Neutral Citation Number: [2022] EWHC 722 (Admin)

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: 30/03/2022

Before:

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

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Between:

R (on the application of) JASON KESSIE-ADJEI	**Claimant**
- and –	
SECRETARY OF STATE FOR JUSTICE	**Defendant**

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- -

Mr S Grodzinski QC & Mr A Deakin (instructed by **Scott Moncrieff & Associates**) for the **Claimant**
Mr T Richards (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 8 March 2022

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Approved Judgment

Mrs Justice Heather Williams:

Introduction

1. The claimant challenges the lawfulness of his detention between 15 January and 4 March 2021 ("the unlawful detention challenge"). He was arrested on 15 January 2021 on the basis that he was unlawfully at large ("UAL") and returned to prison to serve the remainder of the determinate sentence imposed by Southwark Crown Court on 9 February 2018. He had been released on licence in April 2019, but his licence was revoked after the commission of a further offence. Although the revocation occurred on 10 January 2020, the claimant was not aware of this and his probation officer led him to believe that his licence had expired unrevoked. As his sentence was originally due to expire on 2 July 2020, his arrest some six months later came as a considerable shock to him. The claimant accepts that the revocation of his licence and his recall to prison were lawful as a matter of domestic law pursuant to s.254 of the Criminal Justice Act 2003 ("CJA 2003") and s.49 of the Prison Act 1952 ("PA 1952"). However, he contends that his detention was in breach of Article 5(1) of the European Convention on Human Rights ("ECHR").

2. The claimant also alleges that PSI 03/2015 fails to conform with the Article 5(1) ECHR requirement for legal certainty in terms of the discretionary power to disapply the effect of s.49(2) PA 1952, which provides that days spent UAL do not count towards the completion of the prisoner's sentence ("the policy challenge").

3. The defendant denies the claim and also contends that the proceedings are an abuse of process in light of earlier proceedings that the claimant brought also challenging the lawfulness of his detention, in relation to which permission to proceed was refused and he did not appeal ("the First Claim"). The claimant, disputes that there is an abuse and also submits that the procedural history of the current proceedings precludes the defendant from raising an abuse argument. In short, Lang J refused permission to apply for judicial review on the papers on 29 March 2021 both on the basis that the claim was unarguable and also as it was an abuse of process. Following a contested renewal hearing, Linden J arrived at the same conclusions, as he set out in his reserved judgment handed down on 29 April 2021. However, the claimant appealed and permission to apply for judicial review was subsequently granted by Nicola Davies LJ by an order dated 20 August 2021. In these circumstances, the claimant submits that in granting permission, Nicola Davies LJ must have determined that the claim was not abusive.

4. The policy challenge is the first ground in the claimant's Replacement Statement of Facts and Grounds ("the Replacement Grounds"). However, it is convenient to consider the unlawful detention challenge first. The claimant does not pursue a further ground included in the original Statement of Facts and Grounds challenging the lawfulness of the defendant's determination that 58 days from the time when he was UAL would be counted towards his sentence. The claimant did not appeal the refusal of permission in relation to this aspect.

5. Accordingly, the issues for the court to consider are as follows:

   i) Was the claimant's detention incompatible with Article 5(1) ECHR in that:

a) It was arbitrary, in particular because it was not reasonably foreseeable and/or because he had been misled into believing that his sentence had already come to an end ("the arbitrariness challenge");

b) There was no lawful basis for the same, as any causal connection between the determinate sentence imposed by the Crown Court and the period of detention had been broken in the unusual circumstance of this case ("the causation challenge"); and/or

c) No consideration was given to the proportionality of re-detaining him before he was arrested and detained ("the proportionality challenge");

ii) Is PSI 03/2015 incompatible with Article 5(1) in the respects alleged by the claimant;

iii) Does the grant of permission to apply for judicial review preclude the court from finding that the proceedings are an abuse of process;

iv) If not, are the proceedings an abuse of process in light of the First Claim; and if the court considers that they are abusive, does this preclude the grant of relief in circumstances where, consistent with the grant of permission, full submissions on the merits have been heard; and

v) If the claimant's detention was in breach of Article 5 ECHR what sum of damages should he be awarded by way of just satisfaction?

The statutory provisions

6. Section 244(1) CJA 2003 requires the Secretary of State to release a fixed-term prisoner on licence as soon as the prisoner has served a prescribed portion of their sentence, for which s.244(3) makes provision. Section 252(1) requires a person released on licence to comply with such conditions as may be specified in the licence.

7. Section 254 CJA 2003 addresses the recall of prisoners while on licence. It provides (as material):

> "(1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.
>
> (2) A person recalled to prison under subsection (1)-
>
> (a) may make representations in writing with respect to his recall, and
>
> (b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations.
>
> (6) On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his

> sentence and, if at large, is to be treated as being unlawfully at large."

8. Section 49 PA 1952 is concerned with persons who are unlawfully at large. As material, it states:

> "(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 the 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…then, unless the Secretary of State otherwise directs, no account shall be taken in calculating the period for which he is liable to be detained, of any time during which he is absent from the place in which he is required in accordance with law to be detained."

9. Where a prisoner makes representations pursuant to s.254(2)(b) CJA 2003, the question of their further release must be referred to the Parole Board, which may direct their further release on licence: ss.255B(4)-(5) and 255C(4)(a)-(5).

10. The claimant does not suggest that these provisions are incompatible with Article 5 ECHR. Accordingly, it follows as a matter of domestic law that:

    i) If a person is at large when their licence is revoked, they are deemed to be UAL (s.254(6) CJA 2003);

    ii) The revocation of their licence stops the clock running on the completion of their custodial sentence for the period whilst they are UAL, save to the extent that the discretionary power to make a direction to the contrary is exercised (s.49(2) PA 1952);

    iii) A person who is UAL is liable to be arrested and detained for the purposes of serving their sentence (s.254(1) CJA 2003; s.49(1) PA 1952).

11. In *R (S) v Secretary of State for the Home Department* [2003] EWCA Civ 426 ("*R (S) v SSHD*") the Court of Appeal held that there was no pre-condition for an individual to know that their licence had been revoked before they are treated as being UAL, with the effect that the clock on their sentence completion will stop (pursuant to s.49(2) PA 1952) even if they are unaware of the revocation. The court was concerned with s.39 of the Criminal Justice Act 1991, rather than the CJA 2003 provisions, but nothing turns on that. Simon Brown LJ (with whom the other members of the court agreed) explained his conclusion as follows:

> "24. …Not merely is there nothing in s39 to support the view that a recalled prisoner must know of his licence revocation before becoming unlawfully at large, but reason and policy strongly suggest the contrary. As Mr Kovats points out, 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."

12. The claimant does not dispute this as a matter of national law. However, Mr Grodzinski QC emphasises that the impact of Article 5 ECHR was not discussed in *R (S) v SSHD* and he submits that the circumstances there were materially distinct from the present case. I will address that contention when I set out my conclusions.

13. As the defendant points out, the offence of remaining UAL, created by s.255ZA CJA 2003, cannot be committed unless the prisoner had been notified of their recall to prison.

The Recall Policy and the Joint National Protocol

14. The defendant's policy on recall to prison is set out in the *Recall, Review and Re-Release of Recalled Prisoners Policy Framework* (the "Recall Policy"). The claimant does not challenge the lawfulness of this policy. Paragraph 3.3.9 of the Recall Policy requires an offender manager to consider requesting the recall of a determinate sentence prisoner released on licence where the individual has breached the conditions of their licence, their behaviour indicates that they present an increased or unmanageable risk of serious harm to the public, there is an imminent risk of a further offence being committed or contact has broken down. Offender managers are in any event required to consider requesting a recall where there has been further offending (para 3.3.13). Recall may be "fixed term" or "standard"; in the latter instance the individual may remain in prison until the end of their sentence.

15. The decision whether to recall an individual is made by the Public Protection Casework Section ("PPCS") on behalf of the defendant, on the basis of a "Part A recall report" submitted by an offender manager (paras 3.3.33 – 3.3.38). If recall is ordered, the PPCS must issue a revocation order to New Scotland Yard, the Police Single Point of Contact (in the present case, at the Metropolitan Police) and the probation services (para 3.3.39).

16. Paragraph 3.8.1 states:

> "Where an offender has remained UAL for more than 28 calendar days (starting from the date of the revocation order), PPCS must issue a letter to the offender notifying them of their recall to custody. The letter will be sent to the offender's last recorded address, as detailed in the Part A report and copied to the offender manager."

17. Paragraph 3.8.2 says:

> "Where the offender has failed to return to custody within 14 calendar days of the date of the letter, PPCS must notify the police by submitting an evidence bundle, copied to the offender manager, informing them that the offender is liable for prosecution."

18. On the face of it, para 3.8.1. is expressed in mandatory terms. In para 13 of his Detailed Grounds of Resistance, the defendant says that in practice this provision is not applied in all cases, but only as a precursor to pursuit of a conviction under s.255ZA CJA 2003. I will return to the significance of this, if any, when I set out my conclusions.

19. The *Joint National Protocol Supervision, Revocation and Recall for Offenders Released on Licence* (the "Joint National Protocol") confirms that it is the police's responsibility to apprehend individuals who are recalled to prison.

PSI 03/2015

20. The defendant's policy on whether, and to what extent, a direction should be made under s.49(2) PA 1952 is contained in PSI 03/2015 *Sentence Calculation – Determinate Sentenced Prisoners* at para 7.1 and Appendix F. Paragraph 7.2.1 confirms the effect of being UAL as follows: "The period unlawfully at large will extend all the dates of a sentence…At the point at which the UAL period begins, the sentence is in effect frozen. On the prisoner's return to custody those original dates are deferred by the days UAL".

21. As relevant, para 7.1 states:

> "7.1.1 When a sentenced prisoner…has been unlawfully at large (UAL) from prison and is then returned to custody, the period of absence will not be treated as part of the sentence served unless the Justice Secretary directs that it should.
>
> 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 (CDDC) and where it has been approved by Ministers…
>
> 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."

22. Appendix F indicates that "Each case will be considered on its individual merits". It goes on to state that NOMS have advised that the following are examples of features that could be considered under exceptional circumstances but "this list is by no means exhaustive". It is not suggested by the parties that any of the features that are then listed applied in the present case. To give a flavour, they include: cases of erroneous release where the prisoner was released subject to conditions which placed significant restriction on their liberty; where the prisoner is disadvantaged by the return to custody, for example by losing employment; and where the prisoner is a primary carer. The Appendix also identifies factors that may count against the prisoner, including where they have deliberately withheld knowledge that their release was erroneous; and public protection issues.

The material facts and circumstances

23. On 6 May 2016 for an offence of robbery the claimant was given a suspended sentence of 24 months' imprisonment. On 9 February 2018 he was sentenced at Southwark Crown Court to 12 months imprisonment for having an article with a blade or point in a public place. Eighteen months of his earlier suspended term of imprisonment was activated, meaning that he was sentenced to 30 months imprisonment in total. In the interim the claimant had been sentenced to five months' imprisonment for a drugs offence, but that had not resulted in the activation of his earlier suspended sentence.

24. On 3 April 2019 the claimant was released on licence pursuant to s.244 CJA 2003. The licence said that his supervision started on 3 April 2019 and expired on 2 July 2020 "unless this licence is previously revoked" (para 2). Paragraph 9 reiterated that the licence expired on 2 July 2020 and para 10 said that the sentence expired on that date. Paragraph 5 set out a number of conditions that the claimant was to adhere to, including: (i) to be of good behaviour and not behave in a way that undermined the purposes of the licence period; (ii) to not commit any offence; and (iii) to keep in touch with his supervising officer. The claimant was warned that if he failed to submit to a recall to custody following a notification of the revocation of his licence, he may be liable to a further charge of being UAL under s.255ZA CJA 2003 (para 7). Paragraph 8 of the document said:

> "If you fail to comply with any requirement of your supervision…or if you otherwise pose a risk to the public, you will be liable to have this licence revoked and be recalled to custody until the date on which your licence would have otherwise ended…"

25. Upon his release on licence the claimant began supervision in the community. His offender manager was a junior probation officer, Christopher Haddow, who had only been in post since February 2019. Mr Haddow's line manager was Alex Babudoh. Both have provided witness statements in these proceedings. Mr Grodzinski accepted that in so far as there were any differences between Mr Haddow's account and the claimant's, the court should proceed on the basis of the defendant's evidence (no application having been made to cross examine the Secretary of State's witnesses).

26. On 12 November 2019 the claimant committed a further offence of having an article with a blade or point in a public place. He was charged and bailed by the Medway Magistrates' Court pending trial, which took place the following March. His bail

conditions included curfew, residence and electronic tagging conditions. Mr Haddow explains that the claimant did not tell him that he had been charged with a further offence and that he learnt of this from an entry on the claimant's nDelius record (the Probation Service's case management system).

27. After learning this, Mr Haddow arranged to meet with the claimant on 31 December 2019. During the meeting the claimant asked at least twice if he would be recalled to prison as a result of the further incident. Mr Haddow told him that no recall decision had been made at the time as the case was being considered by senior colleagues.

28. On 10 January 2020 Mr Haddow was advised by the Head of Service – Lambeth and Wandsworth Cluster to initiate the claimant's recall, given, in particular, that the new charge paralleled his index offence. Mr Haddow then completed the Part A Recall Report which was countersigned by two of his managers and submitted to the PPCS. Later the same day, the PPCS informed Mr Haddow that the claimant's licence had been revoked. The reasons given for the licence revocation in the formal documentation was that the claimant had breached the conditions at para 5(i) and (ii) of the licence (para 24 above). Mr Grodzinski pointed out that the revocation reasons are written as if addressed to the claimant ("You have been recalled to prison because…").

29. The PPCS forwarded the licence revocation to New Scotland Yard and to the Metropolitan Police. It is common ground that the claimant was not informed at this stage. Mr Haddow did not tell him and nor was the claimant sent a notification letter as contemplated by para 3.8.1 of the Recall Policy (para 16 above). As I have already indicated in the Introduction, the claimant was not arrested by police until over a year later on 15 January 2021. The defendant does not know why it took the police so long to act upon the notification. It is not suggested that the claimant was evasive or obstructive in any way. The Recall Notification provided to police gave the claimant's last known address, which was also the address he had been bailed to by the Magistrates' Court; and the claimant appeared in lists of individuals UAL circulated to police in June, September and December 2020. Mr Haddow says that he presumed the police were aware of the recall and dealing with the matter.

30. Mr Haddow had no further contact with the claimant until after he was sentenced by the Medway Magistrates' Court on 9 March 2020 to a 24 months suspended period of imprisonment, with an unpaid work requirement. From 16 March 2020 Mr Haddow recommenced contact with the claimant in connection with this sentence. He accepts that he did not tell the claimant that his licence had been revoked. In his witness statement, Mr Haddow says that this was because he believed there was a risk that the claimant would abscond if he learnt of the recall. Mr Grodzinski critiques this rationale for various reasons. However, as the defendant does not suggest that Mr Haddow's decision not to inform the claimant was justified, it is unnecessary for me to examine his reasoning in any detail.

31. In his witness statement, Mr Haddow also accepts that during a conversation with the claimant shortly before the date when his licence would have expired if it had not been revoked, he said something like: "It is good news that your licence is coming to an end". Mr Haddow says that when he made this comment he was not trying to mislead the claimant; at the time he was not thinking about the fact that the clock on the claimant's licence had ceased running because he was UAL. The defendant accepts that this was

apt to mislead the claimant and does not dispute the proposition that in consequence the claimant believed that his licence had expired on 2 July 2020.

32. Importantly, whatever the imperfections in Mr Haddow's reasons for, firstly, not telling him about the revocation and, secondly, positively leading him to believe that the licence and his sentence would come to an end on the previously stipulated date in July 2020, the claimant accepts that there was no bad faith, in the sense of a deliberate attempt on the part of his probation officer to mislead him.

33. Probation Service electronic records dated 16 July 2020 also recorded that the claimant had completed his sentence.

34. The claimant continued to be unaware of the recall and his arrest on 15 January 2021 came as a complete surprise to him. He says that the police officers who arrested and initially detained him were unable to explain the basis for these actions.

35. On 26 January 2021 the claimant's solicitors requested that the Secretary of State exercise his discretionary power not to leave the days when he was UAL out of account for the purposes of calculating when his sentence was served. An undated letter from HM Prison & Probation Service received on 11 February 2021 indicated that the claimant had been UAL from 11 January 2020 to 14 January 2021, a total of 370 days, so that on his return to custody he had 174 days remaining on his sentence, with an end date of 7 July 2021, but that in the exceptional circumstances 58 days of the time spent UAL would be counted towards his sentence, giving an end date of 10 May 2021. The letter made reference to Appendix F, noting that although he was not released in error, there were parallels in that "he was not informed of the revocation and recall for just over one year…and was, in that sense, 'unknowingly UAL' through no fault of his own". The letter also noted that other than the further offending, the claimant appeared to have complied with the licence conditions. Balanced against that, the letter said that the conditions of the licence had not placed a significant restriction on his liberty; he had benefitted from time in the community following the revocation of his licence; and the breach was a serious one, which paralleled his index offence.

36. In the interim, the claimant had made representations pursuant to s.254(2) CJA 2003. On 4 March 2021 the Parole Board decided that he could be safely released into the community and he was duly released on 8 March 2021.

The First Claim

37. On 22 January 2021 the claimant made an out of hours application, without notice to the defendant, for his immediate release. The application was adjourned by Saini J to 27 January 2021 with directions for the claimant to file and serve a claim form and fully pleaded grounds by 25 January 2021. The claimant duly filed grounds drafted by counsel (not the same counsel as those representing him in the current proceedings). It was indicated that the document had been prepared at short notice, with limited disclosure and with the claimant's legal representatives having restricted access to him (para 6). The relief sought included an order requiring the claimant's release from prison and also damages "for false imprisonment and for breach of Article 5 ECHR". The Statement of Facts said that the claimant had not been made aware of the recall (para 19), but it did not refer to Mr Haddow telling him that the licence was about to end. Paragraphs 32 and 33 made reference to Article 5 ECHR, but the only ground

alleged in the document was that the claimant had a legitimate expectation that his sentence would expire on 2 July 2020. The defendant filed Summary Grounds of Resistance, disputing the claim.

38. On 27 January 2021 the case was listed for consideration of permission and interim relief before Richard Clayton QC, sitting as a Deputy High Court Judge. A skeleton argument was filed on behalf of the claimant dated 27 January 2021. The document stated in the first paragraph that the claimant had not been aware of the recall report "and had been told by his Probation Office that his licence had ended on 2 July 2020". However, no detail of anything said to the claimant by Mr Haddow was then included in the document. It is reasonable to assume that if the claimant's lawyers had been aware of the positive indication that Mr Haddow now accepts he provided, it would have been included, as supportive of the legitimate expectation claim. The skeleton indicated that the claimant was seeking permission to file amended grounds to allege that: (a) the defendant had failed to exercise his discretion under s.49(2) to direct that time be taken into account (following a request that he do so); and (b) his detention was in breach of Article 5(1) ECHR. The latter submission was developed in paras 15 – 19 of the skeleton, where it was contended that the deprivation of liberty was arbitrary, as it failed to meet the Strasbourg criteria that it be "sufficiently accessible, precise and foreseeable".

39. At the hearing on 27 January 2021 the Deputy High Court Judge refused the claimant's applications. He gave his reasons in a reserved judgment handed down on 29 January 2021. Therein he noted that it had been agreed at the hearing that he should deal with the amendment application by considering whether the amended grounds were reasonably arguable (para 10). It appears the Judge proceeded on the basis that the claimant's counsel did not suggest that Mr Haddow had assured him that his licence would not be revoked (para 18). The Judge determined that all the grounds advanced were unarguable. Addressing the Article 5 contention at para 22, he said he rejected the proposition that the deprivation of liberty was not foreseeable, as the sentence of imprisonment provided for the lawfulness of the claimant's detention in light of the operation of s.49 PA 1952. The Judge refused permission to appeal and the claimant did not pursue an appeal thereafter

40. In a witness statement dated 28 April 2021, Samuel Genen of Scott-Moncrieff & Associates explained the difficulties he had experienced with taking instructions from the claimant in relation to the First Claim. In short, he was unable to book a direct telephone call with him and was restricted to listening in to a call between the claimant and a family member on speaker phone that lasted 10 – 15 minutes. The claimant's position is that as at 27 January 2021 it was not appreciated by his advisers that he had been actively misled by his offender manager as to the end point of his sentence.

The current proceedings

41. By a further letter before claim dated 4 February 2021, the claimant's solicitors indicated that a second claim was contemplated. The matters challenged were said to be: (i) the Secretary of State's failure to decide whether to make a direction pursuant to s.49(2) PA 1952; (ii) the lawfulness of the claimant's continuing detention; (iii) the lawfulness of PSI 03/2015; and (iv) the domestic legislative and policy framework governing the calculation of sentences for determinate prisoners UAL. Paragraphs 34 – 41 of the letter contended that the claimant's continuing detention was a breach of

Article 5(1) ECHR as he had been actively misled by his offender manager who had openly discussed with him that his licence would soon be coming to an end.

42. On 5 February 2021 Mr Genen was at last able to have a direct telephone call with his client. He obtained the instructions that formed the witness statement made by the claimant on the same day. In this statement Mr Kessie-Adjei explained that around July 2020 Mr Haddow positively told him that he had completed his sentence and was no longer on licence.

43. On 11 February 2021 the Government Legal Department sent the s.49(2) direction decision (para 35 above) and a response to the pre-action protocol letter. As well as denying the proposed grounds of challenge, the response asserted that to initiate second proceedings would be an abuse of process.

44. The present claim was issued on 16 February 2021. At that stage it was contended that the claimant's detention breached his rights under Article 5 ECHR and that the defendant's s.49(2) direction failed to take into account relevant considerations and was insufficiently reasoned. Lang J refused permission on the papers on 29 March 2021. In addition to indicating that the claim did not disclose any arguable grounds, she considered the defendant was correct "to submit that it is an abuse of process for the claimant to bring this second claim, essentially on the same grounds as the first one (including Article 5 ECHR), issued less than a month later…"

45. As I mentioned in the Introduction, the claimant's renewal application was heard by Linden J who handed down a reserved judgment on 7 May 2021. He agreed with Lang J. At paras 28 – 40 he explained why he concluded that the Article 5 claim was not reasonably arguable. Between paras 41 – 56 he addressed the abuse of process argument. After reviewing the factual circumstances and the applicable principles, he concluded that, on balance, the Article 5 claim was abusive, so that he refused permission on that basis as well. He said that Richard Clayton QC had adjudicated on the merits of the Article 5 contention in the First Claim in circumstances where he described having heard "full argument". He did not consider that the new material relating to the claimant having been positively misled by Mr Haddow provided sufficient justification for these further proceedings. He also noted that the second letter before claim was sent *before* the additional instructions were provided on 5 February 2021, calling into question the extent to which they had provided the impetus for the current claim. He then observed:

> "54 …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 the 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."

46. The challenge to the s.49(2) determination was not alleged to be abusive as the decision post-dated the First Claim. However, for the reasons he identified at paras 59 – 70, Linden J concluded that no reasonably arguable challenge had been identified in relation to it.

47. The claimant appealed Linden J's decision in relation to the Article 5 ECHR ground and in respect of his finding of an abuse of process. He did not appeal the conclusion reached in respect of the s.49(2) determination. The Respondent's Statement on Permission to Appeal submitted pursuant to para 19 of PD 52C, contended that permission to appeal should be refused, not only because the Article 5 ground was unarguable, but also because Linden J had correctly found that to advance it was an abuse of process.

48. By order sealed on 20 August 2021, Nicola Davies LJ granted permission to apply for judicial review (as opposed to permission to appeal) "on Article 5 ECHR grounds". In the Reasons section of the order, she said: "The Article 5 ECHR claim is arguable". The parties do not agree on the significance of this in terms of the abuse of process contention and I will address that when setting out my conclusions.

49. Subsequently, and with the consent of the defendant, the claimant submitted the Replacement Grounds dated 22 October 2021 containing the two Article 5 ECHR challenges that I have already summarised and a second witness statement from the claimant dated 2 October 2021 describing his detention.

Article 5(1) ECHR: principles

50. 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…"

51. Article 5(5) provides a right to compensation for breaches of Article 5.

52. It is well established in the case law of the European Court of Human Rights ("ECtHR") that it is not enough that a deprivation of liberty is based on one of the exceptions listed in sub-paragraphs (1)(a) – (f) of Article 5, it must also be "lawful". This requires not only that the deprivation is in compliance with the relevant national laws; but also that

it is in keeping with the purpose of Article 5, namely of protecting an individual from arbitrariness, and that the domestic law itself conforms with the Convention, including the principle of legal certainty: *Demirtas v Turkey* (2019) 69 E.H.R.R. 27 ("*Demirtas*") at para 142. In the next paragraph the court said:

> "143 The Court observes that "quality of law" implies that 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."

53. The Grand Chamber's judgment in *Khlaifia & Ors v Italy* (Application no. 16483/12) at para 92 is to similar effect.

54. In *James v United Kingdom* (2013) 56 E.H.R.R. 12 ("*James*") the Grand Chamber noted that the ECtHR had not set out an exhaustive list of conduct that might constitute arbitrariness for the purposes of Article 5(1). However, it identified "some key principles" that could be extracted from the case law, emphasising that they were to be applied in a flexible manner. As material, the court then continued:

> "192 First, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. Thus, by way of example, the Court has found violations of art.5(1) in cases where the authorities resorted to dishonesty or subterfuge in bringing an applicant into custody to effect his subsequent extradition or deportation.
>
> 193 Secondly, the condition that there be no arbitrariness demands that both the order to detain and the execution of the detention genuinely conform with the purpose of the restrictions permitted by the relevant subparagraph of art.5(1)…
>
> 194 Thirdly, for a deprivation of liberty not to be arbitrary there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and condition of detention…In the context of art.5(1)(a) a concern may arise in the case of person who, having served the punishment element of their sentence, are in detention solely because of the risk they pose to the public, if there are no special measures, instruments or institutions in place-other than those available to ordinary long-term prisoners-aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences…

> 195 Fourthly, the requirement that the detention not be arbitrary implies the need for a relationship of proportionality between the ground of detention relied upon and the detention in question. However, the scope of the proportionality test to be applied in a given case varies depending on the type of detention involved. For example, in the context of detention pursuant to art.5(1)(a), the Court has generally been satisfied that the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for this Court. However…it has indicated that in circumstances where a decision not to release or to re-detain a prisoner was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court, or on an assessment that was unreasonable in terms of those objectives, a detention that was lawful at the outset could be transformed into a deprivation of liberty that was arbitrary…"

55. In a footnote to para 192, the Grand Chamber in *James* cited *Saadi v United Kingdom* (2008) 47 E.H.R.R. 17 ("*Saadi*") at para 69, in relation to the proposition that detention will be arbitrary where there had been an element of bad faith or deception. Both *Saadi* and *James* cited two cases in support of this proposition: *Bozano v France* (1987) 9 E.H.R.R. 297 ("*Bozano*") and *Čonka v Belgium* (2002) 34 E.H.R.R. 54 ("*Čonka*"). In light of Mr Grodzinski's submissions it is instructive to consider the circumstances in those two cases where violations of Article 5(1) were found in both instances.

56. In *Bozano* the applicant had been convicted in his absence in Italy of serious crimes. After his arrest in France, the Italian authorities unsuccessfully sought his extradition, which was refused on the basis that the trial procedure was incompatible with French public policy. Despite this ruling, the French government issued a deportation order which led to the applicant being taken by police against his will to Switzerland and from there he was extradited to Italy to serve his sentence. The deportation order was subsequently quashed by a French court as an abuse of power. The ECtHR held that the applicant's deprivation of liberty when he was forcibly taken to Switzerland was in breach of Article 5(1) as it had been a disguised form of extradition deliberately designed to circumvent the negative extradition ruling (paras 59 – 60). The ECtHR also highlighted that the authorities had deliberately delayed in serving the deportation order so that the applicant was effectively presented with a *fait accompli* immediately before his sudden expulsion, in which he was not allowed to speak to his wife or his lawyer.

57. *Čonka* concerned applications brought by Slovakian nationals of Romany origin who had unsuccessfully sought asylum in Belgium. Together with a large number of other Slovakian Romany families they were required to attend the local police station. They had been informed that they should attend to enable the files concerning their asylum applications to be completed. However, when they arrived to their surprise they were served with orders to leave Belgium and then taken to a military airport and returned to Slovakia. The ECtHR explained its conclusion that there was a violation of Article 5(1) as follows:

> "41 …Although the Court by no means excludes its being legitimate for police to use stratagems in order, for instance, to counter criminal activities more effectively, acts where the

> authorities seek to gain the trust of asylum seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention.
>
> In that regard, there is every reason to consider that…the wording of the notice…was not the result of inadvertence; on the contrary, it was chosen deliberately in order to secure the compliance of the largest possible number of recipients…
>
> 42 The Court reiterates that the list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision. In the Court's view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the applicants are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of the notice so as to make it easier to deprive them of their liberty is not compatible with Article 5."

58. Mr Grodzinski submitted that the ECtHR's reasoning in *Čonka* showed that an unreliable communication which misled a person in relation to their detention could itself amount to arbitrariness for these purposes and that it made no difference whether or not the inaccuracy or unreliability was animated by bad faith. He submitted that this was consistent with the Convention requirement for accessibility and foreseeability. I will address the issue of foreseeability when setting out my conclusions, but I do not accept the proposition that the presence or absence of bad faith makes no difference or is irrelevant. It is plain from the court's reasoning in *Bozano* and in *Čonka* that the bad faith identified in the respective judgments lay at the heart of the respective findings of a violation of Article 5(1). Indeed, that is the principle abstracted from these cases by the Grand Chamber in *Saadi* and again in *James*, where reference was made to the authorities' use of dishonesty or subterfuge in taking the applicants into custody. Furthermore, it is easy to see why the authorities' conduct in these instances was characterised as "arbitrary". In my judgment there is nothing in the present circumstances that is analogous to these cases.

59. In relation to Article 5(1)(a) ("the lawful detention of a person *after* conviction by a competent court…"), the word "after" does not simply mean that the detention follows the conviction in point of time; it "must result from follow and depend upon or occur" by virtue of' the conviction: *Van Droogenbroeck v Belgium* 4 E.H.R.R. 443 at para 35 ("*Van Droogenbroeck*"). Accordingly, where the issue is raised, the court has to consider whether there was a sufficient connection between the decision relied upon and the deprivation of liberty. In *Van Droogenbroeck* the ECtHR decided that the applicant's detention as a recidivist following a decision by the Minister of Justice followed from and depended upon an earlier judicial decision, but acknowledged:

> "40 …with the passage of time the link between his decisions not to release or to re-detain and the initial judgment

> becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5."

60. In *James* the Grand Chamber explained that the word "conviction" in Article 5(1)(a) signified both a finding of guilt and the imposition of a penalty or other measure involving deprivation of liberty (para 189). As to the nature of the link required, the court said:

> "189 …In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue. In this connection the Court observes that, with the passage of time, the link between the initial conviction and a later deprivation of liberty gradually becomes less strong. Indeed, as the Court has previously indicated, the causal link required by subpara.(a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision by the sentencing court or on an assessment that was unreasonable in terms of those objectives."

61. The Grand Chamber applied a similar approach to causation in finding there had been no violation of Article 5(1) in *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35 ("*Kafkaris*"). The applicant had been convicted on three counts of murder and sentenced to life imprisonment on each count. During the sentencing hearing, the court ruled that life imprisonment meant imprisonment for the remainder of his life. Despite this, when he was admitted to prison, the authorities provided the applicant with a notice giving a conditional release date based on remission calculated by reference to the Prison Regulations then in force and on the basis that the sentence amounted to a term of 20 years. Subsequently the Prison Regulations were declared *ultra vires*. A new law subsequently enacted allowed for remission of sentences in certain circumstances, but it did not apply to life sentence prisoners. The applicant was not released on his notified release date and he claimed his detention from that date onwards was an unlawful deprivation of his liberty. The Grand Chamber concluded that his detention was pursuant to his original sentence, which the Assize Court had made clear was to be for the remainder of his life. Accordingly, the fact he was subsequently given a conditional release date "cannot and, does not, affect the sentence of life imprisonment passed by the Limassol Assize Court or render his detention beyond the above date unlawful. In the Court's view there is a clear and sufficient causal connection between the conviction and the applicant's continuing detention" (para 121).

62. Mr Richards submitted that the decision in *Kafkaris* shows that inaccurate information unwittingly provided to a prisoner about the period of their detention without any bad faith, does not of itself give rise to arbitrariness for the purposes of Article 5(1) if the detention remains pursuant to a lawful sentence imposed by the court. Mr Grodzinski,

on the other hand, submitted that the circumstances in *Kafkaris* are distinguishable from the present case. I will address these submissions when I set out my conclusions.

63. Mr Richards relied upon a line of Strasbourg and domestic authorities that draw a distinction between the court imposed sentence, which satisfies Article 5(1)(a) for the full period of the sentence; and matters relating to the administration of the sentence, including early release and recall arrangements, which do not engage Article 5.

64. *R (Robinson) v Secretary of State for Justice* [2010] EWCA Civ 848; [2010] 1 WLR 2380 ("*Robinson*") concerned a claimant who was convicted of robbery and sentenced to five years imprisonment. He was released on licence after serving two thirds of his sentence but subsequently he was recalled to prison pursuant to s.254 CJA 2003. During the time he was released on licence a legislative amendment came into force removing the right of prisoners recalled under s.254 to be released after serving three quarters of their sentence. The claimant challenged the failure to release him at the three quarters point of his sentence on the basis that it involved a legislative, rather than a judicial, lengthening of his sentence. He relied upon Article 6 ECHR, but the principles identified by the court are of a wider application. The Court of Appeal rejected his appeal from the dismissal of his claim on the basis that the legislative provisions relating to early or conditional release of a prisoner concerned the administration or execution of their sentence and were not part of the sentence passed by the court. Giving the leading judgment with which the other members of the court agreed, Moses LJ observed that the distinction between the sentence imposed by the sentencing court and the administration or execution of the sentence was "a distinction well established in the jurisprudence of the European Court of Human Rights" (para 11; and similarly at paras 26 and 27). He said that it was a distinction that was applied by Strasbourg "whether the right in issue is enshrined in article 5, in article 6 or in article 7" (para 26).

65. The Divisional Court (Fulford LJ, Garnham J) conducted a detailed review of this line of authorities in *R (Khan) v Secretary of State for Justice* [2020] EWHC 2084 (Admin) ("*Khan*"). In that case the claimant sought a declaration that s.247A of the Terrorist Offenders (Restriction of Early Release) Act 2020, which restricted early release for prisoners serving fixed-term sentences for certain terrorist offences, was incompatible with Articles 5, 7 and 14 ECHR. He was serving a sentence of four years and six months and the effect of s.247A was that instead of being automatically released at the halfway point, his case would be referred to the Parole Board at the two thirds point, who would not direct release unless satisfied that his remaining in custody was no longer necessary for the protection of the public.

66. Giving the judgment of the court, Garnham J identified the well-established principles that emerged from the series of decisions he described at paras 113 – 120, including *Brown v United Kingdom* CE:ECHR:2004:1026DEC000096804 where the ECtHR had said:

> "…The applicant however has been sentenced to a fixed prison term by a court as the punishment for his offence. The lawfulness of his detention does not depend, in Convention law terms, on whether or not he ceases to be at risk of re-offending. *The fact that the applicant before the end of the sentence may expect to be released on licence does not affect this analysis.* When such a prisoner is recalled his detention is again governed by the fixed

> term imposed by the judge conforming with the objectives of that sentence and thus within the scope of article 5.1(a) of the Convention" (Emphasis added in the Divisional Court's citation at para 113.)

67. At para 114 Garnham J referred to para 36 of Lord Bingham of Cornhill's speech in *R (West) v Parole Board* [2005] 1 WLR 350 where he said:

> "It seems to me plain that in cases such as the appellants' *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,* since conditional release subject to the possibility of recall formed an integral component of the composite sentence passed by the court." (Emphasis added in the Divisional Court's citation.)

68. At para 117 Garnham J cited the judgment of Lord Neuberger of Abbotsbury PSC (with whom Lord Kerr of Tonaghmore, Lord Carnwarth and Lord Hughes JJSC agreed) in *R (Whitson) v Secretary of State for Justice* [2015] AC 176, which included the following passage:

> "38 …Where a person is lawfully sentenced to a determinate term of imprisonment by a competent court, there is (at least in the absence of unusual circumstances) no question of his being able to challenge his loss of liberty during that term on the ground that it infringers article 5.4. This is because, *for the duration of the sentence period, 'the lawfulness of his detention' has been 'decided…by a court', namely the court which sentenced him to the term of imprisonment.*
>
> 39 That does not appear to me to be a surprising result. Once a person has been lawfully sentenced by a competent court for a determinate term, he has been 'deprived of his liberty' in a way permitted by article 5.1(a) for the sentence term, and one can see how it follows that there can be no need for 'the lawfulness of the detention' during the sentence period to be 'decided speedily by a court', as it has already been decided by the sentencing court…" (Emphasis added in the Divisional Court's citation.)

69. It is unnecessary to refer to the other authorities considered by the Divisional Court. The principles that the court drew from the authorities was helpfully summarised in para 121 as follows:

> "(i) The early release arrangements do not affect the judge's sentencing decision.
>
> (ii) Article 5 of the Convention does not guarantee a prisoner's right to early release.

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

70. Mr Grodzinski submits that the present circumstances are distinct as the claimant was detained at a time after he had been told that his sentence had come to an end. I will address that contention when I set out my conclusions.

Abuse of process: principles

71. The classic description of when the pursuit of a second claim will constitute an abuse of process was given by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31B-D where he said:

> "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. 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 other 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 to what should in my opinion be 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

72. In *Dexter Limited (In Administrative Receivership) v Vlieland-Boddy* [2013] EWCA Civ 14 Clarke LJ (as he was then) summarised the principles to be derived from the authorities in para 49 as follows:

> "i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.
>
> ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.
>
> iii) The burden of establishing abuse of process is on B or C as the case may be.
>
> iv) It is wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.
>
> v) The question in every case is whether applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.
>
> vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

73. In *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004 ("*Summers v Fairclough*") the Supreme Court held that the court had power to strike out a statement of case on the ground that it was an abuse of process at any stage of the proceedings, even after trial. Giving the judgment of the court, Lord Clarke of Stone-cum-Ebony JSC said that the power to do so at the end of a trial should only be exercised in very exceptional circumstances where the court was satisfied that the party's abuse of process was such that they had forfeited the right to have their claim determined (paras 36 and 43). He said that in deciding whether to exercise the power, the court was to have regard to whether striking the claim out was a proportionate means of controlling the court's processes and deciding the case justly; and save in the very exceptional cases, the more appropriate course in civil proceedings would be to give a judgment on the merits of the claim (paras 61 and 65).

74. The cases I have discussed so far concerned private law claims, but an analogous approach has been applied in relation to public law proceedings. In *BA & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 944 the Court of Appeal considered whether a claimant could bring a fresh action in the County Court or Queen's Bench Division claiming damages for unlawful detention, after they had been refused permission by the Administrative Court in respect of a challenge to their removal directions and immigration detention. The President of the Queen's Bench Division referred to the principles identified by Lord Bingham in *Johnson v Gore Wood* and then listed a number of general factors to which a court would ordinarily have regard if further proceedings were brought in that situation. Whilst those circumstances are not on all fours with the present case, some of the factors identified are of wider application. They included the following:

> "(c) …it is important in the overall public interest that all the issues in relation to the lawfulness of removal directions and the legality of the detention are determined by the Administrative Court in one set of proceedings having regard to the overall business of the courts…
>
> (d) The importance of orderly case management under the Civil Procedure Rules is a highly relevant consideration…
>
> (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…"

75. Earlier authorities have also considered the circumstances in which a claimant who has been refused permission to rely on some of their grounds may obtain permission to do so at the full hearing (pursuant to CPR 54.15). In *R (Smith) v Parole Board* [2003] EWCA Civ 1014; [2003] 1 WLR 2548 the Court of Appeal held that a judge hearing the substantive judicial review should require substantial justification before allowing a claimant to advance an argument in relation to which permission had already been refused at a contested oral hearing, but that the judge could do so if they concluded that there was good reason to allow argument on the ground, bearing in mind the interests of the defendant: per Lord Woolf CJ at para 16 (Auld and Clarke LJJ agreeing).

Discussion and conclusions

The unlawful detention challenge

The arbitrariness challenge and the causation challenge

76. I will consider the causation challenge first and then the arbitrariness challenge, given their inter-relationship.

77. Mr Grodzinski submitted that the necessary link between the determinate sentence of imprisonment and the claimant's detention in January – March 2021 was broken because he was led to believe in July 2020 that he would not be recalled and that his sentence was at an end. He also submitted that his detention was arbitrary in light of the following: (i) the claimant was unknowingly UAL through no fault of his own; (ii) there was no justification for failing to inform him of the revocation of his licence and this was contrary to para 3.8.1 of the Recall Policy; (iii) furthermore, he was positively misled by Mr Haddow in July 2020 into thinking his sentence was at an end and there was no justification for this either; and (iv) had the claimant sought advice from a competent lawyer in or after July 2020 he would have been told that he was not at risk of recall, thereby underscoring that the requirement of foreseeability was absent.

78. Mr Richards submitted that the absence of bad faith in this case was highly significant and he relied on *Kafkaris* (as I have already indicated). He said that the claimant's detention was at all material times pursuant to the determinate sentence imposed by the sentencing court, which therefore provided the lawful authority for the purposes of

Article 5(1)(a). The requirement of foreseeability was met because the detention was consequent upon that sentence and did not exceed the 30 months term of imprisonment imposed.

79. For the reasons I will set out, I have concluded that the claimant's detention was pursuant to the determinate sentence imposed in 2018 and I reject the contention that it was arbitrary.

80. Pursuant to the unchallenged statutory provisions that I identified earlier, as a matter of national law the claimant's licence was lawfully revoked and in consequence he was UAL from 11 January 2020. In turn, that had the consequence that days from then onwards whilst he remained UAL ceased to count towards the completion of his sentence (para 10 above), so that when he was arrested and detained on 15 January 2021 he had 174 days remaining on his sentence (para 36 above).

81. I do not consider that there is any material distinction as a matter of domestic law between the instant case and the circumstances in *R (S) v SSHD* (para 11 above). Although Mr Grodzinski emphasised that the claimant in the earlier case was recalled to custody *before* the expiry of his sentence period; that is also the effect of s.49(2) PA 1952 in the present case. Accordingly, national law did not require the claimant to be notified of the licence revocation before he became UAL. In turn, this is of some significance when it comes to the application of the Article 5(1) principles.

82. In my judgment, as a matter of causation, the claimant's detention did result from, follow and depend upon the 30 months sentence imposed in February 2018, so that for the purposes of Article 5(1)(a) there was a sufficient connection between the authority for detention relied upon by the defendant (the sentence) and the contested period of detention. Firstly, it is clear that the reason for the claimant's arrest and detention was in order for him to serve the outstanding portion of his sentence in circumstances where he had breached the conditions of his early release and thus triggered a recall. Secondly, the clear line of authorities I have summarised at paras 65 – 70 above establish that the lawfulness of prisoner's detention is decided, for the duration of the whole sentence, by the court which sentenced him to the term of imprisonment, not only for the initial period of detention but in relation to periods following recall. Thirdly, although Mr Grodzinski sought to distinguish that line of authorities on the basis that in each instance the recall or change in release arrangements occurred *before* the sentence expiry date, that was also the case here; part of the claimant's sentence remained outstanding when he was arrested and detained, for the reasons I have explained. Fourthly, the period 15 January – 4 March 2021 during which the claimant was detained did not exceed the unexpired period of his sentence. Fifthly, there is no material analogy with the Strasbourg bad faith line of cases, as I have already explained (paras 55 – 58 above). Sixthly, there is nothing to suggest that the period of re-detention was inconsistent with the objectives of the sentencing court's decision (paras 60 – 61 above); the objective remained punishment for the crimes the claimant had been convicted of.

83. Whilst the Strasbourg authorities contemplate, and Mr Richards accepted, that circumstances *could* arise where the passage of time severs the connection that would otherwise exist between the initial authority for detention and a later deprivation of liberty; the circumstances where no such connection remained would inevitably be extreme. Mr Grodzinski did not cite any case where a court had found that the connection had been broken, as opposed to those identifying the possibility of this

occurring. Whilst the facts of this case are certainly unusual, for the reasons identified in the previous paragraph, the link between the sentence and the deprivation of liberty remained strong, present and unbroken.

84. Mr Grodzinski suggested that this approach was devoid of a principled dividing line. However, it is inherent in a test which depends in significant part on the temporal relationship between the alleged authority for the detention and the deprivation of liberty, that fact sensitive questions of degree may arise. Of itself, that does not suggest an absence of principle or a need to add to the criteria identified by the ECtHR in *Van Droogenbroeck* and *James* (paras 60 – 61 above).

85. Accordingly, I conclude that the claimant's detention during January – March 2021 remained pursuant to the lawful sentence of imprisonment imposed by the Southwark Crown Court in February 2018.

86. I turn next to the alleged arbitrariness. I have already rejected Mr Grodzinski's submission that for these purposes there is no material distinction between instances of bad faith and the unintentional communication of inaccurate information regarding the detention (paras 56 – 59 above). Nonetheless, I need to consider the significance of the undisputed fact that the claimant was positively led to believe that his sentence was completed in July 2020, in particular in light of the Strasbourg requirement for reasonable foreseeability (para 53 above).

87. The line of authorities discussed by the Divisional Court in *Khan* indicates that the fact that a prisoner's expectations as to how long they will spend in custody are disappointed by events subsequent to the imposition of their sentence, which neither they nor those advising them would have been able to foresee when the sentence was passed, neither breaks the requisite causal connection nor renders the detention arbitrary. This is illustrated by the courts' decisions in both *Robinson* and in *Khan* (paras 65 – 70 above).

88. I agree with Mr Richards that the Grand Chamber's decision in *Kafkaris* is instructive, as an instance where the prisoner was inadvertently provided with incorrect information as to his release date, but his detention was not thereby rendered arbitrary for the purposes of Article 5(1)(a) as it remained pursuant to the sentences lawfully imposed upon him. I do not accept Mr Grodzinski's submission that *Kafkaris* is distinguishable from the instant case because the change in the law which meant the applicant in that case was not eligible for remission occurred *before* he reached his expected point of release after 20 years (paras 62 and 70 above). As I have described, the Grand Chamber's reasoning was based on the proposition that for the purposes of Article 5(1)(a) the lawfulness of the applicant's detention could not be affected by the subsequent provision of a conditional release date, as the legal basis for his detention remained the sentence passed by the court. In light of this, the point in time when the erroneous release date was provided or the point in time when it was changed is not material if detention remains pursuant to the original sentence, as I have found was the case here. When Mr Kessie-Adjei was given the wrong impression in July 2020 that his sentence was at an end, he had already been UAL since 11 January 2020 and accordingly had a number of months of his term of imprisonment outstanding.

89. In the circumstances I consider the requirement of foreseeability was sufficiently met because the claimant's detention in early 2021 remained pursuant to the 30 month term of imprisonment, even if the particular manner in which he served this part of that

sentence was not. Furthermore, the claimant knew that he had committed a further offence and thereby breached the terms of his licence and placed himself in jeopardy of recall.

90. The failure to inform the claimant of the licence revocation meant that there was never any question of prosecuting him for a s.255ZA offence, but, as I have indicated earlier, there was no domestic law obligation to inform him. Whilst the policy envisaged the offender being told of his recall after 28 days, it is clear from para 3.8.1 of the Recall Policy read in context with para 3.8.2 (paras 16 – 17 above), that this was as a precursor to a s.255ZA prosecution. The claimant, does not suggest that para 3.8.1, the terms of the licence recall documentation (para 28 above) and/or the entry on the Probation Service records (para 34 above), were matters that he was aware of at the time or that they gave rise to any legitimate expectation on his part. Accordingly, I do not consider that those aspects afford material support to the submission of arbitrariness.

The proportionality challenge

91. It is agreed that no assessment of the proportionality of the claimant's detention was undertaken before he was recalled to custody. Mr Grodzinski submitted that as there had been over a year since the revocation of the claimant's licence, this assessment ought to have been undertaken before he was detained. It was not suggested that there was any reason to believe that his risk had increased in the interim. He also submitted that had this been carried out prior to his arrest, the defendant should have directed that all the time the claimant spent on UAL would count towards his sentence.

92. Mr Richards, on the other hand, submitted that as the claimant's detention was pursuant to the lawful revocation of his licence and it did no more than give effect to the sentence of the Crown Court, there was no further decision made to detain nor any obligation to consider whether detention remained appropriate.

93. I do not accept that there was any obligation on the Secretary of State to undertake a proportionality assessment *before* the claimant was detained. The authorities I have discussed at paras 64 – 69 establish that detention post-recall does not require additional and specific justification for Article 5(1)(a) purposes if the detention was pursuant to the original sentence imposed by the Crown Court. Further, the principles summarised by the Grand Chamber at para 195 in *James* (para 54 above) show that in the context of detention pursuant to Article 5(1)(a), the length of the detention is a matter for the sentencing court in circumstances where, as I have found, the decision to re-detain remains consistent with the objectives of that sentence.

94. That is sufficient to dispose of the proportionality challenge. However, it is also met by the fact that the claimant now has to accept in these proceedings that the subsequent decision to treat only 58 days of the time he was UAL as counting towards his sentence was a lawful one. At the time of his release following the determination by the Parole Board, the claimant still had 116 days of his sentence left to serve. Accordingly, an earlier determination of how many of his UAL days should count towards his sentence would not have avoided the period he spent in detention from 15 January – 4 March 2021.

95. For these reasons I find that the claimant's detention was not incompatible with Article 5(1) ECHR.

The policy challenge

96. Mr Grodzinski submitted that the references in para 7.1 of PSI 03/2015 to "exceptional circumstances" and "very exceptional circumstances" failed to meet the Convention requirements of accessibility and reasonable foreseeability. Furthermore, that this was compounded by the absence of any express reference in Appendix F to circumstances where the prisoner is unknowingly UAL, resulting, in turn, in unacceptable uncertainty as to whether UAL days would be credited in such circumstances.

97. In response, Mr Richards said that as the PSI 03/2015 did not provide the legal justification for the claimant's detention there was no applicable Article 5(1) requirement for it to meet.

98. I consider that Mr Richards' submission is well founded. For the reasons I have already explained, during the period 15 January – 4 March 2021 the claimant was detained under s.49(1) PA1952 and s.254(6) CJA 2003 pursuant to the sentence of imprisonment that was passed by the Southwark Crown Court in February 2018. Paragraph 7.1 and Appendix F of PSI 03/2015 did not supply the authority for his detention and he was not detained pursuant to this policy. The material parts of PSI 03/2015 concerned the exercise of the discretionary power provided by s.49(2) PA 1952 to reduce the period that would otherwise be left out of account in terms of sentence completion (as days when the offender is UAL). Accordingly, there is no requirement for these parts of the policy to satisfy the Article 5(1) criteria that apply to the authority for the detention (and which were satisfied here, as I have found earlier).

99. Mr Grodzinski said that the operation of the policy was inextricably linked to the way that the claimant's sentence was carried out. However, as the line of authorities discussed in *Khan* shows, the fact that recall or remission arrangements have a bearing on a prisoner's release date, does not mean that they – as opposed to the original sentence – must satisfy the Article 5(1) requirements.

100. Accordingly, the challenged parts of PSI 03/2015 are not incompatible with Article 5(1) ECHR.

Abuse of process

Significance of the grant of permission in this case

101. Mr Grodzinski submitted that Nicola Davies LJ's grant of permission to apply for judicial review (para 48 above) prevented the defendant from contending that the proceedings are an abuse of process at this hearing. He emphasised that the abuse issue was squarely before her, as it was raised in the application for permission to appeal, the judgment of Linden J which was under appeal and in the defendant's response (paras 45 & 47 above). He submitted that Nicola Davies LJ would not have granted permission to proceed unless she was satisfied that the proceedings were not abusive. He noted that both Lang J and Linden J had treated the issue as one to be resolved at the permission stage. He also observed that the grant of permission had not explicitly reserved the question of abuse of process to the substantive hearing.

102. Mr Richards, on the other hand, submitted that as the Court of Appeal's order made no express reference to abuse of process, I should infer that the issue had not been decided

against the defendant when permission was granted. He said the most that could be inferred was that Nicola Davies LJ did not consider the abuse contention raised by the defendant provided a sufficient basis to refuse permission outright. Mr Richards also drew attention to the fact that the defendant was unable to apply to set aside the grant of permission in light of CPR 54.13. He said that in these circumstances there should be no impediment to the defendant maintaining the abuse argument at the full hearing. He sought to draw an analogy with *R v Secretary of State for Transport ex parte London Borough of Richmond upon Thames* [1995] Env.L.R. 390 ("*Richmond upon Thames*") where the court permitted a party to raise arguments which had failed in an earlier case, because it had been unable to appeal the rejection of those arguments in the first proceedings as it had won the case on another ground.

103. Both parties rightly agreed that Nicola Davies LJ must have considered the abuse of process finding made by Linden J and the parties' respective contentions on this issue and that she could not have concluded that the proceedings were abusive, since, if she had done so, she would not have granted permission. The question for me is whether, the language of her order, in light of the known circumstances, is to be interpreted as a positive finding that the proceedings were not abusive or a decision that the abuse issue should be resolved at the substantive hearing of a claim she accepted was arguable.

104. Counsel told me they had been unable to find any authorities that addressed the question of whether, absent any express indication or reservation, a grant of permission to apply for judicial review should be taken to include a positive finding that the proceedings were not abusive, where that issue had been raised before the permission judge.

105. Where an issue is raised in an acknowledgement of service that would prove determinative in the defendant's favour, including compliance with the CPR 54.5(1) time limit, sufficiency of interest in the proceedings (standing) or the existence of alternative remedies, the normal position is that this is addressed at the permission stage, absent an express indication to the contrary from the judge granting permission, for example see *R (Lichfield Securities Ltd) v Lichfield DC* [2001] EWCA Civ 304 at para 34 (time limits) or *R (D) v Parole Board* [2018] EWHC 694 (Admin); [2019] QB 285 at para 10 (standing).

106. However, a grant of permission does not necessarily preclude consideration of such issues at the substantive hearing, even without an express reservation. For example, issues of standing may be so bound up with the factual context and merits as to require consideration at the substantive hearing: *R (Good Law Project & Anor.) v The Prime Minister & Anor*. [2022] EWHC 298 (Admin) at para 17, referring to *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Limited* [1982] AC 617. Further, the fact that permission has been granted in the face of a defendant's contention that there is an alternative remedy available is not in itself a bar to raising the issue at a substantive hearing: Lambert J in *R (Chaudhry) v Secretary of State for the Home Department* [2018] EWHC 3887 (Admin) at para 13, citing *R (Islam) v Secretary of State for the Home Department* [2016] EWHC 2491 at para 26.

107. Accordingly, it appears to me that the position is more nuanced than the claimant's stark proposition that the grant of permission *inevitably* prevents a defendant from maintaining an abuse of process contention at the full hearing (absent any express indication in the order to the contrary). This is consistent with the fact that the grant of

relief in judicial review is discretionary and may depend on a number of factors. That said, there are particular reasons why it is appropriate and desirable that an abuse of process contention is resolved at the permission stage and I would expect that to be the case in usual circumstances, absent any particular reason rendering it in the interests of justice to re-open the issue at the substantive hearing. Firstly, the nature of an abuse contention is that the court's processes are being misused. Secondly, to enable a potentially abusive claim to proceed to a full hearing may well be to subject the defendant to the very oppression that the doctrine seeks to avoid. Thirdly, to do so will likely restrict the power of the court to dismiss the claim as an abuse at the trial stage: see *Summers v Fairclough* (para 74 above).

108. For completeness, I indicate that I do not consider that there is merit in Mr Richards CPR 54.13 based argument; if he was correct that the absence of an appeal against the grant of permission was determinative, that would apply to every grant of permission where a discretionary bar had been raised in the summary grounds for contesting the claim, enabling the defendant to resurrect the argument at the full hearing. The circumstances in *Richmond upon Thames* were not directly analogous to the issue I have to consider.

109. With some hesitation, I conclude that the grant of permission in the circumstances of this case does preclude the defendant from pursuing the abuse of process contention at the full hearing. This is because:

i) The grant of permission did not contain any express qualification in relation to the abuse of process issue;

ii) As I have observed in para 107, given the nature of an alleged abuse of process, it would usually be appropriate to decide it at the permission stage, absent a particular reason for deferring the point and none was suggested here;

iii) The abuse of process issue was squarely before Nicola Davies LJ, including Linden J's detailed judgment and the developed written submissions from both parties on the point; and

iv) It is not suggested that additional relevant matters have arisen since the grant of permission.

Are the proceedings an abuse of process?

110. In case I am wrong in my interpretation of the grant of permission in this case, I have gone on to consider whether the proceedings are an abuse of process on the counterfactual that it was open to me to do so. As I have identified earlier, the fact of the second proceedings does not necessarily constitute an abuse and it is necessary to apply a broad merits based approach (paras 71 – 72 above). Whilst a number of powerful points were identified in Linden J's judgment (paras 45 above), which I have taken into account, I would not have found the proceedings amounted to an abuse of process *at this juncture* for the following key reasons:

i) In light of the permission decision, the substantive Article 5(1) ECHR claims are recognised to be arguable (albeit I have ultimately rejected them) and permission was given for them to be advanced at a substantive hearing;

ii) In turn, this means that the earlier decision of Richard Clayton QC refusing permission in relation to the First Claim loses its potency in terms of the abuse of process argument. The Deputy High Court Judge found that the Article 5 ECHR claim (amongst others) was not reasonably arguable; but the effect of Nicola Davies LJ's permission decision is that a largely similar Article 5 contention (albeit one that is more fully developed) has been accepted as reasonably arguable. Accordingly, as Mr Grodzinski points out, the very foundation of the abuse argument, that permission was refused on a similar contention in the earlier claim, is undermined;

iii) There would be a significant degree of artificiality in deciding that the proceedings were abusive after both parties had prepared for and fully engaged in the hearing before me on the merits. Whilst Mr Richards maintained that I should strike out the proceedings as an abuse of process, or at least record a conclusion that they were abusive, he did not seriously suggest that I should not give a ruling on the substantive issues that had been argued before me and I consider that it would not be in the public interest or the interests of justice for me to adopt that course; and

iv) As the Supreme Court indicated in *Summers v Fairclough* (albeit in the context of a private law claim), to strike out a claim as an abuse of process following trial would only be appropriate in very exceptional cases and the more appropriate course in civil proceedings would usually be to give a judgment on the merits of the claim (para 73). I do not consider that to strike out this claim would be a proportionate means of controlling the court's processes in the particular circumstances of this case.

111. However, I emphasise that this analysis should not be interpreted as giving any kind of encouragement to future claimants thinking of bringing second judicial review claims on similar grounds to an earlier claim that has failed to surmount the permission threshold. The proper course to take is to pursue an appeal in the first proceedings if a claimant is dissatisfied with the refusal of permission; and if he or she does not take that course and instead issues further proceedings they will likely face an abuse argument. Even in circumstances where, as here, further evidence emerged after permission had been refused in the original proceedings, the expected course would usually be for a claimant to make an application to address fresh evidence in the appeal, showing how the *Ladd v Marshall* [1954] 1 WLR 1489 criteria was satisfied. My conclusion that the defendant has not established an abuse of process *at this juncture* of these proceedings is specific to the unusual procedural circumstances that have arisen in this case which I have highlighted in the previous paragraph.

Damages

112. For the reasons that I have explained earlier, I do not consider that the claimant's detention was incompatible with Article 5(1) ECHR. Nonetheless, in case I am wrong in that conclusion I will proceed to summarise my decision as to the appropriate award of damages by way of just satisfaction pursuant to s.8 Human Rights Act 1998 on the counterfactual that he was unlawfully detained between 15 January and 4 March 2021, a period of 52 days.

113. Counsel helpfully agreed that the following principles should be applied:

i) The court will only award damages by way of just satisfaction if it is satisfied that it is necessary to do so and that the making of an award is just and appropriate: *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673, per Lord Bingham at para 6;

ii) When assessing the quantum of those damages, the court must take into account, but is not strictly bound by, the principles applied by the ECtHR: *R (Sturnham) v Parole Board* [2013] UKSC 47; [2013] 2 AC 254, per Lord Reed at para 27;

iii) Broadly, the principle underlying Article 41 ECHR is restitutio in integrum: *Kingsley v United Kingdom* (2002) 35 EHRR 10 at para 40. Non-pecuniary damages may be awarded for unlawful detention and resultant distress: for example, *Sahakyan v Armenia* Application no. 66256/11 at para 29;

iv) Domestic scales of damages may be relevant where the violation of the Convention right has an outcome akin to a private law wrong: *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB) ("*Alseran*") per Leggatt J (as he then was) at paras 930 – 931 and 939 – 942;

v) Domestic authorities addressing quantification of damages for unlawful detention establish that: (i) damages should be assessed in the round and not mechanistically by way of a fixed daily tariff; (ii) the initial shock of detention will attract the greatest award, with the rate at which damages increase falling the longer the person is unlawfully detailed: *Thomson v Commissioner of Police of the Metropolis* [1988] QB 498 and *R (MK (Algeria)) v Secretary of State for the Home Department* [2010] EWCA Civ 980;

vi) The court may find, taking account of the claimant's conduct, that it is just and appropriate to award less than the full value of any damage sustained or (in some circumstances) not to make any award at all: *Alseran* at para 916.

114. Mr Richards accepted that if the claimant's detention was found to be unlawful an award of damages would be appropriate. He submitted that the figure should not exceed £4,000 and he relied on the award in *Mohammed v Home Office* [2017] EWHC 2808 (QB) of £8,500 for 41 days of unlawful detention as the closest comparator, albeit no reduction on account of the claimant's own conduct arose in that case as it was a common law claim. He emphasised: (i) the claimant's record indicated he had spent substantial periods in prison prior to this detention, which was relatively short in comparison; (ii) the claimant was to a large extent the architect of his own misfortune, given his licence was lawfully revoked because he committed a further offence; and (iii) he had had the benefit of an extended period of liberty due to the delay in effecting his recall.

115. Mr Grodzinksi submitted that a figure in the region of £17,000 was appropriate. He emphasised that the claimant had been shocked to find himself returned to prison when he had been led to believe his sentence had been completed. He also drew attention to the conditions of detention described in the claimant's witness statements, in particular that for the first two weeks he had to spend nearly 24 hours a day in his cell with no access to the canteen or showering facilities. He also contended that there should be no reduction in damages as the unlawfulness of the detention resulted from its arbitrariness, which on any view, the claimant was not responsible for. Mr Grodzinski

said that the closest comparator was *Lloyd & Ors v United Kingdom* [2005] 3 WLUK 69 where an award of €9,000 was made to the first applicant for a period of 36 days detention. Allowing for inflation and conversion to sterling produced a figure of £12,256, which when increased to take into account the claimant's longer period of detention resulted in the sum of £17,762.

116. I agree that *Mohammed v Home Office* is the closest comparator in terms of the cases cited to me. In both that case and the present, the claimant had a history of offending and significant previous experience of custody. I take into account that there was no initial shock factor at the start of the period of unlawful detention in *Mohammed*, nor conditions equivalent to the first two weeks experienced by the claimant, but, on the other hand, Mr Mohammed experienced an exacerbation of his post-traumatic stress disorder, whereas nothing equivalent is suggested in the present case. Absent consideration of Mr Kessie-Adjei's own conduct, the two sets of circumstances are broadly equivalent. Allowing for inflation and the longer period of detention in the instant case, a mathematical extrapolation from Mr Mohammed's award produces a figure of £11,400, which I would round down to £11,000 given the well-established tapering effect I have already referred to.

117. However, even if I had found that the claimant's detention was arbitrary I would have considered it just and appropriate to reduce the award I would otherwise have made. I accept that the claimant was not responsible for such arbitrariness, but just satisfaction damages are awarded to compensate him for the period of detention, not simply the experience of being arrested after he believed his sentence to be completed. Accordingly, in my judgment, it is relevant to take into account the fact that the additional period of detention was triggered by the claimant's own serious breach of his licence conditions in committing a further offence which paralleled the index offence and, in turn, led to the lawful revocation of his licence. Had he been arrested in, say, late January 2020 he could have had no complaints about a 52 day period of detention prior to release by the Parole Board, as Mr Grodzinski fairly accepted. Furthermore, when he remained on licence in the community he did so without significant restriction on his liberty, save that he could not travel abroad. In my judgment these circumstances warrant a substantial reduction in the figure that would otherwise be awarded for this period of detention. Accordingly, had I found that the claimant's detention was unlawful I would have awarded the sum of £5,000.

Conclusion

118. For the reasons I have set out above, I conclude that the claimant's detention was not incompatible with Article 5(1) ECHR and that PSI 03/2015 is not incompatible with Article 5(1) in the respects he alleges. In the particular circumstances of this case the grant of permission to apply for judicial review did preclude the defendant from maintaining that the proceedings were an abuse of process before me. However, in any event, if it was open to me to decide the point, in the specific and unusual circumstances of this case, I would not conclude at this juncture that the proceedings were abusive.

119. I would like to thank counsel for their helpful submissions, which were of a very high quality.