Neutral Citation Number: [2022] EWHC 2911 (Admin)

Case No: CO/4091/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

WALID NIAGUI **Claimant**

- and –

THE GOVERNOR OF HMP WANDSWORTH **Defendant**

- -
- -

Steven Levy, Solicitor Advocate (instructed by **Levy & Co Solicitors**) for the **Claimant**
Colin Thomann (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 7 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 This judgment relates to an application for a writ of habeas corpus, which was made to me as King's Bench Division duty judge on Saturday 5 November 2022. I fixed a substantive hearing for Monday 7 November 2022. Shortly before that hearing, the claimant was released, so it was not necessary to issue the writ or make any other order. Nonetheless, I indicated that I would give a written judgment because it has now become clear that the claimant was unlawfully detained for the best part of three days in circumstances which gave and continue to give serious cause for concern.

Background

2 The claimant is an Italian national. On 2 August 2022, when he was 20 years old, he was convicted before Cardiff Magistrates' Court of sexual assault by touching and theft. The sentence for the sexual assault was 16 weeks' detention in a young offenders' institution, suspended for 24 months, and a rehabilitation activity requirement. For the theft a concurrent sentence was imposed: 4 weeks' detention in a Young Offenders' Institution, suspended for 24 months, and a rehabilitation activity requirement. The effect of the conviction for sexual assault was that the notification requirements in Part 2 of the Sexual Offences Act 2003 ("the 2003 Act") applied. These imposed various obligations, including to notify police of his address and of any intended foreign travel.

3 On 9 September, the claimant was arrested at Stansted Airport on return to the UK from abroad and on 10 September he was charged with two offences of breaching his notification requirements contrary to s. 91(1)(a) and (2) of the 2003 Act. He appeared at court on that day and was remanded in custody and taken to HMP Chelmsford.

4 The claimant's trial was listed before three lay justices at Westminster Magistrates' Court on Friday 4 November. The case was not called on until 4pm. The justices noted that the custody time limit was due to expire on Monday 7 November, so decided to proceed with the trial despite the late hour. The trial concluded at just after 7pm. The justices returned verdicts of not guilty on both charges. One of the justices informed the claimant that he would be taken down, processed and released within about 30 minutes. The claimant's barrister, Huda Musa, says in a witness statement dated 10 November 2022 that a member of Serco's staff was with the claimant in the dock throughout, including when the verdict was returned. This is consistent with evidence from HM Courts & Tribunals Service ("HMCTS"), which indicates that a handwritten "end of custody note" was given to Serco staff in court.

5 Ms Musa went downstairs to the cells to see her client. According to her witness statement, she 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, staff at the Offender Management Unit ("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.

6 Ms Musa pressed Serco staff for a fuller explanation and was told that this has always been the policy and nothing could be done until Monday. She asked to see her client to explain this to him. This was not permitted either. Ms Musa was assured by Serco staff that she would be told which police station the claimant was being taken to, but this never happened.

7 The claimant's solicitor, Steven Levy, 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 Friday night and then transferred to HMP Wandsworth on Saturday morning. Mr Levy emailed both HMP Chelmsford and HMP Wandsworth, but received no response from either. He telephoned but was told that nothing could be done until Monday. Further attempts to communicate with the claimant over the weekend at HMP Wandsworth were refused.

8 Unable to get any answer from the prisons directly, Mr Levy indicated an intention to apply for a writ of habeas corpus and, at my direction, notified the duty lawyer at the Government Legal Department.

9 I held a short remote video hearing on Saturday evening. The attendees were Mr Levy, Margaret McNally (of the Government Legal Department) and Kate Stacey (Deputy Director of the Offender Management Team, Ministry of Justice Legal Advisors). Ms McNally had been unable to obtain effective instructions about the authority to detain the claimant; and Mr Levy had not yet drafted a claim form or witness statement, as required by CPR 87.2. I therefore ordered that the application be considered substantively in court on Monday 7 November, at 2 pm, making clear that I expected enquiries to be made by the Governor well before that and, if it were confirmed that there was no authority to detain, the claimant should be released as soon as possible.

10 On Sunday 6 November, at 3.38 pm, Stephen McAllister (Head of Legal Operations for the London Region at HM Courts and Tribunals Service) emailed HMP Wandsworth. The subject line included the words "possible unlawful detention". Mr McAllister said:

> "I do not know if Mr. Niagui faces any other outstanding proceedings before other courts or whether you have authority to detain him on warrant from other locations – but I can confirm in relation to the proceedings at Westminster Magistrate' Court as below that the trial of the two offences resulted in the matters both being DISMISSED and therefore brought to an end immediately the power to detain him in relation to these proceedings."

The hearing on 7 November 2022

11 The claimant was not released on Sunday 6 November and remained in custody until very shortly before the hearing fixed for 2pm on Monday 7 November. At that hearing, Mr Levy informed me of the claimant's release and said that he would therefore not be pursuing the application for a writ of habeas corpus. He submitted that the circumstances were far from satisfactory and invited me to make an order for costs in his favour.

12 Colin Thomann, for the Governor, acknowledged that there was no authority to detain the claimant once he had been acquitted and proposed that what went wrong be investigated and set out in witness evidence, which would also explain the steps being

taken to ensure that there was no repetition. I accordingly made directions for that evidence, and (if necessary) a response on behalf of the claimant, to be filed and served. I made clear that I would deal with the question of costs in the light of these submissions and that I was likely to give a written judgment.

The Governor's evidence

13 The Governor initially filed two witness statements. They explain the system and policies for releasing prisoners and what happened in this case. A third witness statement was filed in response to query from me.

Julie Ellis's witness statement

14 The first witness statement is from Julie Ellis, Head of Offender Management Services at HMP Chelmsford. Ms Ellis says that, in releasing individuals from custody the processes followed are those outlined in Prison Service Instructions 72/2011 (Discharge), 3/2015 (Sentence Calculation) and 23/2014 (P-NOMIS) and apply the HMP/YOI Chelmsford Release Checklist and the HMPPS Licence/Pre-release Checklists.

15 The usual practice where a remand prisoner is acquitted is that the checklists would be completed by a band 3 case administrator and then checked by a band 5 hub manager in the OMU. The checklist is then completed by the head of Offender Management Service or, in their absence, the duty governor.

16 Where a remand prisoner is acquitted, it is necessary to check that the charges of which the prisoner has been acquitted are the only matters for which the prisoner is being held on remand, since a prisoner may be held on remand on multiple warrants. When this check is performed, a number of documents are considered. There is a paper file called the Core Record, known in the prison system as an F2050. It contains all relevant documentation relevant to an individual's imprisonment, including the warrant to detain and court paperwork. It is ordinarily kept in the prison by the OMU, but travels with the prisoner when they go to court, or to other prisons. Sometimes, it is therefore in the possession of Serco.

17 On weekdays during working hours, there is a band 3 employee at the OMU who is responsible for monitoring the functional mailbox, where information from the courts is sent. This duty officer's responsibilities include processing and uploading information in the Core Record to the National Offender Management Information System.

18 Courts regularly sit after 5pm and OMU working hours are extended to accommodate this. But pre-release checking processes remain the same. When a court deals with a case after normal hours, the general procedure is that the court clerk sends confirmation of the result either by email or by using the Common Platform (an IT system which aims to digitise court management processes). If it is 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.

19 The duty governor would request the court record, warrant or document on which the individual is to be released and seek confirmation form the court that all offences had been dealt with. Since they do not have access to the functional mailbox, they would request the court to send the result directly to them. If content that all matters for which

the prisoner is being held have been dealt with, they would authorise the prisoner's release.

20 When time allows, pre-court checks are completed two days prior to a court appearance. These include 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".

21 On the evening of 4 November, Ms Ellis was at home "on call" when she was contacted by Serco cell staff at Westminster Magistrates' Court shortly after 8.30pm. They said they had a prisoner in the holding cells at Westminster Magistrates' Court and that the prisoner had been acquitted. They requested authority to release him. Ms Ellis asked if the prisoner had been acquitted of both offences. Serco staff could not confirm because they had not been in the court room when the verdicts were delivered. Ms Ellis asked if any court staff were available and was told that they had gone home. She then accessed the National Offender Management Information System ("NOMIS"), read out the charges on which the claimant had been tried and asked against whether Serco could confirm that the claimant had been acquitted. While on the telephone, Ms Ellis checked the functional mailbox and the reception mailbox. Neither contained any confirmation of the outcome of the claimant's case. She also checked Common Platform but there was no update on the case. Having "exhausted all avenues open to me", Ms Ellis confirmed to Serco staff that she could not authorise the claimant's release. Serco then said that they would "look to hold him overnight at Southwark Police Station".

22 On 6 November, at 12.30pm, Ms Ellis was contacted by Andy Cox, duty governor at HMP Chelmsford on that day. He then spoke to Ms Stacey and explained to her that there was nothing on the system to indicate the outcome of the proceedings on 4 November.

Hannah Ronald's first witness statement

23 Hannah Ronald is the Head of Safety at HMP Wandsworth. She made her first statement having reviewed relevant records and spoken to relevant staff. She explained that NOMIS records that the claimant arrived at HMP Wandsworth at 10.21 am on Saturday 5 November and that a Prison Escort Record and a remand warrant were presented to the reception team on arrival. She continued as follows:

> "9… The remand warrant recorded that the Claimant has been charged with two offences with a hearing to be held at 10:00am on 4 November 2022 at Westminster Magistrate's Court ("the Warrant"), exhibited at HR/1.
>
> 10. The remand warrant stated that the Claimant could be held until the charge numbers and the hearing of those charges had been completed. It is important to note that a warrant does not record outcomes of charges; that information is to be provided separately by the relevant court either by way of an email to prison or by providing a Memorandum of Entry to be included in the prisoner's core record. It is also the usual procedure that, in the event that a remand prisoner is acquitted from charges at Court, their release is authorised and processed by the Court, with their release affected directly from the Court. It is not a usual occurrence for a remand

> prisoner acquitted of all charges to be returned to prison for release, as occurred in this case. In those circumstances where a remand prisoner is acquitted of all charges and is transferred to a prison, the prison would not know this was the outcome until the court had emailed the prison informing of the outcome of those charges.
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> 11. At the time of the Claimant's arrival at the prison at 10:21 on Saturday 5 November until 15:37 on Sunday 6 November, no information had been provided by Westminster Magistrates Court ("WMC") with respect to the outcome of his charges, either by way of an email or by provision of an Extract of Entry uploaded on the NOMIS database. Accordingly, in the absence of any information as to the outcome of those charges, the remand warrant, together with the PER, were relied upon by the Reception Team as the authority to detain." (Emphasis added.)

24 The warrant was exhibited. It does not, however, state what Ms Ronald says it states. It is addressed to the authorised officers of the prisoner escort contractors and the Governor of HMP/YOI Chelmsford. The heading is "Remand warrant" and it records the next hearing date as "4 November 2022 at 10.00am at Westminster Magistrates' Court". It explains why bail was refused and then records the Order made by the magistrates in the following terms:

> "The defendant shall be taken to the nominated prison establishment and held in custody until produced at court on the next hearing date at the time shown."

25 The warrant goes on to list the charges. It <u>does not</u> state that the claimant must or can be held until the hearing of the listed charges had been completed.

26 On or around 6.15pm on Saturday 5 November, Ms Ronald received a telephone call informing her that an application for a writ of habeas corpus had been made. She therefore accessed the claimant's core record and found the remand warrant and no entry on NOMIS of the outcome of the proceedings. She contacted Joseph Akinremi, Head of the OMU, at home. He did not have access to the Core Record, but did check NOMIS and the OMU inbox. He responded by email at 8.12pm as follows:

> "He was remanded to HMP Chelmsford by Colchester MC. The case I believe was transferred to Westminster MC yesterday, the 04th... from where he arrived WWI today.
>
> There isn't a lot to do until Monday to be honest, when we need to do further checks as below:
>
> - That the case from Colchester MC is the same for which he attended Westminster MC yesterday.
>
> - We have received outcome of the hearing if it's same case (no result has been sent in so far from Westminster MC having checked OMU inbox).

- Make sure all offences have been dealt with and accounted for.

- Make sure there are no other information on his course record that we need to pay attention to such as any public protection issues.

With the above pending, I don't believe he is illegally held as there is no notification received from the court so far over their intention to release.

I will check our inbox again tomorrow to see if the court would send in paperwork, but from my experience, they are not the quickest."

27 At 4.20 pm, Kate Stacey forwarded to Ms Ronald Mr McAllister's email (which had been sent at 3.37pm) confirming that the claimant had been acquitted of the two charges for which he had been tried. Ms Ronald continued:

"19. While this email provided the Prison with sufficient confirmation with respect to the two charges contained in the warrant, I have been informed by OMU that it was not possible for other pre-release checks to be completed until the Claimant's hard copy core record could be reviewed. Importantly, OMU was concerned to ensure that there were no further warrants contained in the Claimant's core record. Given HMPPS's reliance on core records and the need for these to safely stored, access to these is restricted to OMU staff. Information from the core record will be uploaded to NOMIS on the next working day by OMU staff so this would not have been available for Joseph Akinremi to view remotely. As such, it was not possible for OMU to rely solely on the information contained in NOMIS to carry out the necessary checks for his release over the weekend and the review would need to wait until OMU could examine his physical core record and perform the relevant checks, including contacting other organisations and departments. As also explained above, it is one of the essential safeguards against errors in release for OMU staff to review the core record before authorising release so as to ensure that there is no new information which has not been uploaded onto NOMIS or, indeed, incorrectly entered onto NOMIS. As also explained above, given its importance as a primary record, core records are always stored in the OMU's files at the Prison and are only able to be accessed by OMU staff. While Mr Akinremi used his best endeavours to facilitate the Claimant's release, he was unable to do so without access to the physical file. While there were, of course, other prison staff on duty over the weekend, there is no cover for the OMU function as no trained OMU staff are contracted to work out of hours/weekends. As such, there were no OMU staff physically present at the Prison on the weekend who could have accessed and reviewed the Claimant's core record. Accordingly, where OMU input is required in order to release a prisoner, this must be carried out during the normal working week. As set out above, in carrying out pre-release checks, a number of external organisations may also

> need to be consulted. Accordingly, even if the OMU team were to be contracted to work after hours and be physically present at the Prison on the weekend, this will not necessarily mean that immediate releases could be authorised by the OMU after hours/weekends given the common need to consult external organisations, such as courts, the Probation Service, and others, whose assistance may not be possible after hours and weekends.
>
> 20. The following morning, Monday 7 November, Mr OMU carried out an immediate review of his physical file. I have been informed by Mr Akinremi that he arrived at the Prison shortly before 9:00am and immediately instructed the hub manager to look into the Claimant's core record and, if the core record showed that there were no pending charges and that the core record showed no basis for any further checks to be made with external organisations, then to prepare him for final release. I am informed by Mr Akinremi that the hub manager immediately took the core record and began the prerelease checks. Those pre-release checks were completed by on or around 10:47, at which point the Claimant's core record was taken down to Reception in order to process his final discharge.
>
> 21. I am informed by Mr Akinremi that after the Claimant's core record was taken down to Reception, on or around 11:45, he was forwarded an email from his probation officer stating that the Probation Service needed to check his licence since he had been previously sentenced for another offence and the Probation Service had no official address in which to instruct him with respect to his licence. The Probation Service requested that the Prison forward to the Claimant instructions to report to them on 11 November 2022 at 2pm in their offices. Mr Akinremi said he informed them that the OMU could not see that there were any active licences on his core record that would give rise to reporting requirements. However, for caution, the OMU asked Reception to pause his release so that this could be checked with his probation officer. Following a call with the probation officer, OMU were able to confirm that there was no active licence and Reception was asked to continue processing his discharge. Monday morning is a peak time for Reception as this is the time that many new prisoners are received into the Prison. I am informed by Mr Akinremi that he contacted Reception a number of times during this period to check on the status of the Claimant's release and was informed that one of the staff was gathering his property, which contained a number of items. I am informed by Mr Akinremi that at approximately 13:37, he followed up with Reception again to check the status of the Claimant's release and was advised that he had just been released from custody."

28 As noted above, the hearing before me was listed to start at 2 pm.

29 Ms Ronald concluded as follows:

> "22… there was no information whatsoever either in the core record or by way of email or other notification by the Westminster Magistrates Court that the charges contained in the Warrant had been dismissed. In the absence of any information to the contrary, the Reception staff reasonably concluded that the charges set out in the Warrant had yet to be determined and the Warrant was, therefore, prima facie authority to detain.
>
> 23. As also set out above, over the course of Saturday evening, Mr Akinremi and myself sought to determine whether there was enough information available to us to authorise the Claimant's release. Having not received any confirmation from the court that the charges had been dismissed, we were unable to do so. Even when that information was finally provided by the court at 13:37 on Sunday, Mr Akinremi was not able to authorise his release as he did not have access to the core record and was therefore unable to verify that there were no other outstanding charges or other matters which might impact on the Claimant's release. The following morning, upon arriving at the Prison and having access to the core record, the OMU team immediately began to carry out the necessary pre-release checks in order to authorise his release." (Emphasis added.)

Ms Ronald's second witness statement

30 Having read the witness statements and exhibits initially filed on behalf of the Governor I pointed out that the first sentence of para. 10 of Ms Ronald's statement did not accurately reflect the terms of the remand warrant. That being so, I queried the statement in para. 22 that reception staff at HMP Wandsworth "reasonably" concluded that the warrant was *prima facie* authority to detain.

31 In response, Ms Ronald filed a second witness statement accepting that what she had said in para. 10 of her first statement was wrong and that the warrant therefore did not provide even *prima facie* authority to detain. She accepted that the claimant had been unlawfully detained at HMP Wandsworth and should have been released from the holding cells at Westminster Magistrates' Court. The erroneous decision to detain had been taken because the claimant had been received from detention at Southwark Police Station and "in the absence of any confirmation or other information as to the charges on which he had been remanded, the prison not considering it therefore had enough information to be confident that it could authorise his release".

Discussion

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", which, as the warrant itself specified, was 10 am on 4 November 2022. Nothing on the face of the warrant purported to authorise the claimant's detention at any time after that. As the Governor now accepts,

the warrant was not, therefore, "*prima facie* authority to detain" on the evening of Friday 4 November or at any time on 5, 6 or 7 November. 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. On the evening of 4 November 2022, Ms Ellis asked Serco staff whether they were sure that the claimant had been acquitted on both charges. Since the answer was "No", she decided that she could not authorise the claimant's release. On Saturday 5 November, Mr Akinremi said that checks would have to be undertaken on Monday and, until that was done, the claimant was being held lawfully as "no notification [had been] received from the court so far over their intention to release". Even once confirmation had been received from HMCTS that the claimant had been acquitted, Mr Akinremi and Ms Ronald both seem to have thought that it was lawful to detain him until such time as it could be positively confirmed that there was no other authority for his detention. 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.

Costs

38 It is now clear, and admitted, that the claimant should have been released from Westminster Magistrates' Court on the evening of Friday 4 November 2022. He is fortunate to have been represented by lawyers as dedicated as Ms Musa and Mr Levy, who between them made strenuous efforts over the weekend to discover where he had been taken and then to challenge his detention. There is no doubt that there should be a costs award in the claimant's favour. I shall therefore order that the Governor pay the claimant's costs on the standard basis. The costs claimed are, however, substantial and in my judgment not suitable for summary assessment. They will therefore be subject to detailed assessment if not agreed.