



Neutral Citation Number: [2022] EWHC 3173(Admin)

Case No: CO/2768/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2022

Before :

Judge O'Connor
(Sitting as a Judge of the High Court)

Between :

The King On the
Application of

Claimant

Mark Nodwell

- and -

Secretary of State for Justice

Defendant

And

The Parole Board for England and Wales

Interested
Party

Carl Buckley (instructed by **Bailey Nicholson Grayson Solicitors**) for the **Claimant**
Rachel Sullivan (instructed by **Government Legal Department**) for the **First Defendant**

Hearing date: 29 November 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Judge O'Connor:

Introduction

1. This is an application for judicial review of the Secretary of State's decision of 5 May 2022 ("the Decision") to revoke the Claimant's licence and recall him to prison, pursuant to section 254 of the Criminal Justice Act 2003 ("the 2003 Act").
2. The Parole Board has played no part in these proceedings and remains neutral as to the outcome.

Factual Background – A Summary

3. I have before me a witness statement dated 28 October 2022 authored by Ellen Roberts, a Probation Officer who was allocated the Claimant's case in December 2021 ("the COM"). There was no application to cross-examine Ellen Roberts on the contents of the statement. The Claimant has also provided a witness statement, dated 5 August 2022.
4. On 16 April 2021, the Claimant was convicted of assault occasioning bodily harm and racially aggravated assault and sentenced to 2 years and 8 weeks imprisonment. He has a significant criminal record of 39 convictions for 79 offences, including burglary, battery, controlling prostitution for gain, and possession of Class A and B drugs.
5. On 14 April 2022, the Claimant was released on licence. The Claimant's licence and sentence expiry date is 5 May 2023. Conditions of the licence include a requirement to "*be of good behaviour and not behave in a way which undermines the purpose of the licence period.*" By his licence, the Claimant was required to confine himself to remain at an Approved Premises ("AP") in Luton from 8pm to 6am each day, unless otherwise notified by his supervising officer.
6. The Claimant signed a copy of the AP's Rules, which included a provision that no drugs were allowed on the premises. He also signed a document headed, "*Medication in Approved Premises*", which, amongst other things, states that "*any new over-the-counter medication I obtain will be handed in to AP staff*".
7. On 5 May 2022, a search of the Claimant's room was carried out at the Luton AP, due to a suspicion that he was in possession of steroids. Steroids were found in the room, as was a mobile phone which contained a number of threatening messages (which were the following day were confirmed as having been sent to the number attributed to the victim of the index offence) and drug dealing. The Claimant's AP keyworker (who is employed by the Probation Service and works at the AP) and the AP manager, contacted the COM via a Teams call and explained that following the room search the Claimant's space at the AP had been withdrawn. The COM discussed this with her line manager and a decision to recall the Claimant to prison was agreed. Information was subsequently sent to the Deputy Head of Service and to the Public Protection Casework Section ("PPCS") duty Out of Hours team. The PPCS team issued a decision to recall the Claimant on the same date. The Claimant's recall process was handled as an Emergency Out of Hours Recall, because of the timing of the recall and the conclusion that the Claimant was assessed as being a "*High Risk to the public*".

8. The COM did not have, and had not seen, the mobile phone at either the time of passing information to the PPCS, or when completing the Recall Part A report the following day. She relied on information provided to her by the AP keyworker and AP manager (“AP staff”). The date of the text messages was not provided to the COM.
9. The Claimant’s licence was revoked on the basis of a breach of condition 5(i) of his licence, namely that he must “*be of good behaviour and not behave in a way which undermines the purpose of the licence period.*” As a consequence, the Claimant was recalled to prison.
10. The Recall Part A report was completed by the Claimant’s COM the following day, on 6 May 2022. It identifies in Box 1 that a request was made for an “*Emergency Recall*”. At Box 19 of the Report, headed, “*Detail the circumstances and behaviours leading to the recall and provide an assessment as to why the risk is no longer manageable in the community. This must include details of any further offending, including ongoing police investigations and/or charges, court dates and convictions*”, the following is recorded:

“Mr Nodwell was residing at Luton AP. His engagement had been minimal with staff and interventions. There were also concerns regarding Mr Nodwell's activities outside of the AP and associations that he was making in the AP.

A room search was completed on 05/05/2022. Steroids were found in his room and it was apparent that Mr Nodwell was sharing these with other residents. Also, a burner phone was found and, on inspection, text messages were found that strongly suggested drug dealing activity and text messages of a threatening nature were found.

Mr Nodwell's bedspace at the AP was withdrawn.

On 06/05/2022, it was confirmed by professionals that the threatening text messages were sent to a number attributed to the victim of the index offence which highlights further offending behaviour by breach of Restraining Order and breach of non-contact licence condition”
11. A risk management plan was produced on 9 May 2022. This assessed the Claimant as being a high risk to known adults (his former partners), and a medium risk to children and the public. Factors which would increase risk were noted as alcohol, drug use and losing accommodation.
12. The COM spoke to the Claimant via Teams on 19 May 2022. At that meeting the Claimant stated that the mobile phone messages were old messages. The COM visited the Luton AP on 23 May 2022 to ascertain if she could obtain the dates of the text messages. These were not visible to the staff who analysed the mobile phone on 5 May 2022, and not visible from the messages themselves. The COM identified the dates of the messages by opening up a new options menu and scrolling down to find the option which allowed for the time stamp of the messages to be displayed. It was found that the messages pre-dated the Claimant’s conviction and, therefore, pre-dated the Claimant’s release on licence.
13. A Part B Post Recall Management Report (“Part B report”) was completed on 26 May 2022. This recorded that the mobile phone had subsequently been examined, and that

the messages of concern had been sent prior to the Claimant's conviction. The Part B report states:

“Mr Nodwell is assessed as High risk to known adults given that his index offence is related to DV. He is assessed as medium risk to public given his previous offending behaviour and assessed as medium risk to children due to children being present during DV offence.

Mr Nodwell was recalled from Luton AP due to having his bedspace withdrawn for being in possession of steroids and evidence of alcohol consumption in his room. A phone was also found with text messages synonymous with drug dealing and abusive text messages that were later found to be sent to a number linked to the victim of the index offence.

Since the recall, I have had sight of the phone and the text messages and I can confirm that the messages were old messages dated from 2020-2021, therefore, risk towards partner and concerns around ongoing offending behaviour is not assessed as increased as previously believed at the time of the recall. Having said this, the recall is still warranted due to Mr Nodwell having his bedspace withdrawn from the AP.

There are ongoing concerns in regard to Mr Nodwell's engagement with interventions and his openness with professionals which need to be addressed to support Mr Nodwell to make and maintain positive changes, especially given Mr Nodwell's long history of offending behaviour [at Box 9]

I met with Mr Nodwell via Videolink on 19 May 2022. Mr Nodwell accepts that his bedspace was withdrawn but stated he thought that the steroids were allowed at the AP due to him buying them from a shop. Mr Nodwell said that the text messages that were found were old which prompted me to look into this further. Mr Nodwell appeared to be accepting of the recall and was polite throughout the meeting... [Box 10].

Mr Nodwell was recalled due to having his bedspace withdrawn from Luton AP along with the concerns in regard to text messages found on his phone. Since then, the text messages have been reviewed and appear to be old messages prior to his custodial sentence.

It is currently felt that Mr Nodwell would be eligible for re-release, however, it is assessed that Mr Nodwell will require an AP bedspace to manage risk as Mr Nodwell was originally released to an AP for risk management purposes...

I plan to refer Mr Nodwell to an AP. This review length will give me time to complete the referral and, hopefully, secure Mr Nodwell an AP placement and apply for executive release. [Box 14]”

14. On 13 June 2022, the Claimant was deemed unsuitable for executive release on the basis of concerns about his behaviour since recall, it being recorded that, “*The COM has reviewed the Claimant's custodial behaviour and has confirmed that they are withdrawing their support for executive release, as they would like to allow a period of time to evidence any change in behaviour.*”

15. The Parole Board considered the Claimant's recall on 20 July 2022. The Board directed an oral hearing. It was noted that although "[t]he emphasis of the challenge is the alleged further offending (connected to the phone) which has now been disproved following examination of the phone and the dates of the messages sent... Rather less attention is paid to [the Claimant's] behaviour at the AP and his limited engagement. Executive release has been refused because of concerns about [the Claimant's] behaviour in prison." It was also noted that although the Claimant's COM had supported re-release subject to the availability of an AP, "[i]t is apparent however that the COM was not aware at that time of the negative entries or the outcome of the application for executive release." A hearing before the Parole Board has been set for January 2023.

Proceedings

16. The instant proceedings were lodged on 2 August 2022. By way of an Order dated 5 August 2022, David Lock KC refused the Claimant's applications for expedition and a rolled-up hearing. Those applications were renewed, and heard orally before me on 4 October 2022, at which time I granted the Claimant permission to bring the judicial review proceedings and ordered an expedited hearing of the substantive claim.

Legal Framework

17. Section 244 of the 2003 Act establishes a duty on the Secretary of State to release a prisoner after he has served "*the requisite custodial period*". The licence period will normally be the remainder of the original period of the sentence (section 249) and will include conditions (section 250).
18. Section 254 provides:
- (1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.
 - (2) A person recalled to prison under subsection (1) -
 - (a) may make representations in writing with respect of his recall, and
 - (b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations.
 - (2A) The Secretary of State, after considering any representations under subsection (2)(a) or any other matters, may cancel a revocation under this section.
 - ...
 - (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."
19. The Defendant's policy relating to recall is set out in the "*Recall, review and Re-release of Recalled Prisoners Policy Framework*" implemented on 1 April 2019, and re-issued on 30 September 2021 and, most recently, on 21 July 2022 ("the Policy Framework"). The Policy Framework sets out the mandatory requirements and

guidance for all prison and probation staff involved in the recall, review and re-release of recalled prisoners. The purpose of the Policy Framework is identified at paragraph 1:

“Determinate and indeterminate sentenced prisoners who are released into the community subject to licensed supervision are liable to be recalled to custody by the Secretary of State, where (a) they have breached a specific condition of their licence or where (b) the behaviour being exhibited, is sufficiently concerning to indicate that the risk they pose is assessed as no longer safely manageable in the community. This framework sets out the mandatory requirements that the Probation Service, Youth Offending Teams (YOT) and prison establishments must undertake for all recalled prisoners.”

Grounds of Challenge

20. The Claimant’s grounds of challenge to the decision of 5 May 2022 to recall him to prison, can be summarised as follows. The decision to recall was procedurally unfair:
- (1) because no or insufficient enquiry was made; and/or
 - (2) following improper presentation of material.

Discussion

21. It is not in dispute that if a decision to recall an individual is unlawful, it can be quashed by this court, even in circumstances where an alternative route to release will in due course be considered by the Parole Board: R (Calder) v Secretary of State for Justice [2015] EWCA Civ 150.
22. The issue of whether there is an alternative remedy available to the Claimant was raised by the first Defendant at the permission hearing. At that hearing I concluded, given the timescale within which the Parole Board would consider the matter, that the Claimant’s liberty was at stake and that, on the information then before me, the Claimant’s case was otherwise arguable, that the availability of the alternative route to release via a decision of the Parole Board was not a reason to refuse the judicial review. This issue was not pursued by the first Defendant at the substantive hearing.
23. The legislation itself does not set out the test to be applied by the Secretary of State when considering whether to recall a prisoner. The court in R (Wilson) v Secretary of State for Justice [2022] EWHC 1789 (Admin) provided a helpful summary of the leading authorities on the exercise of the power of recall, which I gratefully adopt. Wilson concerned the recall of the claimant to prison on the ground that he was in breach of a licence condition requiring him to notify his offender manager of any developing relationships. Mr Wilson’s former partner informed his offender manager that he was in a new relationship: this was subsequently denied by Mr Wilson himself to the offender manager, but his denials were not recorded in the report upon which the recall decision was ultimately taken. The Defendant’s decision to recall was therefore made on a partial basis. The court held that the failure to accurately present the information known to the offender manager in the report, rendered the recall decision procedurally unfair. In reaching this conclusion His Honour Judge Pearce, sitting as a judge of the High Court, summarised the leading authorities on recall to prison, as follows:

“28. The test to be applied by the Secretary of State in determining recall is conveniently set out by Dinah Rose QC sitting as a Deputy High Court Judge in R (Goldsworthy) v Secretary of State for Justice [2017] EWHC 2822 (Admin):

“The Claimant could lawfully be recalled only if (1) there were reasonable grounds for concluding that there was a breach of his licence conditions, and, (2) in all the circumstances, his recall was necessary for the protection of the public, because of the dangers posed by the prisoner when out on licence: R (Jorgensen) v Secretary of State for Justice [2011] EWHC 977, paragraphs 16 and 25. As Silber J stressed in this case at paragraph 18, detention is justified only as a last resort, where other less severe measures have been considered and found to be insufficient to safeguard the public interest which might require detention. I note that the test applied by Silber J in Jorgensen was conceded by the Defendant to be correct and applied by the Court of Appeal in the case of R (Calder) v Secretary of State for Justice [2015] EWCA Civ 1050, paragraphs 27-28.”

29. It is common ground that the decision of Silber J in Jorgenson provides helpful guidance to a court considering this issue:

“[16] It is not every breach of his or her licence, which will justify a decision to recall an offender ... In my view, in every case where the Secretary of State could reasonably conclude there has been a breach, he or she must then proceed to consider as an important free-standing separate issue, which is what steps should be taken to deal with this breach ...

[22] The Criminal Justice Act 2003 does not provide a list of matters which should be considered. It is settled law that in those circumstances:

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

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

(i) Whether there is ‘evidence upon which he could reasonably conclude that there had been a breach’ ... Put slightly differently, the question is ‘whether the Secretary of State could reasonably have believed on the material available to him that the claimant had not conducted himself by reference to the ‘standard of good behaviour’ ... If the Secretary of State cannot satisfy that test, the recall is unlawful but if he or she can, it is necessary to progress to the next questions;

(ii) Whether there is an absence of any fault on the part of the prisoner so as not to justify recall ... because if there is not any fault, this will probably be a crucial or at least a very material consideration militating against justifying recall;

(iii) Whether the decision to recall the prisoner can be justified on the basis that it is necessary in order to protect the public because of the dangers posed by the prisoner while out on licence...

(iv) Whether adequate reasons have been set out to justify that decision so that the prisoner is ... able to 'understand why the matter was decided as it was and what conclusions were reached on the principal important and controversial issues,' which in this case means able to understand why his recall was justified;

(v) It is not entitled to make the decision on whether the prisoner should have been recalled because of the limited nature and extent of its power to quash a decision on a judicial review application. ... 'The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits ... It is essential that in exercising the very important jurisdiction to grant judicial review, the court should not intervene just because the reasons given, if strictly construed, may disclose an error of law. The jurisdiction to quash a decision only exists when there has in fact been an error of law. Moreover, the court should not approach decisions and reasons given by committees of laymen expecting the same accuracy in the use of language which a lawyer might be expected to adopt ...

[46] ...the primary purpose underlying the power to recall is the protection of the public ... It follows that the issue of proportionality that has to be considered in respect of the decision to order recall is whether it is necessary to protect the public...

[47] The Secretary of State is not obliged to consider alternatives provided that he or she focuses on the central issue and concludes that the safety of the public makes it necessary to order the recall of the prisoner who has been released on licence because the risk to the public cannot be contained in any other way, which restricts the freedom of the claimant less.

[49] ... this court is not a primary fact-finder and will only quash such a decision if no reasonable Secretary of State could have reached that decision or if it is unlawful. To determine whether a decision is Wednesbury unreasonable or unfair, this court would take into account not merely the importance of the right to freedom of the prisoner but also the risk to the public, which, as I have explained is the test of proportionality."

24. Underpinning the Claimant's procedural fairness challenge is the fact that one of the reasons, and the Claimant puts it as high as it being the predominant reason, why he was recalled to prison was that, upon a search of his room, a mobile phone was found which was incorrectly believed to contain threatening text messages and text messages evidencing drug dealing activity, that had been sent subsequent to the Claimant's

release on licence. After the decision to recall had been taken, it was discovered that the text messages on the mobile phone pre-dated the Claimant's imprisonment for the index offence.

25. The gravamen of the Claimant's case before this court is that the AP, COM and PPCS each had a duty to undertake enquiries in order to ascertain the date of the text messages prior to a decision being made to recall him to prison, and that each failed in that duty.
26. By his first ground, the Claimant contends that the decision maker, whether this be the COM or the PPCS, was under a duty to take steps to ensure that the information that had been presented by the AP staff was accurate. The Claimant avers that the failure of the COM or PPCS to take steps to ensure its accuracy, leads to the decision to recall being unlawful.
27. By his second ground, the Claimant contends that the date the text messages were sent would have been available to the AP staff without a detailed and protracted investigation and that, given the consequences for the Claimant, the AP staff were required undertake that brief investigation. The failure to do so led to the information presented to the COM and PPCS being inaccurate which, it is said, ineluctably leads to the recall decision being unlawful.
28. The Claimant maintains that the circumstances that prevail in the instant case are analogous to, and arguably more stark than, those which were considered by this court in Wilson. I have set out, at [23] above, the relevant factual matrix considered in Wilson. The conclusion of the court is summarised at [42] of its judgment:

“[t]he undoubted requirement for there to be reasonable grounds to justify the decision to recall, coupled with the importance of operating a procedurally fair process of decision-making, means that the decision-maker and those providing information to the decision-maker must at the very least ensure that the material that is provided for the decision is reasonably accurate. In this case, that was not so. The Secretary of State was not told that the Claimant denied that he was in a developing relationship of a kind that might put him in breach of his licence condition. This rendered the Recall Report misleading.”

29. What procedural fairness requires is context and fact specific. This Court's function is to determine for itself on the facts of the individual case, when set in the relevant context, whether a fair procedure was followed (Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; [2006] 1 WLR 781, at [6]).
30. Although the relevant context in Wilson was a decision to recall a person to prison, the underlying factual circumstances were inevitably different from those that prevail in the instant matter. In Wilson, unlike in the present case, information relevant to the consideration of whether to recall the Claimant was within the knowledge of the offender manager, but that information was not passed on to the decision maker. In those circumstances, the court understandably concluded that, in the relevant context, the failure to accurately present the relevant information known to the offender manager rendered the process leading to the decision to recall, procedurally unfair.

31. The court in Wilson did not conclude as a matter of principle that there was a requirement on a decision-maker to investigate information provided by an AP or offender manager prior to a decision on recall being made, nor did the court conclude that the failure to present information that would have been available to an AP or offender manager on further enquiry, but that was not known to them at the relevant time, would render a decision to recall procedurally unfair. I observe in particular that, at [43] of Wilson, the court stated that it was not necessary for it determine, on the facts of that case, whether there was a duty to consult the Claimant prior to the making of the recall decision.
32. The decision in Wilson is, however, helpful for its summary, at [41], of the judicial learning on the relevance of a procedural fairness challenge being brought within the sphere of a prison recall:

“[41] The authorities cited by both parties support the proposition that the court should be cautious as to interfering in decision-making in this sphere. This is understandable. Both the Probation Service and the Secretary of State are concerned in the recall process within which the issue of risk to the public is a central consideration. They are far better placed than the court is to assess such risk and correspondingly the court must exercise restraint in interfering with the decision-making process. Moreover, it would be undesirable and contrary to the principles set out in the authorities to impose a heavy duty of investigation and/or consultation before the power of recall is exercised. A Probation Officer preparing a report in this context is required to have regard to a range of material but to reach a decision that may have important implications for public safety.
33. A further element of the context, when considering procedural fairness in the prison recall sphere, are the procedural safeguards statutorily built into the recall process by section 154(2) of the 2003 Act, and which are reflected in the Policy Framework. These safeguards require provision of the recall dossier to a recalled prisoner, notification to the prisoner of the right to submit representations, provision of a list of legal aid lawyers and the opportunity for the prisoner to make a legal phone call within 2 days of receipt of the recall dossier. The COM is also required to submit a Part B report to the PPCS and the recalled prisoner within a specified timeframe of the recall and, on receipt of this, the PPCS must consider whether the recalled prisoner is suitable for executive release. In the Claimant’s case, the COM met with Claimant on 19 May and, in response to representations made by the Claimant, the COM visited Luton AP on 23 May, analysed the mobile phone, ascertained the date of the messages, and wrote the Part B report shortly thereafter.
34. The relevant context in the Claimant’s case, unlike in Wilson, also includes the fact that the emergency recall and Out of Hours processes were utilised. Paragraph 4.3 of the Policy Framework relates to the recalling of individuals who have received a determinate sentence, such as the Claimant, and includes the framework for use of the emergency recall process. It identifies that one of four criteria must be met before use of that process – the first being that the individual is assessed to present an imminent risk of serious harm, and the fourth being that the individual is assessed to present an imminent risk of re-offending. The emergency recall process is reserved for those cases where there is an immediacy of action required to prevent a serious consequence, and this is reflected in the fact that a PPCS must make a decision on recall within 2 hours of receipt of the paperwork from the COM/Probation Practitioner.

35. In relation to an out of hours recall, a request for a recall must meet the criteria for an emergency recall and must have come to light within a specified time of day. Again, it is the PPCS, acting on behalf of the Secretary of State, that is responsible for authorising an out of hours recall request and, given that a necessary element is the assessed need for an emergency recall, a decision must take place within two hours of the COM/Probation Practitioner contacting the out of hours switchboard.
36. In Abedin v Secretary of State for Justice [2014] EWHC 78 (Admin), the court considered the lawfulness of a recall undertaken within the emergency recall process. The Claimant had contended that the decision to recall him to custody due to concerns that he had wiped the hard drive of a computer in breach of his licence, was unfair as it failed to take into account evidence that it might have been done by another family member. Collins J considered the duty of investigation by the Probation Service, in the context of an emergency recall, stating at [16] and [17]:
- "While a request [for recall] must be fair, it is reasonable for the supervising officer to form a view which may be adverse to a particular offender provided that that view is genuine and formed on reasonable grounds.... The decision will be determined by consideration whether there was evidence upon which he could reasonably conclude that there had been a breach.
- This was properly regarded as a case where an emergency recall was needed. There is no obligation to seek any further explanations from an offender or other person in such a case or, indeed, normally in any recall."
37. I remind myself again, that the requirements of procedural fairness are context and fact specific. It is not in dispute that the AP staff, the COM and the PPCS did not have knowledge of the dates that the text messages were sent, prior to the recall decision being made. Looking at the messages on the Claimant's mobile phone did not reveal that information, and a further investigation of the contents of the mobile phone was necessary in order to identify the dates that the messages had been sent. It is not argued by the Claimant that on the actual information available, i.e. absent knowledge as to the dates of the phone messages being available to the AP staff, the COM or the PPCS at the material time, that either the decision to utilise the emergency recall process or the decision to recall the Claimant, was irrational. The absence of such an argument is entirely understandable. Given the nature of the messages on the mobile phone, their nexus to the index offence, the Claimant's criminal history and the other relevant matters such as steroids being found in the Claimant's room, I have no doubt that, at the time the decision to recall was made, the Defendant had sufficient material upon which it could reasonably be concluded that the Claimant was in breach of his licence conditions, that there was an imminent risk of serious harm and that it was necessary to recall the Claimant.
38. The question for me, however, is whether the process which led to the decision to recall was procedurally fair. In addition to the contextual matters identified above, it is also highly relevant that the Claimant has a lengthy criminal history involving drugs and violence, and that there were already concerns on 5 May about his activities outside the AP, and the associations he was making in the AP. The issue of risk to the public is a central consideration in the concerns of both the Probation Service and the Secretary of State in the recall process. There is a significantly reduced timeframe for a decision to be made under the emergency recall process, which clearly reflects the perceived

imminence of the risk of harm and the need to act swiftly to mitigate against the possibility of such risk coming to fruition. As a counterbalance, there are statutory safeguards and safeguards built into the Policy Framework that provide a transparent review process, with the opportunity for a recalled prisoner to make representations and for a re-assessment of the recall decision, after recall has taken place. Of course, this process permits of the possibility of a person wrongly losing their liberty in the event of an unjustifiable recall and subsequently having to rely upon the post-recall safeguards, but this reflects the fact that a powerful and central consideration on recall is the issue of risk to the public.

39. When the assessment of what procedural fairness required in the instant case is set in its proper context, and even absent the additional reasons provided for recalling the Claimant i.e. the fact that steroids were found in the Claimant's room and that his AP bedspace had been withdrawn, in my conclusion there was no requirement or duty on the AP staff, the COM or the PPCS to undertake any further enquiry as to the date of the text messages prior to the recall decision being made, however necessarily brief that enquiry might have been. This is not a decision born out of a principle that there is never an obligation to undertake investigations or seek an explanation from an offender before recall, but it is a conclusion drawn from the context and specific facts of this case.
40. Accordingly, I reject both of the Claimant's grounds and conclude that the decision to recall the Claimant is not vitiated by a breach of procedural fairness.
41. In the circumstances, I need not consider the submissions made to the Court regarding the application of the Section 31(2A) of the Senior Courts Act 1981, and I simply record that had I been required to consider this issue I would have concurred with the Secretary of State's submissions.

Decision

42. The application for judicial review is dismissed.