



**In the High Court of Justice
Queen's Bench Division
Administrative Court
Sitting in Manchester**

CO Ref: CO/1650/2022

Neutral Citation Number: [2022] EWHC 1789 (Admin)

Before:

HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT

In the matter of an application for Judicial Review

THE QUEEN

on the application of

MATTHEW WILSON

Claimant

-and-

~~(1) NATIONAL PROBATION SERVICE~~

(2) SECRETARY OF STATE FOR JUSTICE

Defendants

Mr JUDE BUNTING QC (instructed by **Howards and Henrys Solicitors**) for the **Claimant**

MS ISHAANI SHRIVASTAVA (instructed by **Government Legal Department**) for the **First and Second Defendants**

Hearing date: 23 June 2022

JUDGMENT

Introduction

1. This is my judgment on the Claimant's application for permission to bring judicial review proceedings and, if granted, for substantive orders relating to his release from custody, heard on 23 June 2022. At the conclusion of the hearing, I indicated that I would give my decisions and make an order as soon as possible to reflect the need for urgency in the event that I found

the Claimant's recall to custody to be unlawful, but that I would give written reasons later. These are those written reasons.

2. On 24 June 2022, I made an order in the following terms:
 - 2.1. Allowing the Second Defendant's application dated 10 June 2022 for permission to file further witness evidence;
 - 2.2. Allowing the Second Defendant's application dated 10 June 2022 to remove the First Defendant as a party to the claim;
 - 2.3. Allowing the Claimant's application dated 16 June 2022 for permission to file further witness evidence;
 - 2.4. Allowing the Claimant's application for permission to bring judicial review proceedings by declaring the Second Defendant's decision to recall the Claimant to custody on 10 February 2022 to have been unlawful and quashing the decision.
 - 2.5. Directing the Claimant's release from custody.
 - 2.6. Directing that the Claimant's claims for damages for false imprisonment shall be adjourned for further consideration;
 - 2.7. Reserving costs.
3. I understand that my order was not communicated to the parties until 30 June 2022. This appears to have been due to a mistake on the Court Office. The Defendant then sought an emergency stay, which was granted by Thornton J on the evening of 30 June 2022. The stay lasted until midday on 1 July 2022.

Background

4. On 18th September 2020, the Claimant was involved in a fight on Herbert Street in Stockport. He was convicted of violent disorder and sentenced to two years' imprisonment on 24 March 2021.
5. The Claimant's case as to the commission of the offence is that his cousin was fighting with another person. Another person became involved and the Claimant tried to split them up. It is not clear whether this was the basis upon which he was sentenced.
6. On 12th November 2021, the Second Defendant released the Claimant on licence, at the half-way stage of his sentence. The licence conditions appear at pages 195-197 of the bundle. One of the conditions of the Claimant's licence was that he must "[n]otify [his] supervising officer of any developing intimate relationship with women" (clause 5(xi)). The material before the court indicates that the condition was imposed due to the suggestion that allegations of domestic violence had previously been made to the police about the Claimant, although it is to be noted that he has no convictions for such offences.
7. In the community, the Claimant successfully completed a placement in an approved premises and moved on from the approved premises earlier than expected. This was in view of his

positive progress and compliance. However, in January 2022, the Claimant tested positive for cocaine in two drugs test. The First Defendant addressed these matters through warnings.

8. On 1st February 2022, the Claimant's former partner, RM, contacted his probation officer, Philippa (known as Phil) Burke. The social worker recorded the conversation thus:

“RM informed me that the relationship between her and Matthew has ended. She informed me that he has been seeing another person which apparently is all over social media, however, she does not have social media so has not seen this herself. RM informed me that he has been drinking heavily and she is concerned about him being around the children, therefore, he will not be having any contact with them at this time. She reported that the past 18 months have been "living hell" for her, at this point she started crying. I asked if there have been any DV (sc. domestic violence) incidents, following this RM went quiet and did not say anything. I advised her to avoid any contact with Matthew fr (sic) sometime to let things settle down and then she can consider a set up for contact with the children if she feels that this is suitable. RM advised that her focus is on her children and she will not do anything to jepodise (sic) their safety or them being with her. RM highlighted that the children have been through enough and is concerned about their well-being. Asked RM to contact me if she has any concerns or worries. She agreed to do this.”

9. Following the conversation with RM on 2 February 2022, the Claimant spoke with his probation officer by telephone. He confirmed that he had split up from his former partner. The probation officer thanked the Claimant for his honesty. The probation officer did not ask him if he was in a new relationship.
10. On 9 February 2022, RM again spoke to Ms Burke. In this conversation, RM agreed to MS Burke speaking to the Claimant about the information relating to his having entered into a new relationship. Following this conversation, Ms Burke was sent copies of messages between RM and the woman, CF, with whom it was alleged the Claimant was forming a new relationship. Four pages of messages were exhibited to Ms Burke's statement and slightly redacted screen shots of those messages are contained in Appendix 1 to this judgment. It is common ground that CF's messages are those with a white background and RM's messages are those with a grey background. However, it appears that there is a gap with further messages between screenshot 3 and screenshot 4 which, the Claimant says, is of some significance. In addition, Ms Burke was provided with a photograph of the Claimant and CF. That has not been copied into this judgment for reasons of privacy. It shows the Claimant and CF standing next to each other, facing the camera and smiling.
11. Thereafter she spoke to the Claimant saying that decision had been made to recommend his recall. In this conversation, the Claimant denied that he had entered into a new relationship.
12. Following this, Ms Burke completed Part A of a “Request to Recall” report. Box 19 of the report asks the author to “*detail the circumstances and behaviours leading to the recall and provide an assessment as to why the risk is no longer manageable in the community.*” Ms Burke stated:

“Mr Wilson is assessed as posing a high risk of serious harm towards partners following incidents of Domestic Abuse that had previously been reported to the Police. There were

concerns as Mr Wilson had not previously been honest with professionals in relation to his relationships which led to the absence of safeguarding protocols, due to the lack of information. As a result, Mr Wilson's licence required him to disclose any developing relationships to ensure that new safeguarding issues are managed and dealt with effectively.

"On 1 February 2022, I received a call from Matthew's ex-partner to inform me that their relationship had broken down and that she suspected he was with another woman. Whilst Mr Wilson did confirm the breakdown of his relationship with this partner during a phone call on 2 February 2022, he did not inform his Supervising Officer of a new relationship. On 9 February 2022, during a further phone call with Mr Wilson's ex-partner, it became apparent that Mr Wilson is continuing to progress a relationship with his new female, however, he has continued to fail to report this to Probation. It has become apparent that this female has two young children which has raised further concerns in relation to the risk posed to them. Evidence of this new relationship has been shared with Probation through pictures and copies of conversations.

"Mr Wilson has failed to develop disclose a new intimate relationship which has resulted in an increase in risk as his dishonesty has prevented the relevant safeguarding processes to take place and placed a female and her children at risk of serious harm."

13. Box 20 of the report deals with how the offender has responded to supervision to date. Ms Burke stated,

"Mr Wilson was released in November 2021 and successfully completed a placement within the Approved Premises. He moved on from the AP, earlier than expected, to his mother's address in December 2021 having shown positive progress and compliance throughout. Since this time, Mr Wilson has attended and engaged in all appointments as required. Despite this, Mr Wilson unfortunately produced two positive drug tests during January 2022 as he tested positive for Cocaine. This is assessed to significantly increase his risk further as the risk posed to females considered to be greater whilst Mr Wilson is under the influence of substances."

14. Box 22 deals with the proposed recall type. This is stated to be 'standard' and under the heading "explain you reason for the above recall type recommendation," Ms Burke stated:

"Mr Wilson is assessed as posing a high risk of serious harm towards female partners within the Community. He has shown complete disregard towards Probation Supervision, not only in relation to his current breach of licence but through his lack of transparency throughout previous sentences. It is a concern that he continues to be dishonest with professionals as this results in an inability for services to effectively manage risk and safeguard vulnerable individuals. Mr Wilson has been given numerous opportunities to increase his level of motivation and engage with Probation, but he has repeatedly chose not to, therefore, it is assessed that his risk is not manageable within the Community at this time.

"Mr Wilson will be expected to address his attitudes towards his licence and authority in general, in order to increase his level of motivation to comply in the future. It is clear

that he does not recognise the seriousness of his actions; it is advised that he address this understanding before it is assessed that he can be managed effectively within the Community.”

15. Following this recommendation, on 10 February 2022, the Secretary of State for Justice revoked Claimant’s licence and he was recalled to prison. The written reasons for licence revocation state:

“You have been recalled to prison because the Secretary of State is satisfied that you have breached the following conditions of your licence:

5(i) Be of good behaviour and not behave in a way which undermines the purpose of the licence period.

5(xi) Notify your supervising officer of any developing intimate relationships with women.

In view of the offences for which you originally sentenced, the risk suggested by your offending history and your behaviour as described in the recall report completed by the Probation Service, and which is attached, the Secretary of State revokes your licence and recalls you to prison.”

16. The Claimant has made representations to the Parole Board. They have determined that an oral hearing should take place, the hearing being listed for 30 September 2022.
17. The Claimant’s original licence expiry date was 13 November 2022. However due to his allegedly being unlawfully at large for 11 days, his new sentence expiry date is set at 24 November 2022. In any event, the Parole Board hearing will take place only shortly before his release date and therefore, unless he is subject to executive release in the meantime, the current licence recall would cause him to serve most of his licence period in custody.

The Procedural History

18. This claim was brought by way of Claim Form dated 9 May 2022. The application sought urgent consideration, given the risk that any challenge to the recall would be largely academic if not dealt with quickly. On 11 May 2022, I ordered that the claim be expedited and set a very tight timetable providing for a “rolled up” hearing, with the substantive application to be heard immediately if permission were granted.
19. The timetable was subsequently varied to allow for the provision of witness evidence by the Defendants and evidence in reply from the Claimant. This required application on behalf of each, which was not objected to by the opposing party and I allowed the applications in each case. Notwithstanding how tight the timetable was and the intervening difficulties caused by rail strikes, it was possible for the hearing to proceed by remote means on 23 June 2022.
20. In addition, the Second Defendant sought the removal of the First Defendant as a party to the proceedings. This was asserted to be on the ground that the Second Defendant was the sole decision maker. Whilst this is probably technically correct, the Claimant was concerned that the Second Defendant might argue that his decision was not unlawful given the material placed before him by the First Defendant. However, as counsel for the Second Defendant made clear at the hearing, the Second Defendant accepts his responsibility for the actions of the First Defendant in any event so such an argument could not succeed if the recommendation to recall

was itself unlawful in public law terms. Counsel for the Claimant agreed that this gave him the necessary reassurance and hence I direct that the First Defendant be removed as a party. Hereafter, I will simply refer to the Secretary of State as the Defendant.

21. The court has had before it the following statements:
 - 21.1. Ms Gauden, solicitor for the Claimant, dated 9 May 2022 and 16 June 2022;
 - 21.2. Ms Shuttlewood, dated 7.6.22, head of post-release and national security casework within the Public Protection Casework Section of the Defendant;
 - 21.3. Ms Burke dated 9.6.22 – the Community Offender Manager within the Greater Manchester Probation Service who prepared the Request to Recall. She was also, as indicated, the person who had spoken to RM on 1 and 9 February 2022 and Mr Wilson on 2 February.
22. In her first statement, Ms Gauden set out the history of the case and advanced the Claimant’s submissions. She said that the Claimant denied the alleged intimate relationship with CF stating that she is a friend of some years’ standing. The photograph was taken at a family party that both had attended. In her second statement, Ms Gauden made clear that it was the Claimant’s case that he was only told about the allegation that he was developing a relationship with CF by Ms Burke after she had told him of the recall decision. He had told her that he was not having or developing an intimate relationship with her.
23. Ms Gauden also recites what she says is CF’s account, given in a telephone conversation with her:

“She informed me that [RM] had been sending her aggressive and threatening messages on social media as a result of a photograph that had been posted on social media. The image had been posted amongst a number of images taken at a family party.

“[CF] denied having ever been in a relationship with Mr. Wilson. She states that [RM] had been sending her messages on social media. [CF] stated that she said in a message, ‘I do talk to Matty’ but the next message sent, which is not included in any of the exhibits, stated ‘but not like that.’ In other words, [CF] made it clear to [RM] that she and Mr Wilson were not in a relationship.”
24. Ms Burke’s statement disclosed the following further matters of note:
 - 24.1. Following her initial discussion with RM, she had concerns about a risk to her and her children if she disclosed the source of the allegation that the Claimant was developing a new relationship, therefore she decided not to act immediately;
 - 24.2. She did however contact the police and Children’s social care to express her concerns about the potential risk to CF and her children from the Claimant.
 - 24.3. In her second conversation with RM, RM had consented to Ms Burke sharing what she had said about the Claimant’s new relationship with him.
 - 24.4. As noted above, she decided to request recall before she spoke to the Claimant on 9 February 2022, though Part A of the recall form was not completed until after she

had spoken to him. Whilst the summary grounds of resistance might seem to imply that the Claimant's denial was communicated before Ms Burke had decided to request recall, in fact her evidence is consistent with the Claimant's case that the decision was made before the relationship was mentioned to him.

- 24.5. When she spoke to the Claimant, he said that CF was a friend not a partner but Ms Burke indicated that she did not accept this to be so. Given the information from RM in her first discussion that the Claimant was drinking heavily, she had also "*questioned him as to whether he was under the influence and he had stuttered and slurred his words which he did not usually do.*"
- 24.6. Ms Burke noted in her statement that the box in the Request to Recall report relating to details of alternatives to recall had not been completed, however she said that alternatives to recall were considered (as evidenced by other boxes ticked within the Part A).
- 24.7. In terms of the alternatives to recall, she said this:

"Considerations were made to alternatives to recall, such as re-implementing Mr Wilson's 8pm curfew which had been removed by this point in his sentence. I also gave consideration to issuing Mr Wilson a warning, increasing a Police presence through regular home visits and increasing Mr Wilson's reporting to the Office. However, it was assessed that there were no alternatives that could sufficiently manage the risk within the Community. As stated, Mr Wilson is assessed as posing a high risk of serious harm, indicating that concerns were of immediate harm being caused to the ex-partner or new partner, with the risk that young children could be caught up within any potential event, as it was thought that this previously had not deterred Mr Wilson from acting violently. For any alternative to have been effective in managing risk, it would have required the honesty of Mr Wilson, however, he had evidenced numerous times that he was not motivated to be open with Professionals. It was discovered at the start of the sentence that Mr Wilson had previously been dishonest in regards to his relationships with previous Probation Practitioners as his previous risk assessments failed to note his relationship with the recent ex-partner despite this apparently being present at the time of the risk assessment being created; this omission of information led to significant safeguarding concerns not being highlighted and addressed as required. It was then discovered that Mr Wilson had been consuming illegal substances, through the production of positive tests; Mr Wilson has previously adamantly denied the use of such substances and continued to do so following the positive test results being shared with Mr Wilson. Following on from this, he failed to share the information of the new developing relationship which led to his recall to custody. As a result, it was my assessment that Mr Wilson was unwilling to be open and transparent with myself and other Practitioners which ultimately meant that his risk would not be effectively managed within the Community."

The Relevant Law and Policy

25. Part 12, Chapter 6 of the Criminal Justice Act 2003 sets out the statutory scheme for the release and recall of prisoners on licence.

- 25.1. Section 244 establishes a duty on the Secretary of State to release a prisoner after he has served “*the requisite custodial period*”, in this case one half of the sentence. The licence period will normally be the remainder of the original period of the sentence (section 249) and will include conditions (section 250).
- 25.2. Section 254 provides:
- (1) The Secretary of State may, in the case of any prisoner who has been released on licence under this Chapter, revoke his licence and recall him to prison.*
- (2) A person recalled to prison under subsection (1) -*
- (a) may make representations in writing with respect of his recall, and*
(b) on his return to prison, must be informed of the reasons for his recall and of his right to make representations. “
- ...
- (6) On the revocation of the licence of any person under this section, he shall be liable to be detained in pursuance of his sentence and, if at large, is to be treated as being unlawfully at large.”*
- 25.3. Where a prisoner is subject to recall under Section 254, the Secretary of State must consider whether he or she is suitable for automatic release (section 255A). If not considered to be suitable, there is a duty to refer the question of immediate release to the Parole Board, either on the prisoner making representations within 28 days of recall or in any event after 28 days (section 255C).
26. The Defendant’s relevant policy relating to recall is set out in the document “Recall review and Re-Rerelease of Recalled Prisoners Policy Framework” originally dated 1 April 2019 and re-issued on 1 October 2021.

“4.3.9 COMS (Community Offender Managers) must consider recalling an individual in cases where they (a) have breached a specific condition of their licence or where (b) the behaviour being exhibited, where either (a) or (b) means that the risk posed is assessed as no longer safely manageable in the community. In such cases, COMs may consider that imposing additional licence conditions and taking alternative enforcement action will provide an acceptable and safe alternative to recall. COMs must also consider recall in cases where contact between the COM and the individual has broken down.

4.3.10 The decision to request recall must be based on an individual’s behaviour or circumstances presented whilst on licence. This will not necessarily be directly linked to a breach of a specific licence condition. Evidence of behaviour that presents an unmanageable risk is tantamount to a breach of licence.

4.3.11 COMS must consider whether to seek recall in cases where they have reason to believe that an individual is actively thinking about re-offending...

4.3.12 Where there are allegations of further offending, the decision to request recall must be based upon the individual’s reported behaviour. There is no requirement for the

COM to await the outcome of police investigations or for the individual to be charged, if they are satisfied that the reported behaviour meets the recall threshold.

4.3.13 COMS must consider whether it is appropriate to request a recall where there has been further offending, whether the individual has been remanded or not. In doing so, one of the factors that must be taken into account is whether the risk presented by the individual can be managed, in the event that the individual is automatically released should any further charges be dropped, or whether additional risks have been identified as a result of the alleged behaviour which would warrant an assessment of suitability for re-release by the Parole Board or Secretary of State.

4.3.14 Where the COM is satisfied that should the individual no longer be remanded, they can be released immediately with no increase in RoSH to the public, or risk of reoffending then recall may not be considered appropriate. This must be assessed on a case by case basis. The test for recall does not require the criminal standard of evidence, and it is instead based on the COM's professional judgment as to whether, on the balance of probabilities, the reported behaviour has taken place, or other risk factors have increased.””

The Claimant's Case

27. The Claimant argues that a high degree of procedural fairness required in terms of decision relating to prisoners. As Lord Reed put it in R (Osborn) v Parole Board [2014] AC 1115;

“67. There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hofmann observed however in Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269, para 72, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.

68. The first was described by Lord Hofmann (ibid) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions...

*70. This aspect of fairness in decision-making has practical consequences of the kind to which Lord Hofmann referred. Courts have recognised what Lord Phillips of Worth Matravers described as ‘the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result’: Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269, para 63. In the present context, research has established the importance attached by prisoners to a process of risk assessment which provides for their contribution to the process: see Gill Attrill and Glenda Liell, ‘Offenders’ views on risk assessment,’ in *Who to Release? Parole, Fairness and Criminal Justice* (2007), p 191 (ed Nicola Padfield). Other*

research reveals the frustration, anger and despair felt by prisoners who perceive the [parole] board's procedures as unfair, and the impact of those feelings on their motivation and respect for authority: see Padfield, Understanding Recall 2011, University of Cambridge Faculty of Law Research Paper No 2/2013(2013). The potential implications for the prospects of rehabilitation, and ultimately for public safety, are evident.

71. The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30. Applying these principles, the Claimant contends that the decision to recall him to custody was unlawful, in that:

30.1. To request the Claimant’s recall without giving him an opportunity to comment on the allegation that he had breached his licence was procedurally unfair. Had the

Claimant been asked to do so, before the decision to recall was made, he could have given his version of events. This would have ensured that the decision to recall, which has had serious consequences for him, was properly taken and based on the available evidence.

30.2. In the alternative, the decision was unfair because the report gave a one-sided and unbalanced account of the available evidence, in particular it did not record that the Claimant denied that he was developing an intimate relationship with CF, a fact known to the First Defendant before completing Part A of the form;

30.3. Had the Claimant been consulted:

(i) He would have had the opportunity to explain that he was not in a developing intimate relationship with CF. The Second Defendant had no idea that the Claimant denied the allegation and had no evidence upon which to discount any such denial.

(ii) He could have asked CF to confirm the nature of their relationship. She could then have provided Ms Burke with a full copy of her social media exchange with RM, in which she clearly denied any intimate relationship, it being the Claimant's case that the words "*I do talk to Matty*" in the social media exchange between CF and RM were immediately followed by "*but not like that*."

30.4. The decision was manifestly unreasonable and/or disproportionate. The First Defendant failed to consider any alternatives to recall. There was no real evidence to justify the alleged breach of licence. The evidence upon which the probation officer now relies, was obviously incomplete.

31. In so far as it might be argued that the Court should be reluctant to interfere in a recall decision, the Claimant points to the decision of the Court of Appeal in R (Calder) v Secretary of State for Justice [2015] EWCA Civ 1050. In Gulliver v Parole Board [2-007] EWCA Civ 1386, the Court of Appeal had stated that applications for judicial review in this context were likely to be "*exceptional*" given the role of the Parole Board in providing a remedy. However, in Calder, the Court of Appeal made clear that the potential availability of an alternative route to release via the Parole Board was not a reason in and of itself to refuse an application for judicial review. As Lord Thomas LCJ put it:

"A court will consider all the circumstances including the timescale within which the issue will be decided by the Parole Board and the strength of the submissions put forward to challenge the decision of the Secretary of State in the light of the threshold the Secretary of State has to meet to establish the lawfulness of the recall."

32. The Claimant urges caution in relying on the older cases on this issue. In R (Biggs) v Secretary of State for the Home Department [2002] EWHC 1012 (Admin), Richards J had said of the recall regime then in place:

"I agree that it will generally be inappropriate to challenge a recall decision of this kind on Wednesbury grounds. One is concerned here with an emergency procedure, involving the exercise of an extremely broad discretion by the Secretary of State. He is empowered to recall a person under section 39(2) where it appears to him that it is "expedient in the

public interest" to recall that person before a Parole Board recommendation under section 39(1) is practicable. A challenge on Wednesbury grounds is in reality most unlikely to succeed. In determining the reasonableness of the Secretary of State's view as to expediency of recall, the court will take into account the existence of the post-recall procedure which enables the merits of recall, and in particular the balance of hardship and risk, to be properly assessed by an expert body with the benefit of full information. Against that background the court will inevitably be very slow indeed to conclude that no reasonable decision-maker could recall a prisoner on licence in respect of whom grounds for concern have been expressed."

33. However, the recall in that case was emergency recall, which was subject to review by the Parole Board almost immediately (in that case recall was on 16 April 2022, the judicial review hearing was on 10 May 2022 and the Parole Board hearing was set for 13 May 2022). At the time of Biggs, standard recall occurred only when recommended by the Parole Board. In contrast, this case involves standard recall under the 2003 Act, which does not have Parole Board input before recall takes place. Further, whilst there is a process for review by the Parole Board as I have indicated, the recall took place on 10 February 2022, the parole board hearing is not listed until 30 September 2022. That timescale is such as to require the court to engage with the lawfulness of the recall now.
34. The Claimant further contends that recall was not necessary for the protection of the public and was disproportionate. He draws attention to the fact that, although alternatives to recall are said to have been considered in the Recall Report, the relevant section for the alternatives that have been considered (box 21) is not completed. Whilst the Claimant notes that Ms Burke says in her witness statement that alternatives were considered, Mr Bunting QC on his behalf invites the court to exercise caution in accepting explanations given after the event where, with the best will in the world, there may be a temptation to provide reasoning that seeks to justify the decision but does not in fact reflect what was in the relevant person's mind at the time. In particular, the Claimant notes that Ms Burke misstates the time of the Claimant's curfew in her statement (she says that it was until 8pm then change to 11pm, whereas in fact it was 9pm changed to 11pm), suggesting that it is unlikely that this factor was in the forefront of her mind when considering alternatives to recall.
35. The Claimant makes the following points to support the argument that recall was not proportionate:
 - 35.1. Whilst she expresses concern about the Claimant's drinking, this is not recorded either in the Recall report or in the OASys report prepared following his recall.
 - 35.2. Whilst Ms Burke contacted police and social services to investigate their concerns, it is clear from the letter from the Government Legal Department to the Claimant's solicitors dated 15 June 2022 that the police did not respond to express any concern and child social services said there was no open case relating to the children.
 - 35.3. Ms Burke's first report after recall (a 'Post Recall Risk Management Report') states that the Claimant could be managed in the community in Approved Premises.

The Defendant's Case

36. The Defendant contends that the relevant principles from the case law are as follows:

- 36.1. The Defendant draws from the decision of Richards J in Biggs (a case which predates the coming into force of the Criminal Justice Act 2003) that the Secretary of State must form a view on whether it is expedient in the public interest to recall the person before a recommendation by the Parole Board is practicable, and in circumstances where, if a recall is made, the case will be referred to the Parole Board for a full assessment in light of all relevant information, including written representations from the person recalled. That context tells strongly in favour of “*a rapid decision-making process, without extensive investigation or procedural elaboration.*” If the Secretary of State is presented with information suggesting that there is cause for concern, a decision to recall immediately and to allow matters to be examined fully by the Parole Board after recall, without probing far into the factual background before reaching a decision, cannot sensibly be regarded as an irrational response.
- 36.2. As to the Secretary of State relying on the assessment of the Probation Service, Elias J in R (Hare) v Secretary of State for the Home Department [2003] EWHC 3336 (Admin) (again a case that predates the Criminal Justice Act 2003) said at paragraphs 7 and 8 of his judgment:

“Underlying [the Claimant’s] argument is the premise that there is an obligation on the Secretary of State to go behind the information that is given to him in the probation reports. It seems to me that this is an unrealistic requirement. The Secretary of State here is acting pursuant to a power to recall somebody where he considers it expedient in the public interest that that should be done. I do not see, in those circumstances, that he must, prior to the exercise of that power, satisfy himself that the information that he has been provided with by the Probation Service is correct ... in any event it is plain that a decision by the Secretary of State to exercise his section 39 power will only very exceptionally be the subject of a successful challenge by way of judicial review. As Richards J pointed out in the case of Biggs ... the court will be very reluctant to interfere with the exercise of the Secretary of State’s discretion precisely because the decision of the Secretary of State is effectively subject to a review by the Parole Board, and the Parole Board is in a better position than the court to assess where the balance should lie between, on the one hand, the risk to the public, and, on the other, the interests of the prisoner.”

- 36.3. In Abedin v Secretary of State for Justice and West Midlands Probation Trust [2014] EWHC 78 (Admin), Collins J considered the duty of investigation by the Probation Service:

“[16] While a request [for recall] must be fair, it is reasonable for the supervising officer to form a view which may be adverse to a particular offender provided that that view is genuine and formed on reasonable grounds. ... The decision will be determined by consideration whether there was evidence upon which he could reasonably conclude that there had been a breach: see Gulliver.”

[17] There is no obligation to seek any further explanations from an offender or other person in such a case or, indeed, normally in any recall.”

- 36.4. In Ahmad v London Borough of Brent and others [2011] EWHC 80 (QB), Supperstone J analysed the circumstances in which the Administrative Court should intervene to quash a decision in this context. He said:

“(33) ... the circumstances in which the Administrative Court will contemplate quashing a decision to recall are extremely limited. In [Biggs], Richards J said:

‘24. I agree that it will generally be inappropriate to challenge a recall decision of this kind on Wednesbury grounds. One is concerned here with an emergency procedure, involving the exercise of an extremely broad discretion by the Secretary of State ...

33. In my judgment, if the court is to assess the rationality of a recall decision of this kind, it is essential to have due regard to the context and to focus attention on the actual information available to the decision maker ... If the Sentence Enforcement Unit is presented with information suggesting that there is cause for concern, a decision to recall immediately and to allow matters to be examined fully by the Parole Board after recall, without probing far into the factual background before reaching a decision, cannot sensibly be regarded as an irrational response.’

In [Hare] Elias J considered whether there is an obligation on the Secretary of State to go behind the information that is given to him in the probation reports. He said at para 7:

‘The Secretary of State here is acting pursuant to a power to recall somebody where he considers it expedient in the public interest that that should be done. I do not see, in those circumstances, that he must, prior to the exercise of that power, satisfy himself that the information that he has been provided with by the Probation Service is correct.’”

37. The Defendant contends:

- 37.1. The Recall Report went into sufficient and proportionate detail and reached a decision on Recall which was open to Ms Burke on the available evidence;
- 37.2. It was not incumbent upon the Probation Officer to consult the Claimant about the allegation of his developing relationship with CF, given the risk of serious harm to RM and her children;
- 37.3. There was no requirement for the Secretary of State to conduct his own investigation, since he was entitled to rely on the Recall Report;
- 37.4. Having reached the conclusion that the Claimant appeared to be in breach of his licence condition because of the failure to report the developing relationship with CF, Ms Burke was entitled to come to the conclusion that recall was proportionate.

38. In particular, the Defendant points to the authorities that discourage the court from interfering with the exercise of the discretion to recall, given that recall decisions are made in the context of *“a rapid decision-making process, without extensive investigation or procedural elaboration”* (per Richards J in Biggs at paragraph 33). The Defendant contends that the court should not impose a requirement to consult an offender in advance of a decision to request

recall since to do so would be to case too high a burden on the Probation Service and/or the Secretary of State in a context which might create extra risk to the public.

39. In oral submissions, the Defendant advanced the argument that, even if an error of law had occurred, the decision would not have been different in any event, such that the court should apply Section 31(2A) of the Senior Courts Act 1981 and refuse to grant relief. As I understand the reasoning, it is as follows:
- 39.1. Ms Burke was aware of the allegations made by RM about domestic violence.
 - 39.2. She could see from the exchange of messages between CF and RM that there was accusation and counter-accusation of them interfering in each other's lives.
 - 39.3. Given the assertion that the Claimant had previously withheld material from probation practitioners (see paragraph 15 of her statement) she was entitled to assume that he was probably lying about his relationship with CF.
 - 39.4. Further, given the history of domestic violence, the previous failed drug tests, and the evidence of alcohol abuse (see paragraph 12 of her statement) she was entitled to conclude that he posed a risk to CF and/or RM and their children and to conclude that recall was appropriate.
 - 39.5. Accordingly, had she reported the fact that the Claimant was denying a developing relationship with CF, she would still have recommended Recall and it is highly likely that the Secretary of State would still have recalled the Claimant, in which case the outcome for the Claimant would not have been different.
40. As to the proportionality of recall, the Defendant points to paragraph 47 of Jorgenson cited above and says that it suffices for the Secretary of State to focus on the issue of public safety and the necessity for recall. That is what occurred here.

Discussion

41. The authorities cited by both parties support the proposition that the court should be cautious as to interfering in decision-making in this sphere. This is understandable. Both the Probation Service and the Secretary of State are concerned in the recall process within which the issue of risk to the public is a central consideration. They are far better placed than the court is to assess such risk and correspondingly the court must exercise restraint in interfering with the decision-making process. Moreover, it would be undesirable and contrary to the principles set out in the authorities to impose a heavy duty of investigation and/or consultation before the power of recall is exercised. A Probation Officer preparing a report in this context is required to have regard to a range of material but to reach a decision that may have important implications for public safety.
42. That said, the undoubted requirement for there to be reasonable grounds to justify the decision to recall, coupled with the importance of operating a procedurally fair process of decision-making, means that the decision-maker and those providing information to the decision-maker must at the very least ensure that the material that is provided for the decision is reasonably accurate. In this case, that was not so. The Secretary of State was not told that the Claimant denied that he was in a developing relationship of a kind that might put him in breach of his licence condition. This rendered the Recall Report misleading.

43. It follows that it is not necessary to determine that the Defendant had a duty to consult with the Claimant in order to conclude that the decision-making here was procedurally unfair. Whilst a duty to consult might be argued to arise on the facts of this case, I would hesitate to conclude that it necessarily did. Ms Burke had material before her to suggest some risk to the safety of RM and her children. That might well have justified not consulting with the Claimant. But in the event, she did tell him of the allegation that had been made against him and she received his response. It is no doubt the case that Ms Burke did not believe the Claimant when he denied that he was in a relationship with CF (otherwise she would not presumably have recommended recall). There may have been good reason for this scepticism, though the reason is not explored within the Report other than by noting that the Claimant had not been forthcoming with professionals in the past. But the simple point is that not only was the Secretary of State not provided with any reason not to believe the Claimant's account, he was not provided with the Claimant's account itself.
44. In my judgment, a decision taken to recall the Claimant based on the assertion that he was in a developing intimate relationship with CF, taken without the knowledge that the Claimant denied such a developing relationship, is procedurally unfair in a way that may justify the court interfering by way of judicial review. This does not involve the court overstepping the mark by coming to its own conclusion on the factual material considered by Ms Burke or the court substituting its judgment for that of the Defendant on the material available and the risk posed by the Claimant. Rather, it involves the court requiring an appropriate degree of procedural rigour, in which the decision-maker is provided with the relevant material.
45. The Defendant's alternative argument, that notwithstanding any error of law, the decision would have been the same and therefore there would have been no difference in outcome for the Claimant is of some interest. I have set out my understanding of the reasoning at paragraph 39 above, though it must be said that, given that this issue was not dealt with in the Defendant's witness evidence and/or summary grounds, there is a degree of speculation here. The Claimant's argument that the decision to recall was unlawful because, by the time of the preparation of the recall report, Ms Burke knew that the Claimant was denying the relationship yet did not include reference to this in the report, was advanced orally but not in the grounds or skeleton argument. The Defendant had confirmed in her letter of 15 June 2022 that the Claimant had not been asked to give his account of the relationship before the decision to recall was made, albeit that she was aware that he was denying the relationship when she completed the report. Given that this evidence was available only shortly before the hearing, it is perhaps understandable that the significance of Ms Burke having been aware of the Claimant's denial but not having reported it to the Second Defendant in the Recall Report was not fully appreciated until the hearing itself. Thus, the Claimant had not raised the argument in advance that the decision was unlawful because of the failure to communicate the information about what the Claimant was saying. One could not criticise the Defendant for not having raised the counter argument that, notwithstanding any error of law, the decision would have been the same, but nevertheless the lack of relevant material within the Defendant's evidence and written submissions makes the case difficult to analyse.
46. There was certainly material available that might lead to the conclusion that, even if the Secretary of State had been aware of the Claimant's denial of the developing relationship, he would probably have recalled the Claimant. However, there is in my judgment insufficient to reach the conclusion that there probably would have been no difference in outcome, still less that it is *"highly likely that the outcome for the applicant would not have been substantially*

different if the conduct complained of had not occurred” (in the words of Section 31(2A) of the Senior Courts Act 1981.

47. The reasoning set out at paragraph 39 above does not take account of several features of the material before the court:
 - 47.1. Not only was the Claimant denying the relationship with CF, she was denying it too.
 - 47.2. Had CF been consulted, she apparently could have produced the full context of the social media exchanges with RM which might have cast some doubt on the interpretation being put on the comment “*I do talk to Matty.*”
 - 47.3. The photograph of the Claimant and CF is as consistent with a platonic relationship as it is with a developing intimate relationship.
 - 47.4. Whilst RM is recorded as saying that the developing relationship between the Claimant and CF was “*apparently ... all over social media*”, RM also stated that she herself had not accessed this material - this is bound to raise a question over what reliance could properly be placed on this alleged material.
48. The points made in the previous paragraph would have been apparent to anyone carrying out a brief investigation into the issue. It would not require a sophisticated or lawyerly enquiry of the type that Richards J stated in Biggs was not necessary for a recall decision. Had this material been explored it is difficult to know what assessment would have been made of it. So, whilst it may be that Ms Burke would have reached the same conclusion if she had considered all these matters, this is not a case where the court could say it is “*highly likely*” that the outcome would not have been materially different.
49. My conclusion on the argument that the decision-making process was unfair leads me to allow the application for permission and to quash the decision to recall the Claimant. This renders the other issues in this case academic.
 - 49.1. For reasons that I have considered above, I am not persuaded that the failure to ask the Claimant for his account of matters would necessarily have rendered this decision unlawful, but given that he was told of the accusation and did deny it, it is not necessary to explore the issue further.
 - 49.2. On the question of the proportionality of recall, I am not persuaded that recall, if lawful on procedural grounds, would have been unlawful on the grounds of proportionality. On the assumption that the Claimant’s recall was lawful because the Secretary of State was entitled to consider that he was in breach of licence condition, the Defendant was faced with a situation where the Claimant’s previous partner was raising issues which might legitimately have given rise to the conclusion that she had been the victim of domestic violence and where the Claimant was seemingly denying a developing relationship. I am not persuaded that it is disproportionate to recall a prisoner on licence in those circumstances.

Conclusion

50. For the reasons set out above, I am satisfied that the decision to recall the Claimant was unlawful. I have already made the necessary order relating to the Claimant's release as set out above.
51. It was agreed that the claim for damages for false imprisonment would be dealt with separately and I will make an order to deal with that and any other matters consequential upon this judgment.

APPENDIX 1 – SCREEN SHOTS

Screenshot 1:

Don't know why your both trying to play it down well I do know because you don't want social services well you do what I've just done for the past 12 months with them and you'll understand why I'm so fucking angry !!! He thinks he's clever he really isn't he's an high risk offender who's failed numerous drug tests and social services will be all over you so good luck

Talk about your kids you want to think about them hun !!

Don't you think I've been there and done that !!! My kids have been through the same, Do you know what I'm not sitting here arguing with you!! Your the pathetic one, that really needs to grow up!! Adding me on pathetic Instagrams to message me all the time! Who even does that these days!!! I'm leaving it there, don't need your shit

Screenshot 2:

Don't you think I've been there and done that !!! My kids have been through the same, Do you know what I'm not sitting here arguing with you!! Your the pathetic one, that really needs to grow up!! Adding me on pathetic Instagrams to message me all the time! Who even does that these days!!! I'm leaving it there, don't need your shit

Well your about to do it again leave it there

Screen shot the messages show them everyone , what I do in my spare time when I haven't got my kids had nothing to do with anyone or social services.

I think you find it does hun

But we will let them decide that

Okay leave it there arguing with you!! I'll be waiting for a call of them!! I'll happily speak to them goodnight

If you've been through it before you will know it does. Goodnight

Screenshot 3:

Oh I did just like you go out your way to add me on different profiles

Because your not woman enough to own it until I get your address now you want to talk to me on Instagram 😏

Fucking madness

Why you still here

Get my address happily go there where my mum lives and I'll get someone to pay you a visit!! And own it yeah I do speak to Matty

Screenshot 4:

boring!!! Go and get on with your own life and leave me the fuck alone

You get on with your life instead of meddling in mine

Your meddling in mine mate

And have been since that picture appeared so take yourself back out of it

██████ told you straight about me and Matty but you insisted on carrying on