Neutral Citation Number: [2023] EWCA Civ 27

Case No: CA/2021/003447

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Lord Justice Lewis and Mrs Justice McGowan
[2021] EWHC 3114 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2023

Before:

LORD JUSTICE HOLROYDE
(Vice-President of the Court of Appeal, Criminal Division)
LORD JUSTICE COULSON
and
LADY JUSTICE ELISABETH LAING

- -

Between :

THE KING on the application of NORMAN ROWAN	**Claimant/ Appellant**
- and -	
(1) THE GOVERNOR OF HIS MAJESTY'S PRISON BERWYN **(2) THE SECRETARY OF STATE FOR JUSTICE**	**Defendants/ Respondent**

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- -

Edward Fitzgerald KC and Philip Rule (instructed by **Instalaw Solicitors Limited**) for the **Appellant**
Hugh Flanagan (instructed by **Government Legal Department**) for the **Respondents**

Hearing dates: 26 October 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Wednesday 18 January 2023.

Lord Justice Holroyde:

1. In October 2007 Mr Norman Rowan ("the appellant") was released on licence from a custodial sentence. He failed to comply with the conditions of his licence, and the Secretary of State for Justice ("the second respondent") revoked the appellant's licence and recalled him to prison. The appellant, however, remained unlawfully at large for many years, until he was eventually returned to custody in June 2019. He was released, again on licence, in September 2021, and completed his sentence in June 2022.

2. In September 2020, whilst serving his sentence at HMP Berwyn, the appellant commenced a claim for judicial review. On 23 November 2021 a Divisional Court (Lewis LJ and McGowan J) granted permission to apply for judicial review but dismissed the claim. With permission granted by Lewison LJ, the appellant now appeals to this court.

3. The court has been assisted by the written and oral submissions of Mr Fitzgerald KC and Mr Rule for the appellant, and Mr Flanagan for the respondents. I am grateful to them all.

The original sentence:

4. The appellant pleaded guilty to three offences of violence against his then partner: common assault on a date between 1 May and 30 June 2005; assault occasioning actual bodily harm on 14 October 2005; and unlawful wounding on 15 October 2005. On 9 March 2006, in the Crown Court at Preston, he was sentenced for the offence of wounding to an extended sentence of 4 years, comprising a custodial term of 18 months and an extension period of 30 months. Consecutive sentences of 2 months' imprisonment and 10 months' imprisonment were imposed for the other offences. Thus the total custodial term was 30 months. A direction was made that the 136 days which the appellant had spent on remand in custody should count towards that term.

The appellant's release on licence:

5. On 8 October 2007 the appellant was issued with a notice informing him that on 18 October he would be released on licence pursuant to the provisions of Chapter 6 of Part 12 of the Criminal Justice Act 2003 ("the 2003 Act"), and that his supervision would expire on 16 October 2009 unless previously revoked. The notice set out the conditions of his licence.

6. The appellant complied with those conditions only to the extent of keeping his first appointment with his supervising probation officer, on the afternoon of his release. It appears that he thereafter went to the Republic of Ireland. On 25 October 2007 the Secretary of State revoked the appellant's licence and recalled him to prison, pursuant to section 254 of the 2003 Act.

The appellant's return to prison and subsequent release:

7. The appellant was eventually returned to custody in the United Kingdom on 17 June 2019.

8. In July 2020 the appellant was informed by the second respondent that his sentence would end on 7 June 2022. He was also informed that the original warrant for his imprisonment had been destroyed.

9. The Parole Board subsequently directed the appellant's release on licence. He was so released on 13 September 2021.

The grounds of claim:

10. The appellant challenged the decisions of 14 and 31 July 2020 as to the calculation of his sentence; the application to his case of the provisions of Schedule 20B to the 2003 Act, as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("the 2012 Act"); and his "present unlawful detention without warrant". He sought declaratory relief and damages for any unlawful imprisonment.

11. Before the High Court, the appellant raised an initial issue as to the basis on which he had been sentenced by the Crown Court. The record of that court showed that the extended sentence had been imposed pursuant to section 85 of the Powers of Criminal Courts (Sentencing) Act 2000 ("the 2000 Act"). However, for offences committed after 4 April 2005 – as all the appellant's offences were – that section had been repealed and replaced by section 227 of the 2003 Act.

The decision of the High Court:

12. On that initial issue, the High Court found that the sentence had been imposed under section 227 of the 2003 Act. Lewis LJ, with whom McGowan J agreed, concluded at paragraph 9 of his judgment that an error by the clerk in the Crown Court, when completing the record, was more likely than an error by the judge when passing sentence:

> "If the judge had erroneously referred to section 85 of the 2000 Act, counsel would have been likely to have drawn attention to the fact that the extended sentence could not be imposed under that Act either at the time of sentencing or within the time permitted under the slip rule. Alternatively, if the claimant had considered the sentence to have been unlawfully imposed he could have sought permission to appeal to the Court of Appeal (Criminal Division). He did not do so."

13. Lewis LJ noted at paragraph 10 that it was in any event accepted on behalf of the appellant that the sentence remained in force and valid unless and until set aside by the Court of Appeal, Criminal Division.

14. The appellant advanced two principal arguments. First, he submitted that in the absence of a warrant of imprisonment there was no lawful authority for his detention from 17 June 2019. He relied in particular on the decision in *Demer v Cook* (1903) 88 LT 629 ("*Demer"*). Secondly, he submitted that his release on licence should have been governed by the provisions of the Criminal Justice Act 1991 ("the 1991 Act"). Under those provisions, and in the circumstances of his case, he would have been entitled to automatic release on 25 October 2021, that being the date by which he had served three-quarters of his total sentence (aggregated custodial terms plus extended

licence) of 60 months. Under the provisions of the 2003 Act, in contrast, the entitlement to automatic release at that point was removed, and release before the end of the full sentence became a matter for the second respondent and the Parole Board. From that starting point, he submitted that the effect of the sentence calculation made pursuant to the 2003 Act was to require him to serve a period in custody under a sentence from which he had already been released and to which he was no longer subject, and that the calculation of his sentence in accordance with the provisions of the 2003 Act (as amended by the 2012 Act, in particular by the addition of a new Schedule 20B) was contrary to the common law rule against retrospective penalties and/or to Articles 5, 7 and 14 of the European Convention on Human Rights ("the Convention").

15. The High Court rejected both those arguments. As to the first, the court held (at paragraphs 38-43) that the basis for the lawful detention of the appellant was the sentence pronounced by the Crown Court and the provisions governing his recall to prison. The issuing of a warrant for imprisonment may serve a number of purposes, but the existence of a warrant was not a precondition of the lawfulness of the detention. The decision in *Demer*, which related to different circumstances, did not dictate a different conclusion.

16. As to the second, the Court held (at paragraphs 49-52) that the effect of the relevant legislation was that the appellant was always subject to the release provisions of the 2003 Act in relation to all three of his sentences, and never subject to those of the 1991 Act. It held that the wording of The Criminal Justice Act 2003 (Commencement No. 8 and Transitional Savings Provisions) Order 2005 ("the relevant commencement order") made clear that the release provisions under the 2003 Act applied to the appellant's case, but would not apply to any prisoner serving a sentence imposed for offences committed prior to 4 April 2005. That being the position in domestic law, and the appellant having been lawfully detained following the revocation of his licence and his recall to prison, the Court concluded (at paragraphs 53-63) that there was no breach of any of the Articles of the Convention on which the appellant relied.

The grounds of appeal:

17. The appellant submits that the High Court fell into error in four ways. First, contrary to the principle established in *Demer*, it wrongly permitted the first respondent to justify the appellant's detention in the absence of any copy of a warrant for imprisonment. Secondly, it wrongly disregarded the only written evidence as to the nature of the sentence imposed by the Crown Court, namely the record of that court. Thirdly, it wrongly failed to find that a sentence passed under section 85 of the 2000 Act was governed by the 1991 Act, even if the sentence was technically unlawful because it was imposed for offences committed after 4 April 2005. Fourthly, it wrongly rejected the claim that the appellant's Convention rights had been violated.

18. The respondents have applied for permission to adduce fresh evidence in the form of a witness statement and exhibits produced by Helen Scott, the Sentencing Calculation Policy Lead in the Ministry of Justice. This court has considered that evidence *de bene esse*, reserving its ruling as to whether permission should be granted.

The submissions of the parties:

19. Although pleaded as the second ground of appeal, it is convenient to consider first the issue as to the nature of the sentence imposed by the Crown Court for the offence of unlawful wounding.

The nature of the sentence:

20. The appellant relies on the fact that the only written evidence as to the nature of the sentence comprises the Crown Court record sheet (a contemporaneous document) and a certificate of conviction (issued by an officer of the Crown Court on 26 February 2020). Both documents record that the sentence for the wounding offence was imposed under section 85 of the 2000 Act. Mr Fitzgerald KC accepts that such a sentence would have been unlawful, for two reasons: because section 85 of the 2000 Act did not apply to offences committed after 4 April 2005; and because the effect of section 85(3) of the 2000 Act is that in the circumstances of this case, an extended sentence could only have been imposed if the custodial term was at least four years in length. He further accepts that the sentence remained valid and lawful in the absence of any appeal against it. But, he submits, the High Court was wrong to reject the only evidence as to the nature of the sentence imposed and wrong to base its decision on an inference that a clerical error was made. He argues that Lewis LJ, in the passage which I have quoted at paragraph 12 above, was not entitled to infer that an error by the sentencing judge would have been picked up by counsel.

21. Mr Flanagan submits that the High Court was entitled to find that the sentence was probably imposed under section 227 of the 2003 Act. In any event, he submits, the nature of the sentence is of no importance, because the High Court correctly considered the release provisions on the basis of the date of the offences, not on the basis of the type of sentence.

The absence of a warrant:

22. Mr Fitzgerald KC, relying on *Demer*, submits that the common law requires that a prison governor be in possession of proof, in the form of a warrant for imprisonment, of lawful authority to detain a prisoner. He therefore submits that in the absence of a warrant, there was no lawful authority for the appellant's detention after 17 June 2019. He further submits that the High Court was wrong to distinguish *Demer* on its facts. He refers in particular to two passages in the judgment of Lord Alverstone CJ at p631 of the report. In the first, Lord Alverstone said that the cases cited to him were –

> "… conclusive to show that where a gaoler receives a prisoner under a warrant which is correct in form, no action will lie against him if it should turn out that the warrant was improperly issued or that the court had no jurisdiction to issue it."

In the second, he said that –

> "… to contend that the gaoler would be justified in relying upon other documents which are not in his possession and which are not handed to him, and which are not referred to in the document that is given to him, would be to lay down a most

> dangerous principle and to infringe the rule referred to in the cases already cited, that the warrant and nothing else is the protection to the gaoler, and he is not entitled to question it or go behind it."

23. Mr Fitzgerald KC also relies on the speech of Lord Hobhouse in *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] AC 19 ("*ex parte Evans*") at p46C:

> "The critical importance of the warrant and what detention it actually commands and authorises applies both ways as illustrated by the judgment in *Demer v Cook* (1903) 88 LT 629. Lord Alverstone CJ contrasted two situations. One was where the gaoler receives a prisoner under a warrant which is correct in form in which case no action will lie against him if it should turn out that the warrant was improperly issued or the court had no jurisdiction to issue it. The other was where the warrant had on its face expired or the gaoler has received the prisoner without any warrant, in which case the action will lie: 'the warrant and nothing else is the protection to the gaoler, and he is not entitled to question it or go behind it': p 631."

24. Mr Fitzgerald KC and Mr Rule support their argument as to the crucial importance of the warrant for imprisonment by referring to section 12(3) of the Prison Act 1952 ("A writ, warrant or other legal instrument addressed to the governor of a prison and identifying that prison by its situation or by any other sufficient description shall not be invalidated by reason only that the prison is usually known by a different description"); to Part 13 of the Criminal Procedure Rules (which contains requirements as to the information which must be contained in a warrant for imprisonment); and to passages in *Halsbury's Laws*, volumes 85 and 97A, as to the protection which the warrant affords to a prison governor. They further submit that as a matter of principle, a written warrant is fundamental in ensuring that no person is wrongly held in prison and that a prison governor is able correctly to calculate a sentence in accordance with the law.

25. It is accepted on behalf of the appellant that a warrant, if destroyed, could be reissued by the court concerned, and that a prison governor would then be in possession of the necessary document. There was, however, no warrant at the time the appellant was returned to custody in June 2019 and his detention was accordingly unlawful.

26. Mr Flanagan submits that there is no evidence that a warrant was not issued at the time of the appellant's sentencing, but accepts that the evidence shows it was probably destroyed in 2017. He points out that the certificate of conviction on which the appellant relies was issued on the basis of what was shown on the Crown Court record sheet. He submits that the appellant was lawfully imprisoned by a competent court, and lawfully recalled to prison by the second respondent, and that a warrant for imprisonment, although routinely issued, was not necessary to establish the lawfulness of the appellant's detention. He further submits that no statute now requires the issuing of a warrant for imprisonment, that *Demer* can be distinguished on its facts and by reference to the statutory provisions with which it was concerned, and that the House of Lords in *ex parte Evans* was not concerned with whether the justification for detention depended on the gaoler being able to produce a warrant.

27. It is relevant to note, in relation to this ground of appeal, that the proposed fresh evidence of Ms Scott confirms that at the time when the appellant was sentenced, the Crown Court would have issued a warrant for imprisonment to the staff who escorted him to prison. That practice has now been replaced by the provision of documents in digital form. She further confirms that documents in a prisoner's file (including the warrant) should not be destroyed at a time when he is unlawfully at large, but produces correspondence showing that the appellant's file was destroyed in approximately February 2017. She also produces correspondence showing that the certificate of conviction dated 26 February 2020 was produced by the Crown Court in response to solicitors then acting for the appellant in his application to the Parole Board.

28. Mr Fitzgerald KC helpfully indicated that he did not object to Ms Scott's evidence in relation to general practice, but argued that there was no reliable evidence that a warrant was destroyed in 2017.

The relevant release provisions:

29. On the basis that the only available evidence points to the extended sentence having been imposed under section 85 of the 2000 Act, Mr Fitzgerald KC submits that the appellant is entitled to the benefit of the statutory provisions governing release which would have applied to such a sentence, notwithstanding that it was unlawful when issued. The relevant provisions, he argues, were accordingly those contained in the 1991 Act as at the date of sentencing in October 2007, to which a purposive interpretation should be given because no explicit provision is made for a sentence passed unlawfully. He advances detailed arguments as to the application of those provisions, but accepts that they would fall away if the High Court was correct to find that the appellant was subject to the release provisions of the 2003 Act.

30. The release provisions of the 1991 Act were complex, and are further complicated in the circumstances of this case by the imposition of consecutive sentences. The key submission of the appellant is that the provisions in force in October 2007, and applicable to the circumstances of his case after his recall from licence, would have had the effect that the second respondent would have been under a duty to release him when he had spent a period in custody equal to three-quarters of the aggregated custodial element of his sentences plus the extended licence period of 30 months. It is submitted that he therefore became entitled to release on licence on 25 October 2021. It follows that the first respondent is said to have acted unlawfully in calculating the appellant's release date as being 7 June 2022. It is accepted that that release date was correctly calculated if the release provisions of the 2003 Act applied.

31. Mr Fitzgerald KC submits that this argument remains valid notwithstanding the amendments to the 1991 Act which were introduced by the 2012 Act in December 2012, when the appellant was unlawfully at large. He argues that in 2007 the appellant was conditionally released on licence subject to a specific regime of recall and re-release, giving rise to a legitimate expectation as to the consequences of any breach of licence conditions, and he should not be disadvantaged by subsequent statutory changes. He accepts that on their face, the later statutory provisions – including Schedule 20B to the 2003 Act – do not assist his argument; but he submits that Parliament's intention must have been that a person purportedly sentenced to an

extended sentence under section 85 of the 2000 Act should be treated as subject to such a sentence, notwithstanding that it was unlawfully imposed.

32. Mr Flanagan submits that the application of the release provisions of the 2003 Act which came into force on 4 April 2005, and of the transitional provisions and exceptions relating thereto, is premised on the date of the relevant offending. The relevant offending here took place after 4 April 2005, and the High Court was therefore correct to find that the appellant was always subject to the release provisions of the 2003 Act. He submits that the terms of the relevant commencement order in relation to the 2012 amendment of the 2003 Act, by the addition of Schedule 20B, are clear, and that the appellant's argument would require a re-writing of that order. He further submits that Parliament cannot have intended to compound a sentencing error by giving a prisoner the benefit of release provisions applicable to a form of sentence which could not lawfully have been imposed.

The appellant's Convention rights:

33. For the reasons summarised above, Mr Fitzgerald KC submits that any other interpretation of the statutory provisions would amount to the imposition upon the appellant of an additional and unforeseeable disadvantage in breach of Articles 5 and 7 of the Convention, and would amount to unlawful discrimination, contrary to Article 14, on the grounds of the appellant's status as a person unlawfully at large.

34. Mr Flanagan submits that the appellant's arguments are based on a false premise that the appellant started under the 1991 Act regime but later moved to the 2003 Act regime, and that they fall away if the High Court was correct – as he submits it was – to find that the release provisions of the 2003 Act applied to the appellant.

35. In the alternative, he relies on *R (Khan) v Secretary of State for Justice* [2020] 1 WLR 3932, which – though dealing with a different type of sentence – set out principles applicable to this case. He relies in particular on paragraphs 121 and 122 of the judgment, which followed a review of the relevant case law:

> "121 From those authorities it is possible to draw the following principles: (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.
>
> 122 In our judgment those principles are not affected by the decision in *Del Rio Prada* 58 EHRR 37. *Del Rio Prada* does not detract from the core distinction between sentence passed by the sentencing judge and the administration of execution of

> the sentence. Throughout the relevant period, the governing authority for the detention is the original sentence. It is entirely foreseeable (if necessary with appropriate legal advice) that during the currency of a determinate sentence, which was calculated and imposed without account being taken of the possibility of early release, the arrangements for the execution of the sentence might be changed by policy or legislation. Accordingly, the lawfulness of the sentence was not undermined of compromised by changes of the sort made by the 2020 Act."

36. As to Article 14, Mr Flanagan refers to *R (Stott) v Secretary of State for Justice* [2020] AC 59 at paragraph 8. He submits that the appellant cannot satisfy all four of the elements which are necessary to show a violation of the Article.

Analysis:

37. Having reflected on those submissions, my conclusions are as follows.

The nature of the sentence:

38. The High Court was in my view correct to find that the extended sentence for the offence of unlawful wounding was imposed under section 227 of the 2003 Act. True it is that the only contemporaneous document, namely the Crown Court record sheet, shows that it was imposed under section 85 of the 2000 Act; but as Lewis LJ found, it is more likely that there was a clerical error in drawing up that document than that the court imposed an unlawful sentence, which then stood unremarked and unchallenged throughout the period when the appellant was serving his custodial term prior to his release on licence in 2007, and for many years thereafter. There is a clear inference that the certificate of conviction produced on and dated 26 February 2020 merely reflects the sole surviving record of the Crown Court, and therefore adds no independent support to it. The documents which were before the High Court in relation to the appellant's release on licence all refer to the 2003 Act.

39. It is unfortunate that no transcript is available of the sentencing hearing in the Crown Court. However, the observation of the High Court that counsel would have been likely to have drawn the judge's attention to any sentencing error, and that the appellant could have applied for a hearing under the slip rule or for leave to appeal against sentence if he or his advisers had thought the sentence unlawful, did not in my view involve any impermissible speculation. It must be remembered that the provisions of the 2003 Act which came into force on 4 April 2005 made substantial changes to many aspects of sentencing, and the importance of that date was well known to all criminal practitioners at the time. The new provisions had been in force for at least a month before the earliest of the three offences committed by the appellant, for more than five months before his commission of the last offence, and for about 11 months by the time of the sentencing hearing.

40. It is important not to be misled by the similar names given to the two forms of sentence which are under consideration here. The form of extended sentence introduced by the 2003 Act was entirely different from an extended sentence under the 2000 Act. The criteria for the imposition of the two forms of sentence differed in

important respects. The custodial term imposed on the appellant was far shorter than the minimum period of 4 years which section 85 of the 2000 Act had previously required. Thus the judicial error which the appellant suggests occurred would not have involved an oversight of a complicated nuance of sentencing legislation or commencement provisions: it would have required a wholesale ignoring by the judge and both counsel of the introduction 11 months previously of a materially different sentencing regime. Not only would it have been open to the appellant to appeal against the unlawful sentence which it is suggested was passed, he would have had every reason to do so.

41. In any event, the High Court's decision was a finding of fact as to the basis on which the Crown Court imposed the sentence. That finding could only be challenged in this court if it was unsupported by the evidence or was one which the High Court could not properly have reached. For the reasons I have given, it was in my view a finding which the court could on the evidence properly make.

42. I therefore reject the appellant's challenge to the High Court's decision that the sentence was imposed under section 227 of the 2003 Act. That conclusion has important consequences for two of the other grounds of appeal, which I can take shortly.

The relevant release provisions:

43. It follows from what I have said that the appellant's release was governed throughout by the provisions of the 2003 Act. It is conceded on behalf of the appellant that, on that basis, the release date was correctly calculated as 7 June 2022, and that the detailed argument as to the application of the release provisions of the 1991 Act falls away. In any event, the approach for which the appellant argues goes well beyond a purposive statutory interpretation of the 1991 Act. It would require significant re-writing of provisions of the relevant commencement order and of Schedule 20B to the 2003 Act, which clearly distinguish between sentences imposed for offences committed before 4 April 2005, and sentences imposed for offences committed after that date. I agree with Lewis LJ (at paragraph 50 of his judgment) that there is no proper basis for seeking to compound the suggested sentencing error, and no realistic means of reading into the relevant commencement order the words which would be needed "to give effect to what the claimant would wish the situation to be".

The appellant's Convention rights:

44. It further follows that the submissions as to violation of the appellant's Convention rights, based as they were on the premise that he was sentenced under section 85 of the 2000 Act, similarly fall away.

45. I would add that Lewis LJ at paragraphs 53-63 of his judgment gave brief reasons why there was in any event no violation of the appellant's rights under Articles 5, 7 and 14. I respectfully agree with his decisions, for the reasons which he gave.

46. I therefore conclude that the High Court was correct to find that the appellant was sentenced under section 227 of the 2003 Act, that he was at all times subject to the release provisions of the 2003 Act, and that the recalculation of his release date was correctly carried out in accordance with the 2003 Act. I turn to consider whether his

imprisonment after his recall was nonetheless unlawful by reason of the absence of a warrant for imprisonment at that time.

The absence of a warrant:

47. The decision in *Demer*, and the approval of it in *ex parte Evans*, do not in my view assist the appellant's argument that his detention after 17 June 2019 was unlawful.

48. *Demer* was an action against a prison governor for false imprisonment. The facts, in brief, were that the plaintiff had been sentenced to a term of imprisonment, for which a warrant of commitment was made out by the magistrate. The plaintiff was, however, released on bail pending an appeal. At Quarter Sessions, his appeal succeeded in part, but the recorder imposed a different form of custodial sentence. No new warrant was drawn up: the recorder merely amended a record of the conviction before the magistrate. The plaintiff was held in prison by the defendant, who received no documents other than the amended record of conviction and the original warrant drawn by the magistrate. The plaintiff's conviction was subsequently quashed, and he brought his action for false imprisonment.

49. Lord Alverstone CJ held that the original warrant had upon its face been exhausted by the time the defendant received the plaintiff into his custody, and the amended record of conviction was not equivalent to, and did not take the place of, a warrant. He rejected a submission on behalf of the defendant that no further warrant was required in light of certain documents relating to sureties, those being the "other documents" referred to in the second of the passages which I have quoted at paragraph 22 above. The effect of those decisions was that the defendant was not in possession of a warrant, or anything which was equivalent to a warrant, justifying the detention of the plaintiff to serve a new punishment for a new conviction. It was in those circumstances that the Lord Chief Justice referred to "the warrant and nothing else" being the protection of the gaoler and concluded that the defendant -

> "… was not justified in detaining the plaintiff without a warrant in writing from the recorder, and that, so far as he was concerned, the detention of the plaintiff was unlawful."

50. In *ex parte Evans*, Ms Evans was sentenced to imprisonment. She was entitled to be released on the date properly calculated in accordance with the statutory provisions then in force. The governor calculated that date on the basis of existing case law. In proceedings for habeas corpus and judicial review it was held that the previous case law had misinterpreted the statutory provisions and the governor's calculation was therefore incorrect. Ms Evans then successfully claimed damages for false imprisonment: in relation to the relevant period, the governor could point to no lawful justification for her detention, as the order of the sentencing court stated the length of the term of imprisonment but did not direct him to detain her beyond the properly-calculated date when she was entitled to release; and it was no defence to a tort of strict liability that he had acted in good faith and taken all reasonable care. In short, the governor had no lawful authority for his continued detention of Ms Evans after the date when he should have released her. It was in that context that Lord Hobhouse, in the passage I have quoted at paragraph above, spoke of the importance of the warrant "and what detention it actually commands and authorises".

51. In each of those cases, the issue was whether a gaoler, as the defendant to an action for false imprisonment for a specific period, had a defence when (a) the detention was unlawful, and (b) the gaoler did not have a warrant which nonetheless purported to authorise it. In my view, neither provides any basis for the appellant's submission in these judicial review proceedings that the existence of a warrant for imprisonment is a precondition of lawful detention pursuant to the order of a court of competent jurisdiction. The issuing of a warrant for imprisonment is of course routine, is convenient for a number of reasons and from the gaoler's point of view may in practical terms be essential; but none of that means that the lawful sentence of a court cannot be carried into effect unless a specific document is in existence.

52. It is rightly conceded on behalf of the appellant that if a warrant were lost or destroyed a fresh copy could be made, though it is argued that the copy must be in the possession of the governor when the prisoner is detained. It is further rightly conceded that the lawful authority for the issue of a fresh copy would be the sentence of the court. By that concession, the appellant seeks to rebut the argument that his submissions would lead to absurd consequences for the lawfulness of a prisoner's detention if the records of a prison were affected by fire, accident, negligence or hostile action. That attempt fails, or at any rate gives rise to fresh difficulties: would the prisoner be unlawfully detained during the time it took to search for the missing warrant and then produce a fresh copy? Or during the period between the date when the warrant was lost and the date when its loss was discovered and rectified? The concession shows, however, that the argument of the appellant on this issue is, with respect, artificial. The ability of a gaoler, who has been sued for false imprisonment, to produce a warrant as evidence of a lawful justification for the detention of a prisoner must be distinguished from the lawfulness of the detention itself. Such a distinction was recognised by this court in *R (Lunn) v Governor of HMP Moorland* [2006] EWCA Civ 700: see paragraph 21.

53. Nor is the appellant's case assisted by section 12(3) of the Prison Act 1952, Part 13 of the Criminal Procedure Rules or the passages in Halsbury's Laws which I have mentioned in paragraph 24, above. Those various references to warrants for imprisonment relate to the content and effect of a warrant, but do not provide any basis for treating the existence of a warrant as a precondition of lawful detention pursuant to the sentence of a court. The appellant has been unable to point to any statutory provision which imposes such a precondition.

54. The High Court did not explicitly state that a warrant for imprisonment was initially issued by the Crown Court, but such a finding is implicit in the judgment of Lewis LJ. That finding was in my view inevitable on the evidence before the court. It would be strengthened by the proposed fresh evidence, but I do not regard the fresh evidence as necessary for the resolution of this issue. It is not suggested that the appellant may have been taken from the court to prison, and received and processed into the prison as a convicted and sentenced prisoner, without the usual warrant being in existence. It follows that the warrant must at some later date have been lost or destroyed; and in my view, the date and circumstances of the loss or destruction do not affect the issues in this case.

55. In short, the appellant's detention was at all material times justified by the sentence of the Crown Court and the application of the relevant statutory provisions governing release on licence, revocation of licence and recall. *Demer* and *ex parte Evans* do not

compel the conclusion that his detention from 17 June 2019 became unlawful because at some point during the many years when he was unlawfully at large the original warrant had been lost or destroyed. I therefore reject the appellant's submissions on this ground.

Conclusion:

56. For those reasons, I would refuse the respondents' application for permission to adduce fresh evidence and I would dismiss the appellant's appeal.

Lord Justice Coulson:

57. I agree.

Lady Justice Elisabeth Laing:

58. I also agree.