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Case No: CO/544/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2021

Before:

MR JUSTICE LINDEN

- -

Between:

THE QUEEN
(on the application of JASON KESSIE-ADJEI) **Claimant**

- and -
THE SECRETARY OF STATE FOR JUSTICE **Defendant**

- -
- -

Mr Sam Grodzinski QC (instructed by Scott Moncrieff & Associates) for the Claimant
Mr Tom Richards (instructed by the Government Legal Department) for the Defendant

Hearing date: 29 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am on 7 May 2021

The Honourable Mr Justice Linden:

Introduction

1. On 29 April 2021 I heard argument in relation to the Claimant's renewed application for permission to claim judicial review, permission having been refused on the papers by Lang J on 29 March 2021.

2. Having considered these arguments, I agree with Lang J for the reasons set out below.

The issues in the Claim

3. In very broad outline, on 3 April 2019 the Claimant was released on licence as part of a 30-month determinate prison sentence. On 10 January 2020, his licence was revoked following a serious breach of his licence conditions, but he was not arrested or returned to prison. His offender manager, Mr Haddow, led him to believe that he would not be. In the ordinary course, the licence period of his sentence would have expired on 2 July 2020 and he was also led by Mr Haddow to believe that this was what had happened. On 15 January 2021, however, he was arrested and returned to prison.

4. On 11 February 2021, the Defendant exercised his power under section 49(2) Prison Act 1952 to allow 58 of the days which the Claimant had spent unlawfully at large, following the revocation of his licence, to count towards his sentence, i.e. a third of the period outstanding in relation to his sentence ("the section 49(2) decision"). This meant that his release date was brought forward to 10 May 2020. In the event, however, on 8 March 2021, the Claimant was released pursuant to a decision of the Parole Board.

5. The Claimant challenges his detention from 15 January 2021 to 8 March 2021 on the grounds that it was contrary to Article 5 of the European Convention on Human Rights ("ECHR"), and he challenges the section 49(2) decision on the grounds that it was irrational and failed to take into account relevant considerations. However, the Defendant submits that permission should be refused because:

    i) The Article 5 claim is an abuse of process, permission to bring this claim having been refused by Mr Richard Clayton QC (sitting as a Deputy High Court Judge) following a hearing on 27 January 2021 in the context of a previous claim for judicial review by the Claimant based on the same detention (CO/260/2021);

    ii) In any event, the Article 5 claim and the challenge to the section 49(2) decision are not realistically arguable.

The facts in greater detail

6. On 6 May 2016, a suspended sentence order of 24 months' imprisonment was imposed on the Claimant following his conviction for robbery on 8 March 2016.

7. On 2 January 2018, during the operational period of the suspended sentence order, he was convicted of possession of a bladed article in a public place and was sentenced to 12 months' imprisonment. The custodial part of his suspended sentence was also activated, albeit with a reduction to 18 months, and the sentences were ordered to be served consecutively. The effect of this was that he was sentenced to a total of 30 months' imprisonment.

8. On 3 April 2019, the Claimant was released on licence. His licence notified him that it would expire on 2 July 2020 unless it was revoked before this.

9. In November 2019 the Claimant was again charged with possession of a bladed article in a public place and, on 12 November 2019, he was bailed by Medway Magistrates Court pending trial in March 2020. The Claimant's bail conditions required him to reside at a specified address and he was subject to a 10-hour overnight curfew with electronic monitoring.

10. As a result of this breach, on 10 January 2020 the Defendant revoked the Claimant's licence and recalled him to prison pursuant to section 254(1) of the Criminal Justice Act 2003. The effect of this decision was that, by virtue of section 254(6), the Claimant was now liable to be detained *"in pursuance of his sentence"* and, for as long as he was not detained, was *"unlawfully at large"* ("UAL"). Moreover, by virtue of section 49 (2) Prison Act 1952, the time which he spent at large would not count towards the completion of his sentence unless the Defendant directed otherwise.

11. For reasons which are unclear but appear to include failure by the police to act on the recall, the Claimant was not detained at this stage. As Mr Grodzinski QC points out, this is surprising given that the authorities were, at all material times, aware of the address at which the Claimant was required to reside pursuant to his bail conditions. He was also subject to electronic monitoring and, on 9 March 2020, he attended his trial in relation to the November 2019 possession of a bladed article offence. Indeed, he was sentenced to a further suspended sentence order of 24 months' imprisonment together with an unpaid work requirement.

12. In his witness statement dated 5 February 2021, the Claimant says that Mr Haddow heard about the Claimant's pending trial date and made contact with him. The Claimant says he was not feeling well at the time and suspected that he had Covid-19. He says that it did not appear that Mr Haddow was going to recall him, and he asked Mr Haddow to let him know if he was going to do so. *"He said no, and he knew I was ill because of my voice at the time"*.

13. The Claimant also relies on an email exchange between his solicitor and Mr Haddow following a telephone conversation on 21 January 2021 in which Mr Haddow was asked, amongst other things:

> *"To confirm what you said in our call you said you did not believe he was aware of the recall, but you also said that you were in regular contact with [the Claimant] by telephone. Please confirm when the recall was instigated...*
>
> *I would like to confirm if you informed [the Claimant] that his licence was at an end? Was [the Claimant] informed to keep in contact following completion of the sentence? Why did you not inform [the Claimant] that he was subject to recall? Where there any steps taken to have [the Claimant] brought to custody other than the recall? ..."*

14. Mr Haddow replied on 22 January 2021 as follows, so far as material:

> *"Recall instigated 10/01/2020. Looking through my records, there is no contact suggesting that I advised of recall. If I recall correctly, this was to prevent [the*

> *Claimant] going AWOL and presenting a more significant risk to the public and the fact that [the Claimant] was bailed to an address… with curfew which enabled ample opportunity to execute warrant.*
>
> *I next contacted [the Claimant] following his sentencing for further offence in March 2020, for which he received an SSO. Kept in telephone contact. We had a conversation regarding end of licence date. He is aware of his obligation to maintain contact with myself as per requirement of SSO."*

15. This email suggests that Mr Haddow did not inform the Claimant that he was to be recalled because he was thought to be a flight risk, and that Mr Haddow's expectation was that the Claimant would be arrested at his bail address.

16. The Claimant also says that he was in regular contact with Mr Haddow and was led by Mr Haddow to believe that his sentence would come to an end on 2 July 2020. He says that, for example, on 3 July 2020 Mr Haddow said *"you're all done now… all you gotta do is finish your suspended which finishes on 9 March 2022"* and on 12 July 2020 Mr Haddow had said that it was good news that he had finished his licence. Mr Grodzinski says that this account appears to be confirmed by the second paragraph of Mr Haddow's email of 22 January 2021, cited at paragraph 14, above.

17. On 15 January 2021, however, the Claimant was arrested, notified that his licence had been revoked and returned to prison.

18. On 22 January 2021, the Claimant's solicitor, Mr Genen, made an out-of-hours without notice application for interim relief seeking an order for his immediate release. Saini J adjourned the application to an on notice hearing on 27 January 2021. Saini J also gave directions as to the steps to be taken in preparation for that hearing. These included that the Claimant would issue and serve a claim form and fully pleaded grounds by no later than 12 noon on Monday 25 January 2021, and the Defendant would respond to the application by 4.00 p.m. on Tuesday 26 January 2021, indicating whether he opposed or consented to the release of the Claimant and the reasons for its position.

19. The Defendant did oppose the release of the Claimant and, on 27 January 2021, the matter came before Mr Richard Clayton QC, sitting as a Deputy High Court Judge. The claim included a claim under Article 5 ECHR. Having heard what he described as *"full argument"* Mr Clayton refused permission and dismissed the application for interim relief. At paragraph 22 of his judgment dated 29 January 2021, Mr Clayton held that the Article 5 claim was *"not reasonably arguable"*.

20. The present claim was then issued and served on 16 February 2021.

The general legal framework

21. The key provisions of domestic law for present purposes are sections 254(1) and (6) of the Criminal Justice Act 2003. These provide, so far as material, as follows:

> *"**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."

22. Section 49(1) and (2) Prison Act 1952 provide, so far as material:

> *"**49 Persons unlawfully at large***
>
> *(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."*

23. In **R (S) v Secretary of State for the Home Department** [2003] EWCA Civ 426 the Court of Appeal held that it is not necessary for the recalled prisoner to be aware that their licence has been revoked: they are unlawfully at large whether or not they are aware of this. The reasons for this are fairly obvious. As Simon Brown LJ (as he then was) said at paragraph 24:

> *".....Not merely is there nothing in [section 254] to support the view that the recalled prisoner must know of his licence revocation before becoming unlawfully at large, but reason and policy strongly suggest the contrary.....the judge's ruling would produce the undesirable result that a prisoner, once he has breached his licence conditions, would have an incentive to disappear instead of contacting his supervisor to explain the position − an incentive, indeed, to ignore his licence conditions altogether and simply disappear anyway. There would ordinarily be no injustice in his being held to be unlawfully at large even if he does not know of his licence revocation. In the first place he knows the conditions of his licence and the consequences of breaching them, in particular the likelihood of his licence being revoked. Secondly, following the revocation of his licence, the prisoner is in fact enjoying a period at liberty when he ought properly to have been returned to custody and so cannot reasonably complain if the additional time is required to be served at the end of his licence period."* (emphasis added)

24. Mr Grodzinski pointed out that the factual context for the ruling in **S** was different to the present case in that, for example, the prisoner in that case was recalled shortly after the breach of his licence and within the original licence period, and he had not been led to believe that he would not be recalled. But, correctly, Mr Grodzinski did not argue that this affected the position under domestic law in the present case, namely that, whatever the Claimant may or may not have been told or thought, by operation of sections 49(2) and 254(6) his sentence did not, in law, come to an end on 2 July 2020 because the time which he spent unlawfully at large did not count as part of that sentence.

25. The Defendant's policy in relation to the exercise of discretion under section 49(2) is set out in PSI 03/2015. This provides, so far as material that:

> *"7.1.2 In exceptional circumstances, it may be appropriate to allow a period spent UAL to count towards the sentence. Periods of UAL may only be allowed to count on the recommendation of the Deputy Director of Custody (DDC) and where it has been approved by Ministers. There is no Royal Warrant involved in allowing time spent UAL to count against sentence, which is distinct from the exercise of the Royal Prerogative. Rather a note signed by the DDC confirming the decision will be sent to the establishment. This must be filed securely on the prisoner's Custodial Documents File.*
>
> *7.1.3 The Offender Management Public Protection Group (OMPPG) of NOMS are responsible for handling applications for UAL time to count. Examples of what NOMS would consider when looking at exceptional circumstances can be found at APPENDIX F of these guidance notes. This list is not exhaustive and individual cases will be considered on their own merit.*
>
> *7.1.4 Only in very exceptional circumstances would the Justice Secretary consider allowing UAL time that equated to more than 50% of the sentence term to count against sentence."* (emphasis added)

26. The requirement of exceptionality is not challenged by Mr Grodzinski. It reflects the fact that the sentence is one of imprisonment for the determinate period, here 30 months. An offender may be released on licence half or two thirds of the way through the sentence, as the case may be, but this is a conditional release. They are told in no uncertain terms, when they are sentenced, that if they do not comply with the terms of their licence, or they commit an offence during the licence period, they are liable to be recalled to prison to serve the rest of the sentence and this is also made clear in the licence itself.

27. The factors listed at Appendix F to the PSI include:

i) *"The length of time before the prisoner is informed that they are/have been UAL*";

ii) *"The extent to which the prisoner has been disadvantaged by their return to custody"*, for example if they will lose employment or accommodation;

iii) *"Whether the prisoner has deliberately withheld knowledge of the error"* for example whether they were well aware that they were released too soon;

iv) *"Public protection issues"*;

v) *"Family issues"*, such as if the prisoner is the primary carer for a child;

vi) *"In cases of releases in error:…where a prisoner has been released in error, so they are unknowingly UAL through no fault of their own, and in addition they were released subject to conditions which placed significant restriction on their liberty, consideration should be given that a percentage of this time should count towards their sentence*."

Ground 1

The merits of the Article 5 claim

28. Article 5(1)(a) ECHR provides, so far as material:

> *"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…."*

29. Article 5(4) provides:

> *"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."*

30. And Article 5(5) enacts a right to compensation for breach of Article 5.

31. Mr Grodzinski emphasises that the fact that the deprivation of liberty of a person is in compliance with national law is not, of itself, an answer to a claim under Article 5. The Article is concerned with legal certainty and it prohibits arbitrary and unforeseeable detention. He cites the following passages from **Demirtas v Turkey** (2019) 69 EHRR 27:

> *"142...The Court must further ascertain in this connection whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein, notably the principle of legal certainty.*
>
> *143…where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness…. The standard of "lawfulness" set by the Convention thus 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….. Where deprivation of liberty is concerned, it is essential that the domestic law should clearly define the conditions for detention."* (emphasis added)

32. Mr Grodzinski also relies on paragraph 92 of the judgement of the Grand Chamber in **Khlaifia and others v Italy** (16483/12) which is to the same effect, and he points out that there is case law which suggests that bad faith or deception may be an aspect of, or lead to, arbitrariness: see **James v United Kingdom** (2013) 56 EHRR 12 [192] and **Saadi v United Kingdom** (2008) 47 EHRR 17 [69]. Although he does not suggest bad faith on the part of Mr Haddow, he does point out that Mr Haddow appears deliberately to have decided not to say anything about recall and/or to have confirmed that the Claimant would not be recalled, albeit apparently on the assumption that he would in due course be arrested by the police.

33. Mr Grodzinski's argument is that the arrest and imprisonment of the Claimant on 15 January 2021 was arbitrary and unforeseeable given that he had not been told of the revocation of his licence and recall to prison on 10 January 2020. On the contrary, he

had been told by Mr Haddow that he would not be recalled to prison and, indeed, was not recalled for at least a year after the breach of his licence. Mr Haddow also confirmed that his sentence had been completed and that his period on licence was at an end. This was not a case in which the state had good reason to fail to arrest and return the Claimant to prison immediately. On the contrary, there would have been no difficulty in doing so. The Claimant therefore had every reason to believe what he was told by Mr Haddow.

34. In the alternative, Mr Grodzinski relies on the following passage from **Van Droogenbroeck v Belgium** (1982) 4 E.H.H.R. 443 [35] which explains the word *"after"* where it appears in Article 5(1)(a) ECHR:

> *"The word "after" does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction""*

35. He submits, albeit somewhat half-heartedly, that the conduct of Mr Haddow and the delay in returning the Claimant to prison were such that the causal link between the sentence imposed by the sentencing court and the Claimant's detention in early 2021 was broken. Article 5 (1) (a) ECHR therefore does not apply.

36. As Mr Richards submits, the fundamental flaw in Mr Grodzinski's first argument is the very well established principle that, as Lord Bingham held in **R (Smith and West) v Parole Board** [2005] 1 WLR 350 [36] *"the sentence of the trial court satisfies article 5(1) not only in relation to the initial term served by the prisoner but also in relation to revocation and recall"*. The correctness of this proposition was impliedly affirmed by the Supreme Court in **R (Whiston) v Parole Board** [2015] AC 176 at [31]. See, also, the discussion of Article 5(4) in **R (Youngsam) v Parole Board** [2020] QB 387.

37. This seems to me to be a complete answer to Mr Grodzinski's argument based on arbitrariness. The passages in the ECHR case law on which he relies are directed to the question whether the position in domestic law is sufficiently certain and/or foreseeable. In my view, it plainly is: the law clearly provides that a person who breaches his licence is liable to have that licence revoked and to be recalled to prison. Time spent "unlawfully at large" will not count towards the completion of their sentence. The sentence therefore will not come to an end and they will continue to be liable to be returned to prison. The question whether, as a matter of fact, the person is immediately notified of the revocation of their licence and the recall, and/or appreciates that they are liable to be returned to prison, does not affect the certainty and foreseeability of the legal position. It also remains the case that the subsequent detention is authorised by the sentencing court and Article 5(1)(a) is therefore satisfied. The factual case which Mr Grodzinski makes does not affect this point.

38. The case of **S**, referred to above, also confirms that the knowledge or otherwise of the prisoner is irrelevant to the application of domestic law and I can see no arguable basis for the suggestion that the position in this respect, or more generally, alters when the date on which the sentence would otherwise come to an end is reached. It would still be the case that, as Simon Brown LJ said, such an approach would reward the absconder and provide an incentive to others to abscond. Nor does the fact that the prisoner is positively told that he will not be recalled affect this analysis.

39. In this connection, I note that this was the essential basis on which Mr Clayton rejected the Claimant's Article 5 claim. At paragraph 22 of his judgment he said:

> *"The next question I had to consider was whether the claimant's detention was arbitrary and in breach of Art.5 of the Convention. The defendant submits that the detention was foreseeable because the sentence of imprisonment provides for the lawfulness of the claimant's imprisonment. Section 49 itself makes the position plain and it has been on the statute books since 1952 and, in those circumstances, I reject the submission that the claimant's detention was arbitrary. I, therefore, decline permission to amend the ground on the basis that, in my judgment, the amendment is not reasonably arguable."* (emphasis added)

40. As to Mr Grodzinski's alternative argument, unquestionably the Claimant's detention resulted from his convictions, and the sentences which the court passed on 2 January 2018. Mr Grodzinski argued that, on the Defendant's approach, the Claimant could have been arrested and returned to prison many years, or even decades, after the breach of his licence and long after his sentence would otherwise have come to an end. Mr Richards accepted that the requirement that the detention occurs by virtue of the conviction *might* not be met where there was a very long delay between breach of the licence and the arrest of the prisoner, but he submitted that that is not this case. I agree with him and I therefore need not make any decision on the point.

The abuse of process argument

41. This conclusion renders the abuse of process argument academic but for completeness I will address it given that it was fully argued.

The facts relating to the abuse argument

42. The broad factual position is as outlined above. Thus, although the case was prepared within a short timeframe and, indeed, Mr Clayton remarked at paragraph 10 of his judgment that *"the claimant's submissions were completed at speed"* the "arguability" of the Article 5 claim was fully argued before him. By way of further detail given Mr Grodzinski's arguments I note that:

    i) The hearing before Saini J took place on the seventh day after the Claimant's arrest.

    ii) Saini J directed that the Claimant issue and serve *"a claim form and fully pleaded grounds"*.

    iii) The original Statement of Facts and Grounds pleaded Article 5 and claimed damages for breach of this provision (see paragraphs 7(c), 19, 32, 44 and 45). However, the ground of challenge was that the Claimant had a legitimate expectation, given that he had not been told of the revocation of his license and recall on 10 January 2020, and given that nothing had been said in his dealings with his offender manager to contradict this, that his licence period, and therefore his sentence, would be completed on 2 July 2020.

    iv) Very shortly before the hearing before Mr Clayton the Claimant applied to amend the Statement of Facts and Grounds to add two further grounds of

challenge: a complaint that the Defendant had failed to exercise his discretion under section 49(2); and a complaint of breach of Article 5. Again, the factual basis for the claim under Article 5 was that the Claimant had been in regular contact with Mr Haddow and yet he had not been told that his licence had been revoked and he had been recalled to prison. Nor had Mr Haddow said anything to contradict the Claimant's expectation that his sentence would expire on 2 July 2020.

v) The Claimant was represented by junior counsel at the hearing, as was the Defendant.

vi) At the hearing on 27 January 2021 it was agreed that Mr Clayton would consider submissions as to whether the proposed amendments to the Statement of Facts and Grounds were reasonably arguable.

vii) There was then a further hearing on 29 January 2021 at which Mr Clayton gave a judgment and refused permission in respect of all three grounds. His reasons for rejecting the proposed claim under Article 5 were set out at paragraph 22 of his judgment, which I have quoted at paragraph 39 above.

viii) At the hearing on 29 January 2021 there was then an application for permission to appeal which Mr Clayton refused. The Judge did, however, grant the Claimant's application for a transcript of his judgment to be prepared urgently and at public expense given the Claimant's stated intention to apply to the Court of Appeal for permission to appeal.

ix) An email from the Claimant's solicitor to the Defendant, dated 30 January 2021, states that he had notified the Defendant of the Claimant's intention to appeal even before the hearing on 29 January 2021 and it confirms that he would be doing so and that he would be asking for the appeal to be expedited. He went on emphasise the importance of Mr Clayton's decision given what he said were its wider implications.

x) The Claimant's solicitor sent a letter before claim in respect of the present proceedings on 4 February 2021. The facts on which this was based were essentially those which were before Mr Clayton a week earlier and an Article 5 claim was asserted. This contained passages which subsequently found their way into the Statement of Facts and Grounds in the present case. The reasons for asserting a breach of Article 5 were said to include:

> *"First the Claimant was actively misled by his Offender Manager. Not only was he not informed that his licence had been revoked but his Offender Manager (i) continued to engage with the Claimant for some four months on the basis that the Claimant remained subject to licence conditions and (ii) openly discussed the fact that the Claimant's licence would soon be coming to an end. The Claimant reasonably and properly considered his sentence to have expired on 2 July 2020. His arrest and detention on 15 January 2021, was therefore infected by an element of bad faith or deception and breached his rights under Article 5(1) ECHR."*

xi) In a witness statement dated 28 April 2021, which was submitted for the purposes of the hearing before me, Mr Genen explains, and I accept, that there were difficulties in taking instructions from the Claimant given the pandemic, given that he was in prison and given the urgency of matters. He had had a 10-15 minute phone call with the Claimant but, at the time of the hearing before Mr Clayton he was not aware that the Claimant had positively been told that he would not be recalled to prison and that his sentence had come to an end on 2 July 2020.

xii) As Mr Richards points out, however, it appears that the Claimant spoke to his solicitor on 5 February 2021 at which point they were was aware of all of the facts on which the present claim are based.

xiii) There is no evidence to explain why the Claimant did not follow through on his stated intention to appeal within 7 days of 29 January 2021. However, it may be inferred from the fact that the present proceedings were threatened on 4 February 2021 that it was not necessarily because new facts emerged. There was no new evidence at that stage. In any event, the new evidence emerged on 5 February 2021 as I have noted, and therefore 7 days after 29 January 2021.

Legal framework

43. The parties agreed that the doctrine of res judicata does not apply where permission has been refused in judicial review proceedings. They also agreed that I should adopt the overall approach to the question whether proceedings are an abuse of process which was laid down by Lord Bingham in **Johnson v Gore Wood & Co** [2002] AC 1, 31 albeit he was addressing a situation, unlike the present, in which the issue which was sought to be raised in a second set of proceedings had not been raised or adjudicated in the first. He emphasised that:

> *"Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all…*

44. He added that:

> *"I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach…"*

45. Lord Bingham concluded that what is required is:

> *"a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before"*

46. There were then submissions before me as to the law which applies where permission is granted at an oral hearing in respect of some grounds but not others and then, at the substantive hearing, there is a renewed application for permission in relation to grounds for which permission had been refused. In this connection, I was referred to the judgment of Lightman J in **R (Opoku) v Principal of Southwark College** [2002] EWHC 2092 (Admin) at [14] and [16] where, in broad terms, he said that there needed to be a material change of circumstances if a further renewed application was to be permissible. I was also shown passages from the judgment of the Court of Appeal in **R (Smith) v Parole Board** [2003] 1 WLR 2548 in which it was held that Lightman J's approach had been too narrow: see paragraph 16 in particular. Here Lord Woolf CJ said:

> *"Of course, where, as here, a judge has heard detailed argument, any judge who is conducting the hearing of the main application is going to require significant justification before taking a different view from the judge who granted permission. However, if he comes to the conclusion that there is good reason to allow argument on an additional ground, bearing in mind the interests of the defendant, the judge can give permission for that to happen. It is not unusual for a situation to arise, even in the course of a hearing, where it becomes apparent to the judge conducting that hearing that the interests of justice would be best served by the hearing taking into account arguments on matters which relate to a ground in respect of which permission has been refused. There obviously has to be real justification for permitting that to happen; but judges can be relied upon to ensure that the discretion is not misused… As long as a judge recognises the need for there to be good reason for altering the view of the single judge taken at the permission stage, no further sensible guidance can be provided"* (emphasis added)

47. Finally, I was shown the judgment of the Court of Appeal in **R (BA & Others) v Secretary of State for the Home Department** [2012] EWCA Civ 944 at [27(f)] where the judgment of Lightman J in **Opoku** was referred to with apparent approval in the context of a case in which permission to claim judicial review in respect of the claimant's removal directions and detention was refused on the papers, and a claim for damages for unlawful detention was then brought in the Queen's Bench Division. The President of the Queen's Bench Division said:

> *"(f) Where the Administrative Court has determined an issue or refused permission to bring a claim or advance an issue on a permission application, then even though that determination will not usually give rise to an issue estoppel, it is generally not permissible for the claim or issue to be re-litigated between the same parties in those proceedings or in fresh proceedings: see …the authorities referred to by Simon J in* ***R (Ecopower UK Ltd) v Transport for London*** *[2010] EWHC 1683 (Admin) at paragraphs 19-22 and…**Opoku**…".* (underlining added)

48. At [35] the President concluded that *"in all the circumstances of this unusual case, there was no unjust burden placed on the Secretary of State as there were good reasons for the second set of proceedings"* and they therefore were not abusive.

49. Mr Richards also pointed out that Davis LJ said at [39]:

> *"39. A claim in respect of alleged wrongful detention was included in the second Judicial Review claim. It was, however, clearly tangential to the principal thrust of those proceedings – that is, to challenge the decision to set removal directions. But all the same it was sufficiently adumbrated to cause Cranston J to indicate, as part of his reasoning in deciding to refuse permission on the papers, that there could be no objection to the earlier detention….In my view, in deciding overall whether the private law proceedings were an abuse it is of significance that no attempt to renew the application to an oral hearing was made – by this time, indeed, Pierce Glyn had written the pre-action letter indicating an intention to issue private law proceedings for damages for alleged wrongful detention. In applying the Johnson v Gore Wood test, that is relevant: matters might have stood on a different footing had the application for permission nevertheless been renewed to an oral hearing (attended, perhaps, by counsel for the Secretary of State as respondent) when all issues – including the assertion of wrongful detention – might have been debated and adjudicated upon."* (emphasis added)

50. However, the Court of Appeal said, and Mr Richards accepted, that the **Johnson v Gore Wood** *"broad merits-based approach"* should be adopted in cases such as the present.

Applying these principles in the present case

51. Mr Grodzinski argued that the Article 5 ground was raised in CO/260/2021 by way of an application to amend in the context of expedited proceedings and Mr Clayton's reasons for holding it to be unarguable were brief. He complained that Mr Clayton did not grapple with the argument that the treatment of the Claimant was arbitrary. He also relied on the importance of the issue from the point of view of the Claimant and the public which, he submitted, justifies a second, more fully pleaded, claim at first instance. He also points out that new facts have emerged since the hearing on 27 January 2021 and that, if permission is granted on the section 49(2) point, it is appropriate for all issues to be heard together at first instance (although this claim does not appear to have been the reason for deciding not to appeal Mr Clayton's decision). He says that any burden caused to the Defendant by reason of the additional hearing in the present proceedings can be compensated in costs. On a broad, merits based, approach, then, the Article 5 claim in the present proceedings is not abusive.

52. On balance I consider that the Article 5 claim is abusive. As I have pointed out, Mr Clayton adjudicated the merits of the Article 5 claim before him rather than refusing an amendment in the exercise of his discretion. He did so after *"full argument"* at a hearing attended by junior counsel for both sides who submitted skeleton arguments, referred him to the relevant law and made oral submissions. The Claimant's submissions may have been short, and Mr Clayton's reasons for rejecting the Article 5 claim were brief, but I would characterise them as brief and to the point. It is clear from his judgment that he fully understood that the Claimant's case was that his detention was arbitrary given that he had reasonably understood from the failure to arrest him, and his offender

manager's failure to tell him that his license was to be revoked, as well as the delay, that his sentence had been completed and he was not at risk of being returned to prison.

53. I accept that discovery of material new facts might have justified the course which the Claimant took, in issuing a second set of proceedings, in a given case. But the evidence that Mr Haddow had positively told the Claimant that he would not be recalled and had said that the licence period had come to an end was known to the Claimant at all material times, although I agree that allowances should be made for the reasons explained by Mr Genen. More importantly, as I have noted, it is far from clear that the additional evidence was the reason why the second set of proceedings was issued rather than there being an appeal to the Court of Appeal. Even if this was the reason for the change of course on the part of the Claimant, in circumstances where his expectation or understanding that he would not be recalled was not in dispute before Mr Clayton, the additional facts merely provide further justification for his expectation or belief, on which the original Article 5 claim was based. These facts therefore do not provide a new or materially different basis for the Article 5 argument. The Claimant's argument was and is that his imprisonment was arbitrary, and therefore contrary to Article 5, because he had been (mis)led to believe that he would not be recalled and there had then been a delay in recalling him. These are facts of which he and his solicitor have been aware at all material times.

54. Nor is this a case in which, say, the Judge rejected the Claimant's case that he was not aware that he would be recalled, and the Claimant wants to put further evidence before the court to prove this. As I have said, the basis for the current Article 5 claim is essentially the same as the basis for the claim which the Judge rejected as unarguable and the answer to it is the same as the answer which the Judge gave. If the Claimant wanted to pursue this argument he should therefore have appealed to the Court of Appeal as he said, at the time, was his intention. As I have noted, the reasons for his change of approach are unclear. He certainly has not proved a good reason for doing so and, on one view, the claim in the present proceedings is a form of collateral attack on the decision of Mr Clayton.

55. I therefore consider that the public interest in finality of litigation should prevail. It cannot be an answer simply to say that the Defendant can be compensated in costs when such costs were entirely avoidable, given the possibility of an appeal. Nor are the issues in the present case of sufficient importance to justify allowing the Article 5 claim to proceed, even if I had considered that it had sufficient merit. There is no evidence, for example, that what happened here is a common occurrence, and the length of the period of time in prison which is said to be contrary to Article 5 in this case is relatively short and has come to an end. The Article 5 claim is therefore for compensation only.

56. I therefore refuse permission on this ground also, as Lang J did.

Ground 2: the challenge to the section 49(2) decision

57. As this decision was taken on 11 February 2021 there is no suggestion that Ground 2 is abusive.

58. The Statement of Facts and Grounds alleges four respects in which the Defendant's section 49(2) decision was irrational.

i) First, although the decision-maker took into account the issue of public protection, they did not take into account the fact that Mr Haddow had supported the Claimant's re-release in a Post-Recall Review dated 29 January 2021.

ii) Second, in considering the Claimant's argument that he had been detained in the context of the pandemic, was therefore a risk of infection and was unable to communicate with his family, exercise and wash himself the decision-maker stated that *"No evidence has been presented as to the conditions within the prison, nor to our understanding has a complaint being made to the prison with respect of these matters"*. It is said that the Claimant hardly needed to prove what he said about the prison system at the time and that, if there were any doubt about it, inquiries could and should have been made.

iii) Third, although decision-maker noted that the Claimant had complied with the conditions of his licence (save for the commission of the November 2019 offence) and observed that none of the conditions of the licence placed a significant restriction on his liberty, and although these were relevant considerations, the decision-maker had not grappled with the point that, having complied with his licence for the full licence period (with one exception) he was now effectively being required to reserve a significant part of his sentence.

iv) Fourth, the decision-maker misunderstood paragraph 7.1.4 of PSI 03/2015, which I have set out at paragraph 25 above, and/or mistakenly thought that he should only allow as much as 50% of the remaining period to be served to count and/or failed to give adequate reasons why the Claimant's case was "exceptional" but not "very exceptional".

The first complaint

59. By way of explanation of the first complaint, I was shown a copy of Post-Recall Review, dated 29 January 2021, in which Mr Haddow supported the re-release of the Claimant within 28 days of his return to prison. The document assesses the "Risk of Serious Harm" posed to the public by the Claimant as "medium" but is generally positive about him. It also contains the following passage:

> *"B.* ***Give a clear recommendation why you assess it is safe to re-release the prisoner at or before Day 28****: Significant time has elapsed since the recall incident and the RoSH does not appear to be imminent in the areas of concern, namely group offending and the carrying of weapons."*

60. Mr Haddow's recommendation was also endorsed by a NPS/YOT Manager.

61. The parties agreed, however, that Mr Haddow's recommendation cannot have been accepted given that the Claimant was not released, and the matter was subsequently referred to the Parole Board which made the release decision in the Claimant's case.

62. Mr Grodzinski argues that Mr Haddow's view was necessarily a relevant consideration and that failure by the section 49(2) decision-maker to take this view into account therefore rendered the decision irrational.

63. I do not consider that this proposition is reasonably arguable. As Mr Richards pointed out, Mr Haddow was making his recommendation in the context of the question of re-release within the statutory 28-day period, which question is based on an assessment of risk. That question arose in a particular factual and statutory context. The section 49(2) decision arose in a different factual and statutory context i.e. one in which the decision had been taken not to re-release, there was a statutory presumption that none of the time when the Claimant was unlawfully at large would count towards his sentence and the question whether a different decision-maker should decide that some of this time would count required a range of considerations to be taken into account with a view to deciding whether this was an exceptional case. Although these considerations included risk, they were wider than this.

64. Had the decision-maker made a different assessment of risk to that of Mr Haddow in coming to a conclusion under section 49(2) then Mr Grodzinski's argument might be more convincing but, in this case, both decision-makers proceeded on the basis of the same assessment of risk. The second decision-maker decided on a different response given the different statutory context and the wider considerations which were in play. That decision-maker was under no obligation to consult Mr Haddow, whose recommendation had been rejected in any event, in coming to a decision.

The second complaint

65. Mr Grodzinski understandably did not develop this point in his oral submissions. No doubt the reason for this was that there is nothing in it. Having made the point highlighted by Mr Grodzinski, the decision-maker went on to say, perfectly rationally:

> *"In any event, [the Claimant's] detention in custody is in accordance with the terms of his sentence and relevant legislation and constitutes no more of a disadvantage than any other prisoner returned to custody."*

66. No challenge to this alternative way of looking at the matter was made on behalf of the Claimant.

The third complaint

67. Again understandably, this complaint was not developed orally by Mr Grodzinski. There is nothing in it. A fair reading of the section 49(2) decision reveals that the decision-maker rightly considered the extent to which the conditions of the Claimant's licence were such that he had undergone significant punishment during the licence period which, in turn, should be taken into account. The decision-makers', perfectly rational, view was that the licence conditions were not onerous and did not provide a compelling reason to allow time during which the Claimant was unlawfully at large to be treated as part of his sentence.

The fourth complaint

68. This complaint is based on the last paragraph of the section 49(2) decision. The decision-maker noted that the Claimant had been unlawfully at large from 11 January 2020 to 14 January 2021, a total of 370 days. And on his return to custody he had 174 days remaining on his sentence and a sentence end date of 7 July 2021. Having considered the various relevant Annex F factors, and particularly the facts that the

Claimant was not told that his license had been revoked and was *"unknowingly UAL through no fault of his own"*, the fact that he had generally complied with his licence conditions, and the delay in returning him to prison, the decision-maker concluded:

> *"On the other hand none of the conditions of his revoked licence placed a significant restriction on his liberty (such as a curfew or electronic monitoring; the application notes he was subject to an electronic tag however this was imposed separately as part of his bail conditions). He therefore benefitted from time in the community following the revocation of his licence. Moreover, the offence which he committed on licence and for which he was sentenced was serious and paralleled his index offence. There are therefore public protection concerns with respect to any allowance of time from his sentence. For these reasons a full allowance of the UAL days to the remaining period of his sentence is not considered appropriate by the Head of Group.*
>
> *However, to reflect the exceptional circumstances of this case, the Head of Group is prepared to allow 58 days of the time spent UAL to count as time served towards the remainder of [the Claimant's sentence]. 58 days represents a third of the time remaining on his sentence (calculated from his return to custody on 15 January 2021). That number has been reached as 50% would be too great, taking into account the provisions of paragraph 7.1.4 (although it is noted that refers to the total sentence, it is considered to apply equally to the remaining sentence in this case) and 25% would not seem appropriate in all the circumstances. A reduction of 58 days means his sentence end date will be 10.05.2021"* (emphasis added)

69. I agree with Mr Grodzinski that the third underlined passage, quoted above, is poorly worded but I do not accept that it amounts to a misdirection. The decision-maker was clearly aware that the guidance in paragraph 7.1.4 of the PSI applied to the whole of the sentence, as they expressly noted that this was the case. Although they then said that *"it is considered to apply equally to the remaining sentence in this case"*, they cannot have meant that there would have to be *"very exceptional circumstances"* before there could be a reduction amounting to 50% of the part of the sentence which remained to be served given that they had made the point that this rule of thumb did not apply. In a clumsy way, they were saying that 50% of the remaining sentence was also too high *"in this case"*.

70. Overall, it seems to me that the section 49(2) decision took into account all of the relevant considerations. It was balanced, sensible and fair to the Claimant. I do not accept that there is any reasonably arguable challenge to this decision.

Conclusion

71. Standing back and looking at this case in the round, I do not consider that any injustice will be caused to the Claimant by the refusal of permission. In summary, on 2 January 2018 a court authorised his imprisonment for up to 30 months for the offences which he had committed and he was told that in the event of any breach of his licence he would be liable to be recalled to prison to serve the whole of his sentence. He was therefore aware of this when he committed a further offence during the licence period. In the event, he was at liberty for a good deal longer than might have been expected after the commission of the relevant offence, apparently as a result of an administrative error, and he has served significantly less than 30 months' in prison. Understandably he feels

a sense of grievance about being led to believe that he would not be recalled to prison and that his sentence had been completed, only to be arrested and detained long after the breach of his licence. But this was fully taken into account in his favour in the section 49(2) decision.

72. I also note that even if the maker of the section 49(2) decision had concluded that 50% was appropriate, and 87 days should therefore be taken off the remaining part of the sentence, the new sentence end date would have been in mid-April 2021 and this would not have resulted in the Claimant being released before 8 March 2021, as he was. In order for the section 49(2) decision to reduce the amount of time which the Claimant spent in prison after his recall, the decision would have had to have been to allow approximately 4 months' time unlawfully at large to count in relation to the, just under, 6 months to run on the sentence i.e. around two thirds of the remaining sentence. Given the requirement of exceptionality under the PSI, and given the views of the decision-maker on the overall merits of the case, it seems very unlikely that this would have been the result if there had been no reference to paragraph 7.1.4, or would be the result on any reconsideration of the matter in the event that the section 49(2) decision was quashed.

73. For all of these reasons, then, I refuse permission.