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Case No: AC 2024 LON 004134

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2025

Before :

MR JUSTICE RITCHIE

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Between :

BABIR BASHIR	**Claimant**
- and -	
SIMON DRYSDALE, THE GOVERNOR AT HIS MAJESTY'S PRISON PENTONVILLE	**Defendant**

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Louise Willocx of counsel (instructed by **ABV Solicitors**) for the **Claimant**
Natasha Barnes of counsel (instructed by **the GLD**) for the **Defendant**

Hearing dates: Out of hours: on Friday 13th December; Saturday 14th December 2024.
In hours on Wednesday 18th December 2024 and Tuesday 14th January 2025.

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 22nd January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

The Parties

1. The Claimant is a member of the public. The Defendant is the Governor of HMP Pentonville (the Prison).

The Issue

2. The Claimant brought habeas corpus proceedings arising from potentially unlawful weekend imprisonment by the Prison Governor at HM Prison Pentonville. The issue arose because the effect of his sentence was that due to time served on remand he was entitled to early release.

3. The context for this case was that late in the afternoon on Friday 13th December 2024 the Claimant was sentenced at Snaresbrook Crown Court, by HHJ Sharkey for dangerous driving, causing grievous bodily harm, driving whilst disqualified, criminal damage to a police car and driving with no insurance. The sentence was 10 months in prison (I have seen the Warrant) with a driving disqualification of 2 years and a compensation order to be paid by instalments.

4. Having already served sufficient time in prison on remand (40% of his sentence), the Judge stated that he was entitled to release immediately after the sentence was passed at 16.37 hours. Counsel's note of the Judge's sentencing remarks contains a record of the words: "to be released today". The Defendant in the criminal case (the Claimant herein) attended the sentencing hearing remotely from the prison. He was only entitled to release on licence because he had not served his full sentence.

5. There are detailed provisions in the *Criminal Justice Act 2003* S.240ZA, setting out when and how time served on remand is to count as time served for the offence. The sentencing Judge will be given the relevant information by the prosecution at some stage and it may on rare occasions be relevant to the sentence, see for instance *Barrett* [2010] EWCA Crim. 365, but see also the ruling in *Giga* [2008] EWCA Crim. 703 and in *Round* [2009] EWCA Crim. 667, which restated the general principle that time served on remand is not generally taken into account in determining sentence. In any event, the calculation of time served is a purely administrative function of the prison/probation service, as Treacy J observed in *Bhayani* [2005] EWCA Crim. 352 at para. 56.

6. Early release was provided for in S.244 of the *Criminal Justice Act 2003* which states as follows:

   1) "**244 Duty to release prisoners not subject to special provision for release**

      (1) As soon as a fixed-term prisoner, other than a prisoner to whom section 243A, 244ZA, 244A, 246A, 247 or 247A applies, has served the

> requisite custodial period the purposes of this section, it is the duty of the Secretary of State to release him on licence under this section."

A prisoner serving a fixed-term sentence is usually released after serving one-half of the sentence. Due to prison overcrowding, with effect from 10.09.2024, in certain cases, reference to 'one-half' is to be treated as 40 per cent. The calculation is made administratively and takes account of time served on remand and any deduction due in accordance with the court's declared number of days subject to qualifying curfew bail or detention awaiting extradition. After release, the remainder of the sentence is served subject to licence and post-sentence supervision, in certain cases.

7. The information is needed by the sentencing Judge because S.52 of *the Sentencing Act* 2020 requires the sentencing Judge to explain the effect of the sentence to the offender in ordinary language including the early release provisions, see *Patel* [2021] EWCA Crim. 231 at para. 9.

8. The problem in this case arose because the Defendant did not release the Claimant from prison after the sentence was passed. As a result, the Claimant applied for a writ of Habeas Corpus to obtain his own release. The Defendant's reason for failing to release the Claimant was the Defendant's assertion that his staff in the Offender Management Unit (OMU) and the staff in the probation service had not processed and could not process the necessary paperwork before the sentence was passed and they had all gone off duty at 4.30 pm on the relevant Friday. Thus, the Claimant faced being imprisoned for a weekend. His partner was listed for the induced birth of their child on the Sunday that weekend.

9. No case law or submissions were put before me in relation to how much time is allowed to the Prison to deal with the administration of the necessary matters relating to release and licence conditions after a sentence has been passed.

Bundles for each hearing

10. The Claimant applied out of hours for a writ of Habeas Corpus or an order for release. At a hearing at 23.15 hours on Friday 13th December 2024 (I was the Out of Hours Judge) I was provided with counsel's note of the sentencing, two witness statements: (S. Hoque dated 14.12.2024 and S. Mehta dated the same date) and the communications made by the Claimant's lawyers with Pentonville Prison. I refused to make an order without hearing from the Prison. I listed a further hearing for the next morning. My clerk contacted the Duty Governor.

11. On Saturday 14th December at 08.00 hours, at the video hearing which I had requested, Mr Barton, the Duty Governor of HMP Pentonville, attended with no lawyers. No additional documents were provided by the Defendant.

12. On Wednesday 18th December 2024 in open Court Ms Kylie Bennett, the joint head of the OMU, attended with no witness statement from the Defendant. An email from the Defendant was produced.

13. On 13 January 2025 the Defendant provided a witness statement and this was produced at the hearing on 14th January 2025.

Facts

14. On 13.12.2024, after the Claimant was sentenced, the following then occurred. At 16.39 hours the Claimant's counsel notified her solicitors of the outcome by telephone. At 16.55 hours no answer was provided by the Prison on the telephone when the lawyer called, so an email was sent to the OMU at the prison requesting the release of the Claimant. At 16.55 an automated response was received from the OMU providing the Prison reception email address for communicants sending emails out of normal (midweek) OMU working hours. At 17.06 the Claimant's lawyers sent an email to the reception email address of the Prison. At 17.08 a telephone call was made to the Prison, which was answered and the lawyers were told that it was unlikely that the Claimant would be released until Monday because the OMU had closed at 16.30 hours. At 20.59 a further email was sent to the prison because the Claimant had not been released and no response had been provided to the lawyers' various emails. The Habeas Corpus application was then made out of hours. There were two reasons made out for the release of the Claimant. Firstly, there was no legal reason for him to be imprisoned, secondly, his wife was due to give birth by induction the next day.

15. On Saturday 14th December at 08.00 hours, at the video hearing, Mr Barton, the Duty Governor, stated that he had not been aware of the communications from the Claimant's solicitors until my clerk called him late on the Friday evening; he was not sure which "Bashir" was being referred to and that there was no system at Pentonville for releasing prisoners over the weekend who had gained the right to release on licence after 5pm on a Friday. Furthermore, he did not know how long it would take to release the Claimant. I ordered that the Claimant be released by 12.00 midday on that Saturday (there being no legal right put forward or established by the Defendant to imprison the Claimant) and directed that the Defendant shall before 10.30 hours on Monday 16 December 2024 file and serve a witness statement explaining the grounds for detention and the system in place for releasing prisoners who gain their entitlement to release after 5.00 pm on a Friday and explaining what had occurred in the Claimant's case. I listed a follow up hearing.

16. The Claimant was released at around 14.00 hours on Saturday 14th December. My direction was therefore breached by the Defendant by two hours and by the Monday thereafter the Defendant did not provide any witness statement justifying the detention, despite my order to do so.

17. On Wednesday 18th December 2024 the follow up hearing took place in open Court and Kylie Bennett, the head of the OMU, attended with one additional document being provided by the Defendant. This was an email which stated:

> "To whom it may concern,
> I have been asked to clarify the out of hours process for releases.
> Normal releases are sent to the OMU mailbox. Out of hours the below paragraph is in place on that mailbox and explains how to contact the duty governor who is responsible out of hours.
> *The HMP Pentonville OMU mailbox is monitored between 9:00am and 16:30pm, Monday to Friday. If a Prisoner after 5pm is required to attend court, or the communication is regarding a bail that has been granted, a notice of discontinuance or an automatic release for time served, please contact: Reception on 0207 023 7168 /169 Email: Reception.Pentonville@justice.gov.uk or Comms on 0207 023 7007 who will be able to direct your query to the Duty Governor -otherwise the communication will NOT be actioned until the NEXT WORKING DAY. Thank you OMU HMP PENTONVILLE*
> The reception mailbox is monitored out of hours and the Comms is staffed 24hrs a day. There is a Duty Governor on call for 24hrs. The Duty Governor will organise the release etc with support from the Head of OMU, operational support line, public protection OOH support line, the regional on-call and whoever is on I/C (Governor or deputy Governor). Given that the release was transacted yesterday I would say that the process worked as expected, however always keen to receive feedback in ways we can improve. Simon Drysdale **Governing Governor**"

18. No witness statement was provided by the Defendant in breach of my earlier order. The Defendant did not assert lawful detention. Ms Bennett explained to the Court that the Prison had to complete public protection checks and a probation officer had to be assigned before the Claimant could be released. She explained that there was no "paperwork in advance system" for this. At weekends the Duty Governor would contact her to carry out the paperwork. The Duty Governor did not understand the system and that was why it did not work for this Claimant. Because the Defendant had not complied with my Court Order I made a further order as follows: a hearing was to be listed at 10.30 am on 14 January 2025 for 1 hour before me. The Defendant was ordered to appear at the hearing on 14 January 2025 and to provide the witness statement as directed in my Order of 14 December 2024. The Defendant was ordered to pay the Claimant's costs of the habeas corpus application, by 15 January 2024, summarily assessed at £6,145. I gave a short extemporary set of reasons.

19. On 14 January 2025 the Defendant was represented by counsel and provided a witness statement from Simon Drysdale, the Governor of the Prison, dated 13.1.2025. The Defendant did not assert lawful detention. He apologised for the failure to release the

Claimant in good time and set out the procedure in the Prison for overnight and weekend release, or "out of hours" as it was called. Starting with the normal process, he explained that it involved receipt by the Prison OMU of the sentencing paperwork from the relevant Court during office hours (9 - 4.30). Then consideration of the original remand warrant and the sentence. Three levels of staff then assessed the paperwork. An administrator, a manager and a Head of Function at the OMU. In addition, a licence may be required from the probation service where, for instance, the prisoner has been sentenced but is being released on licence because he has served enough time to trigger such (as was the case with this Claimant). Mr Drysdale stated that this last piece of work by the probation service "can take weeks". The licence conditions are imposed in accordance with the *Licence Conditions Policy Framework*. A Community Offender Manager from the probation service generates a licence via the Digital Prison System. Conditions are mandatory and if not complied with could result in a prisoner released on licence being returned to custody. A probation service manager then approves the licence.

20. For out of hours releases, the Prison's OMU is unstaffed after 4.30 on a Friday (and after 4.30 pm any day midweek) and the unit merely provides an automatic email response stating the absence of staff and guiding the communicator to contact reception who "*will be able to direct your query to the Duty Governor - otherwise the communication will NOT be actioned until the NEXT WORKING DAY."* That wording in itself is a clear indication that the Prison has not realised the seriousness of the situation for prisoners whom a Judge has ordered shall be released in the late afternoon of any day. Mr Drysdale asserts that the reception phone line is manned 24 hours per day. The key parts of the system are identified in the following evidence:

> "17. Where the Duty Governor becomes aware that a prisoner should be released out of hours, they should notify one of the two Heads of the Offender Management Unit. Staff at the Offender Management Unit only work Monday to Fridays, but in this scenario, they are asked to work overtime to compile the necessary information and complete the necessary checks.
> 18. However, as set out above, HMP Pentonville rely upon other parties to finalise release and the courts, Probation Service and Home Office have cut off times at the same or a similar time. In particular, Community Offender Managers (and local Senior Probation Officers) do not have an out of hours service with respect to preparing licences for those released out of hours. Nor does the Home Office with respect to authorising the release of Foreign Nationals. This causes very real problems for the release of prisoners out of hours as licence conditions are imposed for the protection of the public."

21. There are 4 actual or potential defects apparent to me in this approach.

    (1) **Firstly, process: Governor level awareness of the Judge's decision and the duty to grant liberty on licence.** The evidence shows that the Prison reception

did not take the communications from the Claimant's lawyers seriously and did not inform the Duty Governor, Mr Barton, on Friday 13th December. More generally, para. 17 of Mr Drysdale's witness statement does not contain a statement that the reception staff "must" pass on any out of hours communication from a lawyer containing the assertion that a prisoner has been "released" (I use that term in a general sense and because the Judge in this case said those words) as a result of a Judge's decision.

(2) **Secondly, process: notifying the Head of the OMU.** Para. 17 sets out only that the Duty Governor "should" notify one of the heads of the OMU, not that he/she must do so and provides no timescale, nor does it say that the Head of the OMU is contractually obliged to do the out of hours work. Crucially, Mr Drysdale then asserted that the Head of OMU is "asked" to work overtime. This makes the liberty of the subject dependent on the social arrangements of a member of staff which is a concern and does not seem appropriate to me in principle.

(3) **Thirdly, process: obtaining licence conditions.** Mr Drysdale stated that the probation service do not have an out of hours service for preparing licence conditions. So, for instance, in the case of the Claimant, the Prison had to construct the licence conditions themselves on Saturday morning (on 14.12.2024). This, says Governor Drysdale, was not their task and they did not have access to the relevant records so might in other cases be putting the public at risk.

(4) **Fourthly, process: doing the work in advance of the Court hearing.** Underlying all of this inadequacy was the failure of the Prison and the probation services to do the paperwork in advance of the hearing at which the prisoner is to be sentenced, in so far as that was possible. So, for instance, if the prisoner was facing other serious charges and will not be released whatever sentence is passed then this information should be made available. In any event the time served on remand, the "time served" information, should be accumulated before the hearing. Likewise, the suggested licence conditions, if the sentence results in a right to be released.

Law and procedure

22. CPR r.87 governs Habeas Corpus for release proceedings. R. 87.2 sets out the procedure for making the application and requires the filing of a Claim Form and a supporting witness statement or affidavit and the contents thereof. The application may be made ex-parte. Service is provided for in r. 87.9. R. 87.3 permits a High Court Judge to consider the application on paper and r. 87.3 empowers the Judge to make an order to issue the writ (to bring the prisoner before the Court) or to adjourn or give directions. R. 87.5 provides that a Judge may consider the application at a hearing and at such a hearing the Judge may order that the Claimant be released (see r. 87.5(g) and r. 87.6).

23. This issue of prisons failing to release prisoners after acquittal or after a sentence, all or most of which has already been served, has become more commonplace recently. So,

there are two reported cases in the last two years: *R (Niagui) v Gov. of HMP Wandsworth* [2023] 4 WLR 2, a decision of Chamberlain J. and *R (Bumju Kim) v Gov. of HMP Wandsworth* 2024] EWHC 645, a decision of Pepperall J. Additionally, Cotter J. heard one in the week (13-18 January 2025) and I have heard another one in the last 2 years.

24. In *Niagui* the claimant was acquitted in the Magistrates' Court and informed that he would be taken down, processed and released within about 30 minutes. A member of Serco's staff was with the claimant in the dock throughout, including when the verdict was returned and a handwritten "end of custody" note was given to the Serco staff member in Court. The claimant's barrister went downstairs to the cells to see her client but was informed by Westminster Magistrates' Court security staff that the claimant was not going to be released. Serco staff then told her that prisoners had to be returned to the prison for release, however the staff at the OMU at HMP Chelmsford would not be available until Monday so, the claimant would be detained at a police station until then, when he would be returned to HMP Chelmsford and processed for release. The claimant's solicitor made enquiries on the following morning and ascertained that the claimant had been taken from Westminster Magistrates' Court to Southwark Police Station at 11.55 pm on that Friday night and then transferred to HMP Wandsworth on Saturday morning. The solicitor e-mailed both HMP Chelmsford and HMP Wandsworth, but received no response. He called and was told that they would do nothing until Monday. The lawyers applied for Habeas Corpus. A hearing was set for the following Monday. The claimant was released just before the hearing. At the hearing the Governor acknowledged that there was no authority to detain the claimant once he had been acquitted and proposed that what went wrong should be investigated and set out in witness evidence, which would also explain the steps being taken to ensure that there was no repetition. Chamberlain J. made directions for that evidence to be filed and served. The evidence was filed and showed that the system was as follows. When time allowed, pre-court checks were completed two days prior to a court appearance. These included checking that the right prisoner is being produced and whether there are any other matters in relation to which the prisoner is being detained. If there are, the Prison Escort Record is marked "Not For Release" or "NFR". However, Courts regularly sit after 5pm and the Wandsworth OMU working hours were extended to accommodate this. The pre-release checking processes remained the same for late sentencing decisions. When a court dealt with a case after normal hours, the general procedure was that the court clerk would send confirmation of the result either by e-mail or by using the Common Platform (an IT system which aims to digitise court management processes). If it was necessary to process a release over the weekend, the Duty Governor would be contacted and the Head of Offender Management Services would assist them by telephone from home. The Duty Governor would request the Court record, warrant or document on which the individual was to be released and seek confirmation from the Court that all offences had been dealt with. Since they do not have access to a functional mailbox, they would request the Court to send the result

directly to them. If content that all matters for which the prisoner was being held had been dealt with, they would authorise the prisoner's release.

25. In the event, on the facts in *Niagui,* the Magistrates Court did not provide the paperwork to the prison service to release the claimant. Chamberlain J ruled as follows:

> "**32** There are five troubling features of this case.
> **33** *First*, no-one (including a Serco employee, a police custody officer or a prison officer or governor) may detain another person, except with lawful authority. Where the authority relied upon is a court order, the extent of the authority to detain depends on the terms of the order. In this case, the remand order was clear. It authorised the claimant's detention "until produced at court on the next hearing date", … It is a matter of concern that this was not noticed by any of Serco's staff, the custody officer responsible for the claimant's detention at Southwark Police Station, the relevant staff at HMP Chelmsford or those who received him into custody at HMP Wandsworth and declined to release him thereafter.
> **34** *Second*, a person who complains of unlawful detention does *not* have to show that there is no authority to detain him. Once it is shown that he is being detained, the detaining authority has to show that there *is* authority to detain him. That is so whether the complaint is made by application for a writ of Habeas Corpus or by a claim for false imprisonment. This is not just a procedural quirk. It is central to the protection accorded by the common law to the liberty of the subject. The way this case was dealt with suggests that this fundamental point is not understood by some of those responsible for detaining prisoners. … In each case, the question should have been "Can we show that there is a legal authority to detain?", not "Can we show that someone has authorised release?"
> **35** A *third* and related point is that Prison Service instructions and policies concerning the steps to be completed prior to release no doubt serve a useful function, but the need to comply with them is not a lawful ground for detention. Again, staff seem to have thought that, because the relevant checks could not be completed before Monday, they were obliged to continue to detain the claimant until then. This was not lawful. When remand prisoners are taken to court, prison staff must ensure *either* that checks to see whether there are other authorities to detain are carried out beforehand (as Ms Ellis says happens when time allows), *or*, at the very least, that staff are available by telephone and have the records they need to carry out the necessary checks immediately upon acquittal. Once a prisoner is acquitted, it may be that the prisoner can be lawfully detained for the short time necessary to process and release him in an orderly fashion. On no view, however, should he be detained overnight, let alone over a weekend, to enable such processing to take place.

> **36** *Fourth*, the way in which Ms Musa's legitimate enquiries were dealt with leaves a good deal to be desired. Ms Musa says that a member of Serco staff was in court when the claimant was found not guilty and the presiding justice said he would be released within 30 minutes. It is unclear why that member of staff was unable to pass this on, particularly if, as HMCTS records suggest, that member of staff had been given a hand-written "end of custody note". In any event, Ms Musa personally told Serco staff on the evening of 4 November that the claimant had been acquitted. That seems to have counted for nothing. It is particularly concerning that Ms Musa was not even allowed to speak to the claimant and that Serco staff, having promised to tell her where the claimant was being taken, then failed to do so. The offhand way in which Mr Levy's enquiries were dealt with is also troubling. I understand the resource pressures on prisons, but a complaint by a solicitor that a prisoner is being unlawfully detained demands a substantive response as a matter of urgency, even over the weekend. It is not acceptable to say, "Wait till Monday".
> **37** *Fifth*, although the lack of any prima facie authority to detain is now accepted by the Governor, Ms Ronald's statements, taken together, provide little reassurance that these events will not be repeated. Consideration should be given to the drafting of a new instruction or policy document giving effect to the principles I have set out here, so that Prison Service staff and contractors have a better understanding of their legal powers and duties."

26. Thus, by November 2022, when the judgment was handed down, the 5 Chamberlain concerns were or should have been clear to all prison Governors in cases where a prisoner has been acquitted.

27. The next case was *Bumju Kim,* which was not a weekend detention case, it was midweek. On Tuesday 16th January 2024, Mr Kim pleaded guilty at the Westminster Magistrates' Court to an offence of battery. He was sentenced at 11.41 am to ten weeks' imprisonment. Taking into account the time that Mr Kim had spent on remand, he should then have been released. Instead, Mr Kim was put on a prison bus and taken back to Wandsworth Prison. That evening, Mr Kim was told that it might take until Thursday 18th January for the paperwork to be sorted out. His solicitor formally complained that his client's continued detention was unlawful. At 6.28 pm, his solicitor spoke to an employee at the prison who refused to put him through to, or even provide the name of, the Duty Governor. He was told to email the OMU but the employee could not confirm whether they would respond that day. The solicitor duly emailed the OMU at 7.16 pm and put them on notice that, should Mr Kim not be released, he would be seeking an out-of-hours hearing before a High Court Judge for the issue of a writ of Habeas Corpus. The email included the word "URGENT" in capital letters in the subject line and was marked as being of high importance. There was no response. The solicitor called the prison again at 8.15 pm. He described the call in his second

statement: "The officer … initially refused to provide any details for the duty governor, but when it was explained that we would be making an application to the High Court should I not be able to speak to the duty governor and resolve the issue he said he would try and speak to them. I was then put on hold so that he could speak to a duty governor. On his return I was told that the duty governor was not able to speak to me and nothing could be done by the prison until the morning of 17 January 2024, as the OMU had finished work at 17:00 and they process all releases." In one final attempt to get the prison to engage with him, the solicitor emailed Governor James at 8.30 pm. Again, he included the word "URGENT" in capital letters in the subject line and marked the email as being of high importance. Again, there was no response. Pepperall J ordered the writ of Habeas Corpus to be issued and Mr Kim was to be produced at the listed hearing. Mr Kim was released but not until after the deadline. In breach of Pepperall J.'s order, the Governor failed to produce Mr Kim before the Court. The Governor neither appeared nor was represented. Pepperall J. ordered the Governor to file and serve evidence by affidavit explaining, first, the grounds, if any, for Mr Kim's detention between the sentencing hearing on 16 January and his release; and, secondly, the reasons why the Governor had failed either to release Mr Kim or produce him before the court by 11 a.m. as ordered and as commanded by the writ of Habeas Corpus. The Governor failed either to comply with that order or seek a prospective extension of time. Accordingly, on 26 January 2024 Pepperall J. made a further order requiring the Governor to provide the required affidavit evidence. On this occasion, the order was specifically directed to the Governor, Katie Price, and endorsed with a penal notice. Finally, on 29 January 2024, Governor Price made a witness statement. Even then she was in breach of the orders which clearly required her to file evidence by affidavit. She explained that an administrator within the OMU made an initial calculation and correctly identified that Mr Kim should be released. Prison procedure required a second check to be conducted by another member of staff. In error, the secondary checker did not review the calculation until after 5 pm. The Governor then explained that upon review of the file, the secondary checker was unsure of the release date because of the discrepancies in the offences and dates between the Remand Warrant and the Custodial Sentence Warrant. The secondary checker escalated this to one of the local hub managers who advised that, given the time, and that the original calculator was no longer available on that day, clarification should be sought from the Court the next morning. Pepperall J. ruled as follows:

> "19.5 Further, it is extraordinary that a solicitor's insistence that a prisoner was being unlawfully detained and that, absent his immediate release, an out-of-hours Habeas Corpus application would be made to a High Court Judge does not appear to have met the threshold of seriousness to trouble the duty governor. Instead the complaint appears to have been met with institutional indifference.
>
> …
>
> 22. **For the avoidance of doubt:**

> 22.1 It is neither lawful nor acceptable to detain prisoners for a further 24 hours after there ceases to be any lawful basis for their continued detention.
> 22.2 It is incumbent on the prison service to ensure that pre-release checks are completed speedily. The onus is always on the prison service to establish that there are grounds for further detention, and not upon the prisoner to establish his or her entitlement to release.
> 22.3 Prisons must be able to respond urgently to lawyers properly raising questions as to the lawfulness of continued detention. Governors are responsible for the management of their prisons and it is not acceptable to ignore Habeas Corpus applications or to regard them as an inconvenience that can be addressed during office hours or delegated to the OMU.
> 22.4 Court orders and writs of Habeas Corpus must be strictly complied with and treated with greater seriousness than has been evident in this case."

28. Thus, to Chamberlain J's 5 concerns, Pepperall J. added a sixth to the effect as follows: communications from solicitors about prisoners' release and assertions of unlawful detention should not be fobbed off, delayed or blocked. When they are received out of hours they must be passed on to the Duty Governor ASAP.

Live Evidence

29. I had the benefit of live evidence at the hearing on 14.1.2025. Governor Simon Drysdale informed me that he agreed that his reception staff, who were grade 3 prison officers working on reception in the Prison, were to be instructed that where a Judge has effectively released a prisoner in a case and the reception staff are so informed, this is a red flag event which must be communicated to the Duty Governor. He informed me that one of the two Heads of the OMU are contractually paid to be on call and on duty overnight and over the weekend and is contractually bound, if called upon by the Duty Governor, to process the prisoner's paperwork for release pursuant to the Judge' order. He informed me that he had retrained senior staff about out of hours release and a leaflet was being drafted to set out the procedure and the process at the Prison.

30. Mr Drysdale apologised for failing to release the Claimant in accordance with my order and for failing to provide a full witness statement in accordance with my first order. He identified that the second key defect in the current process at his Prison for out of hours release was the lack of an out of hours probation service. His staff and he himself are not trained probation officers. They are prison officers. He asserted that it is not their job to draft probation licence conditions. They do not have access to the relevant offender computer records in any event. In this case, because I had ordered the release of the Claimant, his staff drafted off the cuff standard form licence conditions, but he asserted that this was not the right way forwards for any other offender. I take into account that the Government has set up and provides an out of hours service for sentencing calculations to assist prison

OMUs. However, there is no out of hours probation service for the necessary licence conditions for "released" offenders.

31. I am most grateful to Mr Drysdale for his evidence and his professional approach at the hearing to the issues in this case, once he had realised the seriousness of breaching Court Orders. I accept his evidence.

Applying the law to the facts

32. I understand from the evidence that the Claimant was released at around 14.00 hours of Saturday 14th December 2024. I had ordered his release by midday. I accept the apology provided to this Court for the breach of my order.

33. In paras. 18-19 of Mr Drysdale's witness statement he states that this out of hours issue has been escalated within HMCTS (not HMPPS) and is the subject of ongoing discussion and asserts that efforts are being made by Courts not to sentence defendants late on Fridays so this problem is "rare". I regret to say that I do not readily accept this evidence of rarity but, even if it is correct that members of the public are being held overnight and over weekends rarely because of the untimely paperwork of the prison service or the probation service, that is wrong in principle and may in each case be a breach of the liberty of the subject. Transferring the responsibility for solving the problems to the Court service by asking Courts not to sentence during the late afternoon, during work hours, is not the proper solution in my judgment.

34. As to the particular facts of the Claimant's case, paras. 20-39 of Mr Drysdale's witness statement set out how the Claimant in this case was not released after a judge used the word "release"; how the Duty Governor was not told of the lawyers communications; how the lawyer was fobbed off by the Prison's reception staff; how Habeas Corpus was the only way to get the Prison to engage; how even after two video hearings and a High Court Judge's order the Claimant was not released at midday and how not insignificant sums of taxpayers' money were thrown away in legal fees in getting the Prison to do what it is required in law to do.

35. Mr Drysdale asserted in paras. 40-42 of his witness statement that he has taken steps to ensure that this does not happen again. Those were: he has instructed Duty Governors on the correct process; his staff are preparing a step by step guide and staff have been made aware of a support line provided by HMPPS to calculate the "time served" duration to be set off against the sentence. No one from the probation service has put in any evidence and all Mr Drysdale can say as to their part is that he would raise it with his counterpart. The steps taken internally, supported as they were by Mr Drysdale's live evidence, are a positive improvement. What Mr Drysdale has failed to do is implement a system whereby all of the necessary paperwork which can be done is done in advance of a sentencing hearing by his OMU.

36. The second potentially serious defect in the current system at the Prison relates to the lack of timely service provided by the probation service. A pre-sentence report will be obtained in many cases from the probation service before hearings at which prisoners will be sentenced. The Probation Service did not provide any evidence in this application but has had the opportunity to make comments on this judgment because I told counsel that I would give 7 days for comments and I sent a draft of the judgment to the parties and asked for comments from HMPPS and the Claimant. Draft licence conditions should perhaps be set out in parallel with the pre-sentence reports. After sentence the probation officer in Court may be able to assist with licence condition before release. If none of that is done or possible then, most importantly, an out of hours licence conditions service is needed to assist the Prison. If none is provided then "weekend imprisonment" and "midweek imprisonment" will continue to arise, leading to potential claims for Habeas Corpus, claims for damages for unlawful imprisonment and substantial legal costs liabilities, all of which are paid for by taxpayers, at a time when prisons are hugely overcrowded.

Conclusions

37. Despite the concerns raised by Chamberlain J. and Pepperall J., the Defendant detained the Claimant after he was sentenced and after the Judge said he was to be released, whilst administrative paperwork was not even started, let alone completed. The result of this was that the detention was potentially unlawful, a potential common law claim for damages arose and an application for Habeas Corpus to a High Court Judge out of hours was made, all of which ran up legal costs which were paid for by taxpayers.

38. I have been considering how to make it clear to the Prison Governor that potential unlawful imprisonment due to the out of office hours failure to release the Claimant and the breaches of Court Orders must be taken seriously. I have carefully considered going through the contempt process against the Governor for the breaches of my orders relating to his witness evidence and the timely release of the Claimant. In future cases this may arise or be pursued however, having heard the Governor give evidence and having been impressed by the seriousness with which he approached the issues, I have instead chosen to set out above what, on the evidence before me, appear to be the deficiencies in the system at Pentonville Prison for release of prisoners out of hours. It is a matter for HMPPS to devise a system to resolve the issues relating to out of hours release from prison.

39. Without any evidence from the Probation Service I do not have a full or in the round understanding of the feasibility of or time needed to carry out the necessary administration to construct the necessary licence conditions before hearings in cases where, after sentence, the prisoner is "entitled" to early release on licence because the Secretary of State falls under the S.244 duty to release on licence where he/she has already served sufficient time on remand to trigger release. Nor have I had the benefit of full, carefully argued submissions on the way the S.244 duty to release works and whether there is any legal basis for detaining a prisoner in prison after sentence where

time served "entitles" him to release on licence. I put the word "entitles" in quotes because the Act expressly imposes a duty and does not express a right. The latter may arise directly from the duty, or it may not. Despite this it may help if, in summary, in relation to Pentonville Prison, I set out below a restatement of Chamberlain and Pepperall JJ's concerns which I considered applied equally in this case and add one of my own:

No unlawful detention

(1) No-one (including a contractor's employee, a police custody officer, a prison officer or Governor) may detain another person, except with lawful authority. The burden rests on the Prison Governor to show lawful authority.

Complaints about unlawful imprisonment

(2) When a person or his/her lawyer complains of unlawful detention after a Judge's or a jury's decision, the Prison Governor has to satisfy him/herself that there is lawful authority to continue to detain the prisoner and is responsible for communicating that view and the reasons for it to the prisoner and his/her lawyer.

Administrative paperwork is not a lawful ground for detention

(3) Prison Service instructions and policies concerning the steps to be completed prior to release do not provide any lawful ground for detention if the prisoner has an *unfettered right to liberty* (for instance after acquittal where there are no other charges pending). The Prison Governor or staff member who thinks that, because the relevant checks "cannot" be completed over a weekend, he may continue to detain the prisoner over the weekend, is potentially acting unlawfully.

Paperwork before hearings

(4) When remand prisoners are taken to Court, the Prison Governor should ensure that the relevant pre-hearing checks are completed to determine whether there are other legal justifications for detention if the prisoner is acquitted or the sentence imposed gives rise to a duty to release the prisoner due to the time served. The time served on remand figures should be calculated and available at Court. In S.244 cases, the duty to grant liberty on licence is not unfettered, it is granted upon on licence conditions which need to be constructed, in many cases, to protect the public and in some cases to protect a specific vulnerable victim. If those conditions cannot properly be laid out in advance of the hearing then, after the hearing, further detention for a short period is likely to be necessary. I have not received any submissions from the Prison that this was lawful at any of the hearings. Indeed the Defendant did not dispute that the detention was unlawful. Whether that approach was correct in law may need more consideration.

Release decisions - communication

(5) Paperwork evidencing Judges' or Courts' decisions to "release" prisoners (in a broad sense) sent between the Courts and the Prison should be clear and timely, including decisions taken late in the afternoon. Delayed paperwork may not be a lawful justification for detention.

Procedure leaflets

(6) A clear, short, Prison policy and procedure leaflet giving guidance about "after hours judicial/Court release decision procedure" is going to be provided for the staff and sub-contractors at the Prison, for the prisoners and their lawyers. That seems sensible to me.

No fobbing off

(7) Out of hours communications from lawyers about prisoners' release timings as a result of Court hearings and assertions of unlawful detention should not be fobbed off, delayed or blocked. When they are received they must be passed on to the Governor or Duty Governor ASAP.

I add the following 8th concern.

Out of hours probation service

(8) When a Judge or criminal Court makes a decision which triggers a duty to release a prisoner from Pentonville Prison subject to licence conditions, a failure of the probation service to provide the Prison with the necessary administrative matters (for instance licence conditions) before the hearing may give rise to unlawful detention by the Prison after the hearing, depending on the factual matrix and the correct interpretation of the duty to release in S.244. If the Claimant had been acquitted and had faced no other charges requiring remand in prison, the right to liberty would have been clear and unconditional. If the duty to release involves the drafting of licence conditions (for instance, because the law entitles the prisoner to release due to the time already served on remand) then the liberty may be conditional. It may be that some time for administrative actions is properly required before the duty to release can be performed. I would need to hear full argument on the law and practicalities relating to release on licence to determine this. In so far as post-sentence administrative work is necessary, because it properly could not have been done pre-sentence, the delay should, in my judgment, be limited to the minimum reasonably practicable. I do not consider a whole weekend to be that minimum. If there is official guidance on this I have not been provided with it. If there is none, then there is a gap to be filled.

END