the application to the claimant of the 2003 Act release provisions rather than the 1991 Act provisions was unlawful on a purposive interpretation of the Order bringing the 2003 Act into force. Mr Rule submitted that the claimant would have been unlawfully detained contrary to Article 5 of the Convention if he had not been released before 25 October 2021. Mr Rule accepted that, in fact, the claimant had been released on licence earlier than that, i.e. on 13 September 2021. However, he submitted that the provisions of Article 5(4) applied to release on licence, relying on *R (Sim) v Parole Board* [2004] QB 1288. The provisions governing release, he submitted, were not reasonably foreseeable and so there was a breach of Article 5 of the Convention.
46. Mr Rule submitted that the change from the application of the release provisions in the 1991 Act to the 2003 Act provisions involved subjecting the claimant to a retrospective penalty contrary to Article 7 of the Convention and the common law. Finally, Mr Rule submitted that the claimant had been discriminated against contrary to Article 14 of the Convention read with Article 5. The basis for this claim was that the claimant was treated differently from a prisoner convicted of an identical offence and sentenced to an identical sentence (i.e. a 48 months extended sentence for unlawful wounding imposed under section 85 of the 2000 Act). That prisoner, assuming he had been in custody, continued to have his release governed by the 1991 Act provisions by virtue of paragraph 14 of Schedule 20B to the 2003 Act. But the claimant – because he was unlawfully at large at the time that Schedule 20B was inserted into the 2003 Act – did not continue to have the benefit of the 1991 Act provisions but instead was subject to the 2003 Act provisions. That, submitted Mr Rule, involved differential treatment on grounds of other status which the defendant could not objectively justify. Mr Rule relied upon a large number of authorities in support of his submissions.
47. Mr Flanagan submitted that the premise underlying all of the claimant's claim was factually wrong. The claimant's release had never been governed by the provisions of the 1991 Act because his offences had been committed after 4 April 2005. Consequently, the provisions of the 2003 Act governed his release on licence. Those provisions required the sentences for the three offences to be aggregated pursuant to section 264 of the 2003 Act giving a total sentence of five years, comprising 30 months imprisonment and a 30 month extended licence period. The prisoner had been released on licence in accordance with the relevant provisions of the 2003 Act. The licence had then been revoked and the claimant recalled to prison under section 254 of the 2003 Act. In those circumstances, the defendant was required to, and did, release the claimant on licence once the Parole Board recommended that the claimant be released on licence

on 13 September 2021 under section 256 of the 2003 Act. Under section 249(1) of the 2003 Act, the licence remained in force until the end of the sentence, i.e. until 7 June 2022.

48. In those circumstances, Mr Flanagan submitted, there had been no breach of Article 5 of the Convention. No retrospective change in the claimant's position had occurred and there could be no breach of Article 7 of the Convention in those circumstances. Furthermore, any change in release provisions would not amount to a penalty for the purposes of Articles 5 and 7 of the Convention in any event. In that regard, Mr Flanagan relied upon the decision of the European Court of Human Rights in *Abedin v United Kingdom* Application No. 54026/16, (2021) EHRR SE6, and *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin). In relation to Article 14 of the Convention, any differential treatment arose between persons who committed offences before 4 April 2005 and those (like the claimant) who committed offences after that date. Differences in licence provisions based on the date when offences had been committed had been recognised as being objectively justified.

### *Discussion*

#### **The position in domestic law**

49. The starting point is the provisions of the Order which brought the provisions of the 2003 Act governing release on licence into force on 4 April 2005. Article 2 and paragraph 19 of Schedule 2 to the Order, however, provided that the 2003 Act provisions did not apply to persons serving a sentence of imprisonment imposed in respect of an offence committed before 4 April 2005. The 1991 Act, therefore, continued to apply to sentences for those offences. However, the provisions of the 2003 Act did apply to those serving sentences for offences committed on or after 4 April 2005. The claimant committed all of the three offences for which he was serving a sentence after 4 April 2005. On a simple reading of Article 2 and paragraph 19 of Schedule 2 to the Order, therefore, the claimant was always subject to the release provisions in the 2003 Act. Those provisions applied on the dates when he committed the offences. He was never subject to the release provisions of the 1991 Act.
50. There is no basis for seeking to give what Mr Rule called a purposive interpretation to paragraph 14 of Schedule 2 to the Order so that the release provisions in the 1991 Act could continue to apply to the claimant. First, the reason why Mr Rule submits that should be done is that the claimant was, or might have been, sentenced to an extended sentence under section 85 of the 2000 Act. Therefore, he submits, the claimant "should" be assessed for release on licence under that Act. There is no basis for attributing such a purpose to the Secretary of State when making the Order. Rather, the clear purpose as appears from the words of paragraph 14 of Schedule 2 to the Order was to draw a distinction by reference to the date upon which an offence was committed. There is no reason to assume that the defendant would have intended to apply the 1991 Act provisions to a sentence erroneously imposed under the 2000 Act (when it should, in fact, have been imposed under the 2003 Act). There is no proper basis for seeking to compound any error in relation to the sentencing powers by providing that the release provisions of the 1991 Act should apply in circumstances where they were not intended to apply. Furthermore, the wording of the Order is clear and the applicability of the 2003 Act provisions is defined by the date of the offences. There is no realistic means

by which words could be read in to give effect to what the claimant would wish the situation to be.

51. Similarly, the Order makes it clear that the release provisions in the 2003 Act applied to the sentences imposed for the other offences, namely the section 47 assault and the common assault. Those offences were also committed after 4 April 2005. There is no basis for seeking to apply the 1991 Act provisions to the sentences for those offences or for arguing that the claimant should have been released unconditionally once he had completed one-half of those sentences. Those sentences fell to be dealt with under the 2003 Act. The custodial elements fell to be aggregated, together with the custodial element of the extended sentence, in order to determine the date at which the claimant was to be released: see section 264 of the Act and paragraph 14 of Schedule 2 to the Order, as interpreted in *Noone*. The duration of the licence granted on release in respect of those offences is fixed by section 249 of the 2003 Act and it remains in force for the remainder of the sentence. For completeness, we note that those sentences would have been aggregated and treated as a single term even under section 51 of the 1991 Act had that been applicable.
52. For those reasons, the starting point is that, as a matter of domestic law, the claimant was always subject to the release provisions in the 2003 Act and was never subject to those in the 1991 Act. In those circumstances, it is possible to deal with the claimant's specific complaints in relation to the Convention relatively briefly.

### **Article 5 of the Convention**

53. Article 5 of the Convention, so far as material, provides that:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

.....

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

54. The claimant was, initially, lawfully detained after conviction by a competent court. He was released on licence, that licence was revoked and he was recalled to prison. He was released again following the recommendation of the Parole Board on 13 September 2021. Any time spent in custody pursuant to the sentence of 10 months' and 2 months' imprisonment, and the 18 months' custodial element of the extended sentence, would fall within Article 5(1)(a) of the Convention as it would be lawful detention after conviction by a competent court. Any period of detention during the extended licence period, assuming that Article 5 applies to such detention, would be subject to review by a judicial body, the Parole Board, under sections 254, 255A, 255C and 256 of the 2003 Act (or previously s. 44A of the 1991 Act). That would comply with the requirements

of Article 5(4) of the Convention: see the decision of the Court of Appeal in *Sim*. So far as Mr Rule relies on the need for the provisions governing release on licence during the extension period to be foreseeable in order to comply with Article 5 of the Convention, the provisions of the 2003 Act and the Order are foreseeable. They identify which provisions apply to release in respect of sentences for offences committed after 4 April 2005. The release provisions, themselves, are contained in the 2003 Act. The provisions of the Order and the 2003 Act, as a whole, are accessible, precise and foreseeable in their application and avoid all risk of arbitrariness. There has been no breach of Article 5 of the Convention.

### **Article 7 of the Convention**

55. In relation to Article 7(1) of the Convention, that provides that:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute an offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time that the criminal offence was committed.”

56. First, on the facts, the release provisions in the 2003 Act were in force and applied at the date when the claimant committed the offences. The claimant was always subject to the release provisions in the 2003 Act. The claimant is not being subjected to any different arrangements or any different “penalty” from those applicable at the time that the criminal offence was committed. There is no breach of the second sentence of Article 7(1) of the Convention.

57. Secondly and separately, in any event, if there had been any changes in the arrangements relating to release on licence, they would not constitute a change in the penalty for the purposes of Article 7 of the Convention but would relate to the manner of execution of the penalty. The total penalty the Crown Court imposed remained the same. See the decision of the European Court of Human Rights in *Abedin v United Kingdom* and the decision of the Divisional Court in *R (Khan) v Secretary of State for Justice*.

58. Whilst the claimant also referred to the common law principle governing retrospectivity, there was no element of retrospectivity here. Nor is there any basis upon which this Court could read the Order as if it did not make the provisions of the 2003 Act applicable to the claimant given the date on which he committed the offences.

### **Article 14 of the Convention**

59. Article 14 of the Convention provides that:

“14. 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.”

60. In broad terms, it is appropriate first to identify the differential treatment to which the claimant says he is subject. Then it is necessary to consider whether (1) the circumstances fall within the scope of a Convention right (2) the difference of treatment is on the ground of one of the characteristics in Article 14 or some other status (3) the claimant and the persons treated differently are in analogous situations and (4) the defendant is able to demonstrate an objective justification for the difference in treatment. See the judgment of Lady Black JSC in *R (Stott) v Secretary of State for Justice* [2020] AC 51 at paragraph 8.
61. The first and critical point in this case is to identify what is the difference in treatment. The claimant seeks to compare himself with a person who is subject to the release provisions of the 1991 Act, who was in custody on 3 December 2012 (when schedule 20B of the 2003 Act came into force) and who continued to benefit from the release provisions in the 1991 Act by virtue of the provisions of Schedule 20B. The claimant says he was in the same position – but that he was unlawfully at large on 3 December 2012 and, therefore, by operation of Schedule 20B, he no longer enjoys the continued application of the release provisions in the 1991 Act. He says that, for the first time, he was brought within the ambit of the 2003 Act provisions by virtue of the coming into force of Schedule 20B to the 2003 Act.
62. That analysis is, however, factually wrong. The claimant was not a person who was ever within the scope of the release provisions in the 1991 Act. He committed his offences after 4 April 2005 and the release provisions of the 2003 Act applied to him. The release provisions of the 1991 Act never applied to him. He is not in a position whereby the provisions of the 1991 Act ceased to apply to him because he was unlawfully at large on 3 December 2012.
63. So far as the claimant is concerned, the differential treatment would arise out of comparison between the claimant (who committed his offences after 4 April 2005) and a person who committed offences before 4 April 2005. The claimant is subject to the 2003 Act provisions; the other person is not. That is because of the date on which the offences were committed. However, even assuming differential treatment between the claimant and such a prisoner on grounds of other status, and assuming that they are in an analogous situation, the difference in treatment would be objectively justified. The second defendant wished to move to a different system of release provisions, including increasing the licence period to make it co-extensive with the remainder of the sentence. That was done by making the 2003 Act provisions governing release apply to sentences for offences committed on or after 4 April 2005. The decision to alter the arrangements for early release is objectively justified. The application of the new arrangements to those who committed offences after a certain date is also objectively justified. That conclusion is consistent with the observations of Lord Hughes JSC in *R v Doherty (Shaun)* [2017] 1 WLR 181, cited by Lady Black JSC in *Stott* at paragraph 62. For those reasons, the claimant has not suffered any unlawful discrimination contrary to Article 14 of the Convention read with Article 5.

## CONCLUSION

64. The claimant was lawfully detained following the revocation of his licence and his recall to prison. As the claimant committed his offences after 4 April 2005, the provisions governing release contained in the 2003 Act applied to him. His subsequent release on licence, and the calculation of the licence period, have been lawfully carried



out in accordance with the relevant provisions of the 2003 Act. There has been no breach of Articles 5, 7 or 14 of the Convention. The claim is accordingly dismissed.