Neutral Citation Number: [2019] EWCA Civ 1954

Case No: C1/2017/1357

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Holroyde
[2017] EWHC 658 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2019

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE SIMON
and
LADY JUSTICE THIRLWALL

- -

Between :

DESMOND SHIELDS-McKINLEY	**Appellant**
- and -	
THE SECRETARY OF STATE FOR JUSTICE **THE LORD CHANCELLOR**	**Respondent**
- and -	
THE CROWN COURT AT DERBY	**Interested Party**

- -
- -

Mr Philip Rule & Mr Ian Brownhill (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Mr Myles Grandison (instructed by **Government Legal Department**) for the **Respondent**
Hearing dates : 30th and 31st October 2018

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Approved Judgment

PRESIDENT OF THE QUEEN'S BENCH DIVISION:

1. The appellant, Desmond Shields-McKinley, appeals against the dismissal of his application for judicial review by Mr Justice Holroyde (as he then was) on 5 April 2017.

2. The complaint in these proceedings arises out of the failure to credit the appellant with the time he had spent on remand in custody in Germany whilst awaiting his extradition to the United Kingdom, for the purpose of calculating his release date in respect of his sentence imposed post-extradition and conviction, in this jurisdiction.

3. For the reasons that follow, I would dismiss this appeal.

The legal framework

4. The relevant provisions of domestic law engaged by the claim are contained in the Criminal Justice Act 2003 (the 2003 Act) as amended by certain provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): those provisions came into force on 3 December 2012. Specifically we are concerned with sections 240ZA, 242 and 243 of the 2003 Act as amended, and the relationship of those provisions with the European Arrest Warrant Framework Decision (2002/584/JHA) (the Framework Decision) adopted on 13 June 2002.

5. Article 34(2) of the Treaty of the European Union provides so far as is material:

> "The Council shall take measures and promote co-operation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of objectives of the Union. To that end, acting unanimously on the initiative of any member state or of the commission, the Council may-…(b) adopt Framework Decisions for the purpose of the approximation of the laws and Regulations of the member states. Framework decisions shall be binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect."

6. Article 1 of the Framework Decision, headed "General Principles" provides that:

> "Definition of the European arrest warrant and obligation to execute it
>
> 1. The European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
>
> 2. Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

> 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the Treaty of the European Union."

7. Article 26 of the Framework Decision headed "Deduction of the period of detention served in the executing Member State" provides that:

> "1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.
>
> 2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."

8. Prior to its repeal by LASPO, section 240 of the 2003 Act provided (in summary) that days spent in custody prior to sentence in relation to a particular offence, could count as time served as part of the sentence, provided a court gave a direction to that effect and stated in open court the number of days in relation to which the direction was given.

9. Parliament decided in LASPO that, in general, the amount of time spent on remand in custody was to count as time served as part of the sentence and the calculation of this should be carried out administratively. This was achieved by repealing section 240 and inserting section 240ZA[1] into the 2003 Act. Section 240ZA of the 2003 Act provides in part that:

> "(1) This section applies where—
>
> (a) an offender is serving a term of imprisonment in respect of an offence, and
>
> (b) the offender has been remanded in custody (within the meaning given by section 242) in connection with the offence or a related offence…
>
> (3) The number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by the offender as part of the sentence…"

[1] Sections 108(2), 151(1) (with Sch. 15); S.I. 2012/2906 art. 2(d).

10. Further, section 242 (headed Interpretation of sections 240ZA, 240A and 241) now provides that:

> (1) For the purposes of sections 240ZA**,** 240A and 241, the definition of "sentence of imprisonment" in section 305 applies as if for the words from the beginning of the definition to the end of paragraph (a) there were substituted—
>
> ""sentence of imprisonment" does not include a committal—
>
> (a)in default of payment of any sum of money, other than one adjudged to be paid on a conviction,";
>
> and references in those sections to sentencing an offender to imprisonment, and to an offender's sentence, are to be read accordingly.
>
> (2)References in sections 240ZA and 241 to an offender's being remanded in custody are references to his being—
>
> (a) remanded in or committed to custody by order of a court,
>
> (b)remanded to youth detention accommodation under section 91(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, or
>
> (c) remanded, admitted or removed to hospital under section 35, 36, 38 or 48 of the Mental Health Act 1983 (c. 20)."

11. The amendments to the regime for crediting time spent on remand were made for the reasons explained by Lord Thomas CJ in *R v Leacock* [2013] EWCA Crim. 1994:

> "2. …Until the coming into force of [LASPO] on 3 December 2012, as is well-known, a number of problems arose in relation to the provisions of section 240 of the Criminal Justice Act 2003 under which the court had to specify the amount of time spent on remand that was to count as time served as part of the sentence. Insufficient dialogue had occurred prior to its enactment as to the practicality of the provision. It soon became clear that, at the time of sentence, mistakes were often made as to the period of time which had been spent on remand and the error was not discovered until after the 28/56 day period within which the sentencing court could correct the error under s.155 of the Powers of Criminal Courts (Sentencing) Act 2000, often referred to as the slip rule.

3. As the correction of errors by an appeal process was a disproportionate use of the scarce resources available to the judiciary, this court devised a way of dealing with the problem. In *R v Gordon* [2007] EWCA Crim 165, this court in a judgment of the Court delivered by the President of the Queen's Bench Division, Sir Igor Judge, made clear that a sentencing court, when it passed sentence and intended that the full period on remand should count, should use words to enable an error to be corrected by the clerk at the Crown Court; ... A suggested formulation was put forward. In *Nnail and Johnson* [2009] EWCA Crim 468 this court further refined that formulation: see also *R v Boutell* [2010] EWCA Crim 2054…

5. It has always been the duty of defence advocates to ensure that proper information about their client relevant to sentence was before the sentencing court. This included information about the period of time spent on remand or under a qualifying curfew. If it was concluded that an error had been made by the sentencing court, it was the duty of defence advocates to apply to this court within the strict time limits applicable. It was against this background that in *R v Irving and Squires* [2010] EWCA Crim 169, the then Vice-President (Hughes LJ) made clear at paragraph 13 that steps should be taken to deal with the ever increasing number of cases where errors had been made. Solicitors and counsel must specifically ask the defendant whether he had been the subject of tagging. Furthermore:

> "This court should, we think, scrutinise with some particularity applications for long extensions of time when the sole complaint is an error of calculation relating either to section 240 or section 240A. We have it in mind that prisoners are usually provided with their earliest date of release, that is to say when they are eligible for release on licence early and often very early in their sentence. Most prisoners, but not all, have a pretty good idea of when it ought to be. If a major error has been made they are likely to spot it. If the error is a matter of a very few days that might not be spotted but the consequences are much less serious. It ought not to be expected that this court will routinely grant long extensions of time to correct such errors when no one has applied his mind to the issue until long after the event. As always, if a defendant wishes to seek to appeal he must get his application lodged promptly. We sympathise with the position of counsel and solicitors but it will not be enough to obtain long extensions of time that counsel or solicitors accept that they also missed the point. We do not say that no extensions will be granted, but they should be scrutinised in future with care."

> 6. As this court had urged on many occasions, Parliament decided in LASPO that in general the calculation of time on remand should be carried out administratively. On 3 December 2012 the relevant provisions of LASPO came into effect. Section 240 of the 2003 Act was repealed and s.240ZA was inserted into the CJA 2003. With effect from the same date s.240A was amended; it did not make the calculation of days under the qualifying curfew automatic; it remained necessary for the court to make a direction. The effect of the provision was clearly explained by Sweeney J in *R v Hoggard* [2013] EWCA Crim 1024 at paragraph 23…"

12. It is to be noted that in *R v Thorsby* [2015] EWCA Crim 1, [2015] 1 WLR 2901 it was held that where a defendant was denied his statutory right to credit for days on qualifying curfew, and bore no responsibility for that failure, the Court of Appeal, Criminal Division was likely to take steps to correct the error even when a significant extension of time to appeal against sentence was required. However, where the applicant, with knowledge of the error, failed to act with due diligence to make the application for an extension of time, the position was likely to be different.

13. In the case of an extradited prisoner, by virtue of section 243(1) and (2) of the 2003 Act, as originally enacted, section 240 applied to days spent on remand in custody awaiting extradition. Section 243(2) provided that "In the case of an extradited prisoner, section 240 has effect as if the days for which he was kept in custody while awaiting extradition were days for which he was remanded in custody in connection with the offence, or any other offence the charge for which was founded on the same facts or evidence."

14. Section 243 was amended by LASPO with effect from 3 December 2012,[2] in this case by the insertion of a new subsection (2) and (2A).

15. Section 243 of the 2003 Act, as amended, now provides (and provided when the appellant was sentenced) in respect of persons extradited to the United Kingdom as follows:

> "Persons Extradited to the United Kingdom
>
> > "(1) A fixed-term prisoner is an extradited prisoner for the purposes of this section if—
> >
> > (a) he was tried for the offence in respect of which his sentence was imposed or he received that sentence —
> >
> > (i) after having been extradited to the United Kingdom, and
> >
> > (ii) without having first been restored or had an opportunity of leaving the United Kingdom, and

[2] See section 110(8) of LASPO; and Article 3 of the Extradition Act 2003 (Repeals Order 2004 (SI 2004/1897 and paragraph 31 of Schedule 13(2) to the Police and Justice Act 2006.

> (b) he was for any period kept in custody while awaiting his extradition to the United Kingdom as mentioned in paragraph (a).
>
> (2) In the case of an extradited prisoner, the court must specify in open court the number of days for which the prisoner was kept in custody while awaiting extradition.
>
> (2A) Section 240ZA applies to days specified under subsection (2) as if they were days for which the prisoner was remanded in custody in connection with the offence or a related offence." (emphasis added).

16. The upshot is that at the same time that Parliament removed the obligation for the court to make a direction specifying in open court the number of days spent on remand in custody in this jurisdiction to count towards the sentence to be served, it inserted a positive requirement for such a direction to be made for prisoners who had been extradited to this jurisdiction, in respect of the days they had spent in custody abroad while awaiting extradition. As Lord Thomas CJ pointed out at para 6 of *Leacock*, at the same time, Parliament also preserved the requirement for the court to make a direction in open court, specifying the number of days spent on qualifying curfew to count as time served[3].

The factual and procedural background

17. The facts found by the judge are set out in the judgment below and can be briefly summarised.

18. The appellant committed a number of serious crimes in this jurisdiction and left the country. In July 2012 he was arrested on a European Arrest Warrant (EAW) in Germany. After spending 50 days on remand in custody in Germany, that is, from 18 July 2012 to 6 September 2012 (the Germany days) the appellant was extradited to this jurisdiction, where he remained in custody pending his trial. In December 2013 the appellant was convicted after a trial before Mr Recorder Elson (the recorder) at the Crown Court sitting at Derby, of a number of serious sexual offences, the victim of the offences being a boy under the age of 13.[4] On 31 January 2014, at the same court, he was sentenced by the recorder to a total extended determinate sentence of 8 years, pursuant to section 226A of the 2003 Act, comprising a custodial term of 4 years, with an extended licence period of 4 years. At the time of his sentence, the appellant had spent 511 days on remand in custody in this jurisdiction, that is, between 7 September 2012 and 30 January 2014 (this unusually lengthy period resulted in part from his decision to dispense with his legal representatives, shortly before 21 January 2013, the original date fixed for his trial and to make a successful application for an adjournment in order to obtain fresh representation).

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[3] See section 240A(8) of the 2003 Act (as amended by section 109(4)(a) and section 151(1) (with Schedule 15) of LASPO; and SI 2012/2906, art.2(d)).

[4] He was convicted of seven counts, contrary to either sections 9(1), 10(1) or 11(1) of the Sexual Offences Act 2003, offences listed in Schedule 15B of the CJA 2003.

19. The recorder said nothing in his sentencing remarks about the time that the appellant had spent on remand in custody in this jurisdiction. The legislative changes made to the 2003 Act by LASPO meant there was no longer any requirement for him to do so. Those days were automatically credited.

20. As for what had happened in Germany, the fact of the appellant's arrest in Germany was briefly mentioned in the pre-sentence report. The report simply said that the appellant had been remanded in custody, following his arrest in Germany and his subsequent arrival in the UK in July 2012. As the judge was later to observe, this may have given the erroneous impression that any period of detention in Germany must have been extremely brief. However that may be, the recorder was not told by counsel for the defence or for the prosecution, that the appellant had spent time on remand in custody in Germany before his extradition and nothing was therefore said about the Germany days in the recorder's sentencing remarks.

21. The judge made some pertinent observations about these matters at paras 24 to 26 and para 32 of the judgment below. He noted that as recorded in the Acknowledgement of Service, the recorder, when asked about these matters in connection with these proceedings, said that if anyone on the appellant's side had drawn his attention to the point, and presented him with the appropriate evidence, he would have given the appellant credit for the time spent on remand in Germany. The judge said it was difficult to understand why the recorder was not told as the relevant statutory amendments had been in force for at least a year and both prosecuting and defence counsel owed professional obligations to assist the recorder with all relevant sentencing material. The judge said there was however no clear evidence about what the lawyers did and did not know about the Germany days. There was no information before the judge either, as to whether the German authorities had provided information about the appellant's detention, in accordance with what was required by Article 26.2 of the Framework Decision. The appellant of course did know he had been detained there. The judge said he would have expected the appellant to mention that fact to his lawyers even if he did not know the precise dates or legal effect of his detention abroad. Prior to the commencement of these proceedings, Counsel who had represented the appellant before the Crown Court had, sadly, died, and it had not been possible to obtain any information from prosecution counsel or the appellant's former solicitors as to why the issue of the Germany days had not been raised at any material point.

22. The judge observed that the appellant's former counsel was under a professional duty to advise him on the merits of an appeal against sentence and that given no application for leave to appeal sentence had been made at the time, it must be inferred that either such advice was in negative terms, or that the appellant indicated that he did not wish to appeal. The important point for present purposes however, the judge said, was that the giving of advice on a potential appeal provided another opportunity, in addition to that available under the slip rule, for the appellant's representatives to take steps to remedy the omission to specify the Germany days as part of the sentencing procedure. An application for permission to appeal could have been made without leave 28 days after the sentence was imposed or by applying for extension of time in which to appeal. The judge noted that no such application had ever been made to the Court of Appeal, Criminal Division. He expressed surprise that this had not been done in March 2015, when the appellant was engaged in correspondence relating

to an issue as to whether the recorder had recommended deportation; nor, even more surprisingly, said the judge, in April 2016, when the appellant's solicitors first raised the issue of the Germany days with the respondents (see para 24 below). He said no satisfactory explanation had been given as to why that obvious course was not taken.

23. Shortly after the appellant's sentence, in accordance with normal practice, Her Majesty's Prison and Probation Service (the Prison Service) calculated the appellant's automatic release date. This was done by reference to the period of 511 days that the appellant had spent on remand in custody in the United Kingdom. On that basis, the date for automatic release was calculated as 6 September 2016. The appellant was given this information on a copy of the Release Dates Notification slip (also called the sentence calculation sheet) dated 3 February 2014. At the stage when it did this calculation, the Prison Service did not know, and had no reason to know on the face of the Order of the court or otherwise, about the Germany days. Had those days also been credited against the time to serve, the appellant's release date would have been calculated to be on or about 17 July 2016, rather than 6 September 2016.

24. On 4 April 2016, so more than 2 years after his sentence was imposed, and some 4 years after his extradition, the appellant's solicitors sent a letter before action to the Prison Service which, for the first time, raised the issue of the Germany days, and the effect this would have on the appellant's release date. The letter invited the Prison Service to withdraw the flawed sentence calculation sheet and to provide an "updated" release date. It said (incorrectly because it overstated the period by 7 days) that the appellant had been held in custody in Germany between 11 July 2012 and 6 September 2012 awaiting extradition to the United Kingdom and that had the Prison Service taken into account the time spent in custody awaiting extradition, his release date would be "July 2016". The letter did not identify the evidence the appellant had to demonstrate that he had in fact been remanded in custody in Germany during that period. It did not specify a precise date for the appellant's release. It did not say either that the appellant and his (new) legal team did not have the evidence about this and needed to be supplied with it.

25. On 12 April 2016, the Sentence Calculation Policy Lead at the Ministry of Justice, Ms Scott, responded to the letter before action saying that the "Prison Service cannot credit the time unless it has been directed to count by the sentencing court. The sentencing court must establish how much of the time was spent in custody solely pending extradition and direct the number of days accordingly." The appellant was advised "to approach the courts and request that they urgently send an amended Order of Imprisonment to the Prison Service that details how many days they are directing to count under s243." The problem with this "alluringly simple approach" as the judge described it, however, was that by that stage more than the 56 days had elapsed from the date of sentence and the Crown Court therefore had no power under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000 (the slip rule) to vary the sentence to rectify any error or omission: it was *functus officio*.

26. On 13 April 2016, the appellant's solicitors wrote to the Crown Court at Derby, asking for an "urgent amended order of imprisonment directing how many days [the appellant] had spent abroad". The letter stated that without such a direction, the Prison Service would not be able to credit such time, and gave a different and incorrect period for the time the appellant had spent in custody (of 3 months, from July to September 2014) to that given in the letter before action. The judge said it was not

clear why an incorrect period was given, and one that was different to that given in the letter before action. It appears, regrettably, said the judge, that there was no response to this letter. The judge accepted from Mr Rule that there had been some further correspondence with Derby Crown Court. Of that, we have seen three documents: a letter of 24 June 2016 from the appellant's solicitors, which asked for disclosure of the appellant's EAW and Memorandum of Conviction, a response from the Crown Court on the same day, asking on what authority this information was requested and a subsequent email to the Crown Court from the appellant's solicitors, undated, repeating the request for the Memorandum of Conviction. The email of the 24 June 2016 said in terms, that applications for permission to appeal against sentence, for judicial review, for a writ of habeas corpus and a claim for false imprisonment were being contemplated.

27. In the event however, these proceedings for judicial review were not commenced until 11 August 2016, so some 25 days after the period when the appellant would have been released from custody, had the Germany days been credited. The judge said it was not clear to him why the appellant had waited until the (legal) vacation before commencing proceedings, despite knowing that the time when he contended he should be released was in July.

28. The issue of proceedings (including an application for the writ of habeas corpus and interim relief) prompted further urgent inquiries by Ms Scott which (with the assistance of the National Crime Agency) produced a response from the German authorities. This said: "There are no data in our files concerning a detainment of the subject in Germany". Further, Derbyshire Police on 17 August 2016 said they could only confirm the date of the appellant's arrest in Berlin and of his extradition to the United Kingdom but not that the appellant was held in custody whilst awaiting extradition. It was not until the 23 August 2016 that the National Crime Agency received from the German authorities the information that the appellant had been "provisionally detained pending extradition" in Germany from 18 July 2012 to 6 September 2012. An urgent application for a writ of habeas corpus on behalf of the appellant was then heard and granted on 26 August 2016 by Holgate J, when only limited time was available for the hearing, who directed that the rolled up hearing of the claim for judicial review be adjourned.

29. The judicial review claim was heard by Holroyde J on 9 February 2017. He granted permission to apply for judicial review but dismissed the claim: see [2017] EWHC 658 (Admin).

30. The essence of the claim made to the judge was that the appellant should have been released from custody on or about 17 July 2016, that he had been wrongly detained thereafter due to a failure to apply a mandatory statutory provision, and that he was entitled to redress for wrongful detention.

31. The judge rejected the claim on all grounds. In addressing the case made by the appellant, he held this was not a case where the Order made by the court that passed sentence could be the subject of administrative correction by the Prison Service (as it was argued it could be, by analogy with the process for correcting days pronounced in open court, identified in *Gordon* at para 56). Further, the judge rejected the appellant's argument that the Secretary of State was under a duty by virtue of sections 240ZA and 242 of the 2003 Act to perform the sentencing calculation correctly,

regardless of what the sentencing court has said and even if it was contrary to the court's Order. At para 68 the judge said:

> "Section 240ZA only applies to days in detention abroad which have been specified under section 243(2). If no such days are specified in open court, in accordance with section 243(2), then no such days can be taken into account under section 240ZA(3). Here, the omission to specify the Germany days did not render the sentence imposed on the claimant unlawful."

32. The judge accepted, at para 73, that he was bound by the *Pupino* [5] principle of conforming interpretation to give effect to the Framework Decision when interpreting the relevant provisions of the 2003 Act, to the extent that it is possible to do so without contradicting the clear intent of the legislation. However the judge did not accept that this meant he could interpret section 243(2) of the 2003 Act in line with the 'clear purpose' of the Framework Decision, so that a person should be given credit for the whole period during which he was awaiting extradition, regardless of what was said by the sentencing court. The judge decided that section 243(2) is not inconsistent with the aim of Article 26.1 of the Framework Decision. He said at para 77 that the Framework Decision "says nothing about the procedure by which the relevant period is to be identified". Moreover, he identified "an obvious and important" reason for the requirement in section 243(2), namely that without such a pronouncement, the Prison Service has no definitive statement as to the number of days for which credit must be given. It does not have access to records in relation to time spent in custody abroad, and in the absence of a clear statement and records there is scope for uncertainty and disagreement. He went on to say, at para 78, that even if section 243(2) was inconsistent with the aim of Article 26 of the Framework Decision, he could not see how the plain words of the section could be read in the way suggested by the appellant. Such a reading would clearly be *contra legem*, and would raise practical administrative problems, including those already mentioned.

33. Article 5 of the of the Convention for the Protection of Human Rights and Freedoms (the Convention) provides in part:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a) The lawful detention of a person after conviction by a competent court;…4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

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[5] *Criminal Proceedings against Pupino* (Case C-105/03) [2006] QB 83 and see *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344

34. In relation to the claim that the appellant's detention infringed his rights under Article 5 of the Convention, the judge did not accept there had been a "gross and obvious" error on the part of the Crown Court, in particular, because there had been no submissions to the recorder about the Germany days at the time of sentence; nor did the judge accept there had been an error of law on the part of the Prison Service. It would, he said, have been constitutionally improper for the Prison Service to amend or ignore the Order made by the Court; and permitting the Prison Service (or a member of the Crown Court office staff) to override the order made would circumvent the proper appeal procedure. As to that the judge noted that he had been given no explanation for the appellant's failure to pursue an appeal against sentence or, even at this stage, to apply for an extension of time to make such an application.

35. The judge rejected the submission made in the alternative that the appellant's detention after 17 July 2016 was unlawful because the respondents should have exercised the powers available under section 248 of the 2003 Act which permit the release of prisoners in exceptional circumstances on compassionate grounds.[6] The judge held that section had no application on the facts. Finally, the judge also rejected the submission that this was a case for the exercise of the Royal Prerogative of mercy, holding that this would, in effect, circumvent the proper appeal procedure, which was not desirable. In any event, he said the appellant had only raised the issue of the Germany days in early 2016, the German authorities had only provided a definitive answer on the question shortly before the appellant's release and there had been no culpable delay on the part of the respondents in investigating the matter.

The Grounds of Appeal

36. We need not trouble with an argument raised below that the Framework Decision is of direct effect in domestic law. As Lewison LJ said, when refusing permission to appeal on that ground:

> "The CJEU has held both in *Ognyanov*[7] and in *Poplawski*[8] that the Framework Directive is not directly applicable. *Cretu* does not hold to the contrary. All that *Cretu* decides is that since 1 December 2014 the UK is bound to apply a conforming interpretation to its own domestic legislation; see [17]. Ground 1 has no real prospect of success."

37. It is said however that the judge was in error in dismissing the claim for judicial review for the following reasons. First, it is possible and necessary, applying the principle of conforming interpretation, to construe sections 240ZA, 242 and/or 243 of the 2003 Act to ensure that the state "shall deduct all periods of detention arising from

[6] Section 248 (1) provides that: "The Secretary of State may at any time release a fixed-term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds."

[7] *Criminal Proceedings against Ognyanov* Case C-544/14 [2017] 2 WLR 1249.
[8] *Criminal Proceedings v Poplawski* [2017] 4 WLR 173.

the execution of a European arrest warrant from a total period of detention to be served" as required by Article 26.1 of the Framework Decision. Secondly, the lack of a direction pursuant to the obligation in section 243 of the 2003 Act does not preclude the crediting of time pursuant to section 240ZA. Thirdly, in the alternative, the Secretary of State is bound to credit the days by application of the Royal Prerogative of mercy. Fourthly, the failure to credit the Germany days resulted in a period of additional and arbitrary detention in violation of Article 5 of the Convention. Finally, the judge's conclusions were erroneous because he failed to take into consideration material facts.

38. In developing those grounds in detail, Mr Rule's principal submissions can be summarised as follows. First, the interpretation principle is a strong one and accords with the strong presumption that the domestic law will accord with international obligations and substantive conformity should look beyond mere technical requirements: see for example *Goluchowki v District Court in Elblag* [2016] 1 WLR 2665, SC at paras 44 to 45. In the circumstances, it is said that a conforming interpretation is possible; and/or that practicalities or technicalities should not be permitted to impede a conforming interpretation. Further, it is not impermissible to 'by-pass' the requirement of a direction pursuant to section 243 of the 2003 Act by an accurate administrative correction or an acceptance of time post-sentence: see *Gordon*; *Leacock*; *R v Collier* [2013] EWCA Crim 1132 and *R (Archer) v HMP Low Newton* [2014] EWHC 2407.

39. Secondly, Mr Rule submits section 242(2)(a) of the 2003 Act defines "time remanded by court order" in a manner that can include both the English and German Courts. Post LASPO, there no longer exists any judicial discretion or power retained over time spent on remand. Thus, Mr Rule argues, any error made by the sentencing court cannot affect the Prison Service's duties under sections 240ZA and 242. In this connection, Mr Rule refers amongst other things, to the Prison Service Policy Statement which contains the advice that "the Court of Appeal made it clear that under Section 240ZA the Prison Service must automatically credit any relevant remand even where it had previously been directed not to count by the court".

40. Thirdly, if it is not possible to credit the days spent in detention on remand by applying the interpretative approach, then Mr Rule submits a legal duty arises by virtue of Article 26.1 of the Framework Decision to deduct the Germany days by applying the Royal Prerogative of mercy. This would not, so it is said, circumvent the approach to 'out of time' criminal appeals. This is an unusual situation where the offender could not be expected to know the law better than his lawyers or the judge and the Royal Prerogative is in any event always available even where alternative appeal routes exist. Further, whilst accepting the correct number of days to credit would have to be ascertained for the prerogative powers to be exercised, Mr Rule disputes the judge's finding that there was regrettable delay but no culpable failure by the respondents to ascertain this information after the letter before action was sent; alternatively he submits the "state authorities" were duty bound to make reasonable inquiries to ascertain it.

41. Fourthly, it is said that the sentencing procedure in this case suffered a gross and obvious irregularity because of the failure to apply a mandatory statutory provision. The detention was accordingly a violation of the appellant's rights under article 5 of the Convention or was arbitrary in any event: see *Wright v Lord Chancellor* [2015]

EWHC 1477 (QB). It was wrong in principle Mr Rule argues, to exclude 'the state's liability' for a judicial error (which consisted of not applying the law, rather than a mistake in attempting to apply the relevant law) because of errors by the appellant's legal representatives and those of the Crown Prosecution Service; and once the respondents were aware that there was no lawful basis to detain the appellant, he ought to have been released forthwith.

42. Finally, the judge, so it is said, failed to take account of material matters, particularly repeated steps taken by the appellant's legal team to obtain confirmation of the evidence to support the claim from 'state bodies' before the claim was issued.

Discussion

43. It is uncontroversial that when applying national law, the national court that is called upon to interpret it must do so as far as possible in light of the wording and purpose of any material framework decision in order to achieve the result which the framework decision pursues (the conforming principle). That principle is not absolute however and has its boundaries including that the obligation on a national court to refer to the content of a framework decision when interpreting domestic law, and cannot serve as the basis for an interpretation of national law *contra legem*: see *Pupino* at para 47. See further, *Joao Pedro Lopes Da Silva Jorge (Case C-42/11)* at para 55 and *Poplawski* at para 33. The clear intention of Parliament expressed in unambiguous language in section 243(2) is that in the case of an extradited prisoner, section 240ZA only applies to days in detention abroad which have been specified under section 243(2); and that in the absence of such a specification, those days cannot be taken into account under section 240ZA(3). The judge was right to hold in those circumstances that a conforming interpretation cannot be applied so as to lead to any different conclusion, for to do so would be to interpret *contra legem*.

44. Mr Rule submits that in order to achieve compliance with Article 26.1 of the Framework Decision, the requirement under section 243(2) of the 2003 Act must be read down as a mere technicality which may be ignored. I do not agree with that submission, or with its premise, which is that such a step is required to achieve substantial compliance. Section 243 is not incompatible with the Framework Decision merely because there was a failure in this case to specify the Germany days in open court, or a failure on the part of the appellant to pursue the legal avenues available to him to put the matter right. It is not necessary in my opinion, to refer the question of compatibility raised by the appellant to the CJEU as Mr Rule invites us to do.

45. Article 34(2)(b) of the Treaty of the European Union explicitly leaves the choice and form of methods to achieve the result [pursued by the particular framework decision] to Member States. The Framework Decision in this case says nothing about the domestic procedure by which the relevant days are to be identified. Parliament is therefore free to create a means by which Article 26 of the Framework Decision is given effect domestically. This is what section 243(2) does. The requirement that the relevant days be specified is not one that is onerous or difficult to fulfil such that it frustrates the objective of the Framework Decision, nor does it "impede" a conforming interpretation

46. As the judge pointed out the requirement serves a distinct purpose. Without a pronouncement by the Court, the prison governor has no definitive statement of the

number of days in custody awaiting extradition for which credit must be given when calculating the release date. As the facts of this case illustrate, in the absence of such a statement, there would be considerable scope for uncertainty and disagreement in circumstances where, in contrast to the position where a defendant is remanded in custody in this jurisdiction, the Prison Service has no access to the records of days spent in custody awaiting extradition and cannot therefore make the calculation itself. In this respect, the position is analogous to that which arises where days on bail are spent subject to a qualifying curfew. Further, as the judge said, the submission that the legislative requirements should, in effect, be side-stepped or ignored, fails to address how the correct number of days should be identified, or by whom or at what stage or who would resolve any dispute about the days to be counted and by what procedure.

47. The argument that credit for the number of days spent in detention abroad can be given administratively, notwithstanding the clear meaning of section 243(2), is a flawed one in my view. Contrary to the submissions made by Mr Rule, the reasoning in *Gordon* and the line of authority that followed it, undermines rather than supports the case for the appellant. In the face of an express and similarly worded requirement for a pronouncement in open court under the pre-LASPO regime, the solution then identified by the court when errors were made as to calculation, was not to ignore the plain words of the statute and recast the decision as a wholly administrative one - such a step could only be taken by amending the legislation, as Parliament did through LASPO - but to find a form of words which meant the order made by the court was a temporary one, permitting a later administrative correction where necessary. No such form of words was used in this case. In addition, as noted by the judge at para 67, the cases of *Collier* [2013] EWCA Crim 1132 and *R (Archer) v. HMP Low Newton* relied on by Mr Rule in this context, do not assist in the interpretation of section 243 of the Act. Those cases pertain to section 240ZA of the 2003 Act, a provision under which Parliament has determined that the sentence calculation is an administrative task, and illustrate the duty the Prison Service is under in its application of that section.

48. I am not persuaded by Mr Rule's third and alternative interpretative route to arriving at the result for which the appellant contends, namely that section 242(2)(a) of the 2003 Act defines "time remanded by court order" for the purposes of section 240ZA in a sufficiently broad manner so that it can include remands in custody by both the English and German Courts, with the consequence that a failure to make a direction compliant with section 243 does not preclude the crediting of days spent in custody abroad.

49. It is not clear that this submission extends to suggesting that Parliament could in this jurisdiction, compel courts in Germany to specify in open court, the number of days spent on remand in custody pursuant to an EAW. However that may be, the judge succinctly encapsulated at para 49, the reasons for rejecting Mr Rule's submission:

> "First, [Mr Rule] says that CJA 2003 s240ZA entitles the Claimant to credit for the time when he was "remanded in custody"; and s242(2)(a) defines that phrase as meaning "remanded in or committed to custody by order of a court". He sought to argue that the reference in s242(2)(a) to the order of "a court" is not expressly limited to a court in England and Wales, and therefore extends to any court in any jurisdiction. Mr Rule cited no authority in support of that submission, and I

> am unable to accept it. If Parliament had intended a court in this country to take into account periods of remand in custody in any jurisdiction it would in my view have used much clearer language to that effect. Moreover, it seems to me that if Mr Rule's submission were correct, then section 243 of CJA 2003 would serve no purpose. Mr Rule also argued that the reference to a court order in s242 is satisfied by the order made fo[r] the EAW by the Magistrates' Court in Leicester on 11th May 2012. Reliance was placed on the free movement of judicial decisions in the Framework Decision so that this domestic court order engages s242. Again I am unable to accept that submission."

50. I turn next to the appellant's contention that the Secretary of State was bound to credit the Germany Days by application of the Royal Prerogative of mercy.

51. At paras 82 and following, the judge said this:

> 82. The defendant's prerogative power to release a prisoner is set out, under the heading "Special Remission", in Ch.13 of instructions issued by the National Offender Management Service in relation to the calculation of determinate prison sentences. Chapter 13 of the instructions, which were reissued in December 2015, relates to "errors in calculation". The chapter begins as follows:
>
> "13.1 Errors in Calculation
>
> 13.1.1 If a mistake in a calculation is found which changes a prisoner's release date, immediate action must be taken to rectify the mistake. If there is any doubt, the sentence calculation helplines must be consulted before the release dates are changed."
>
> The instructions specifically consider what should be done if correction of an error in calculation results in a release date being deferred. Paragraph 13.1.4 provides:
>
> > "Where a prisoner has been given to understand for several months that he or she will be released on a date *before* the correct release date, consideration must be given to whether the sentence imposed should be served up to the correct release date or whether the period in question should be cancelled out by the exercise of the Royal Prerogative of Mercy (sometimes referred to as 'special remission'). The decision whether to seek the exercise of the Royal Prerogative in such cases must take account of the relevant circumstances, balancing the expectations or distress of the prisoner and his or her family against the obligations on the Prison Service to ensure that the sentence of the court is

> implemented. The Royal Prerogative cannot be exercised lightly: each case must be carefully considered on its individual merits."

85 The Royal Prerogative of mercy was considered by a Divisional Court in *R v Secretary of State for the Home Department Ex parte Bentley [1994] Q.B. 349*. The court held that decisions taken under the Royal Prerogative may be susceptible to judicial review. At 365C–365D Watkins LJ, giving the judgment of the court, said

> "… it is an error to regard the prerogative of mercy as a prerogative right which is only exercisable in cases which fall into specific categories. The prerogative is a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. We would adopt the language used by the Court of Appeal in New Zealand in *Burt v Governor-General [1992] 3 N.Z.L.R 672, 681* : 'the prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchical right of grace and favour.' It is now a constitutional safeguard against mistakes. It follows, therefore, that, in our view, there is no objection in principle to the grant of a posthumous conditional pardon where a death sentence has already been carried out. The grant of such a pardon is in recognition by the state that a mistake was made and that a reprieve should have been granted."
>
> …

87 As to the power to order release under the Royal Prerogative, I agree with Mr Rule that it is in principle engaged by the circumstances of this case. The prerogative power is not the same as, or coterminous with, the statutory power to order early release from a sentence on compassionate grounds. The exercise of this prerogative power would not go behind, or undermine, the sentence imposed by the Crown Court: it would be a discretionary remission from a sentence which was lawfully passed.

88 Initially, I felt that the claimant's arguments on this issue were compelling. But Mr Grandison pointed to two reasons why the defendant cannot be criticised for failing to exercise her prerogative power. First, as a matter of principle, it would have been wrong for her to do so because she would thereby have circumvented the appeal process which was available to the claimant, but in which he would have been required to explain the reasons for the long delay in raising the issue. Secondly, as an important practical consideration, the German authorities only gave definitive information as to the period of detention in Germany on 24 August 2016, which was only a very short time before the claimant was in any event released

> pursuant to the order of Holgate J. Mr Rule countered those points by submitting that there was a negligent failure on the part of the defendant to pursue the enquiries of the German authorities or the Derbyshire Police and National Crime Agency more promptly and effectively.
>
> 89 I accept both of Mr Grandison's submissions on this point. The argument of principle which he raises does in my view provide a good reason why it would have been inappropriate for the defendant to order release. It is a potent factor in a case in which, even now, there has been an absence of any satisfactory explanation for the failure to follow the obvious appeal route.
>
> 90 As to the practical considerations, it has to be borne in mind that the claimant did not raise this issue until years after sentence was passed, and it is therefore unsurprising that the defendant had to spend some time making enquiries. The first response of the German authorities was to the effect that they had no record of the claimant's detention in that country, and further enquiries were then necessary. If Holgate J had not ordered release when he did, my conclusion might have been different; but in all the circumstances of this case, I do not accept Mr Rule's submission that there was culpable delay on the part of the defendant.
>
> 91 I therefore reject the submission that the claimant's continuing detention became unlawful when the defendant became aware of the failure to specify the Germany days, but nonetheless did not exercise either of her powers to order his release.

52. For a person who has been convicted of an offence on indictment, Section 9 of the Criminal Appeal Act 1968 provides a statutory route of appeal to the Court of Appeal against errors in sentencing; and by section 18(2) the statutory period for making an application for permission to appeal against sentence is within 28 days of the date on which the sentence was passed. The Court has a discretionary power by section 18(3) of the 1968 Act to extend the time stipulated in section 18(2), but reasons should usually be given for the delay in applying, and those reasons and the underlying application will be scrutinised with particular care where the delay in making the application is a lengthy one: see for example, the observations of Lord Thomas CJ in *Leacock* at para 5 citing what was said by Hughes LJ as he then was, in *Irving* at para 13.

53. Where there is such a delay, a point worthy of argument may nonetheless result in an entire application, including for an extension of time, being referred to the Full Court by the Registrar of Criminal Appeals, where it can be dealt with expeditiously – and urgently if the circumstances merit it - as a non-counsel application, if the sole ground is to correct an unlawful element in the sentence. A paradigm example of such a case

would be where there has been a failure to specify in open court the number of days for which a defendant was held in custody awaiting extradition. See further, the observations of Davis LJ in *R v Hyde* [2016] EWCA Crim 1031 at paras 29, 32(8) and 36; and at paras 43 to 44 where Davis LJ made two further points that are pertinent in the current context: first, that if there is a failure to specify such days, the Prison Service has no authority to apply those days to the sentence imposed by the Crown Court and secondly, the proper route for correction of the error is by appeal to the Court of Appeal, Criminal Division.

54. It is true that an explanation should usually be given for any delay in making the application, and that the court retains a discretion as to whether to extend time. In my view however the approach the court would adopt to out of time applications to correct errors of the sort that occurred in this case would be no different to that which the court would adopt to granting extensions of time where there has been a failure by the sentencing court to credit time spent on bail subject to a qualifying curfew: see further, the court's observations in *Thorsby* referred to at para 12 above. Whether an extension of time will be granted will be likely to turn on the reasons for the delay in making the application rather than on the length of the delay, albeit the greater the delay, the more detailed the scrutiny of the reasons for it are likely to be. If, as the court said in *Thorsby*, the applicant bears no responsibility for the failure to make an in time application for leave to appeal, an extension of time is likely to be granted. That would not be the likely position however, if an applicant with knowledge of the error, failed to act with due diligence in making the application, or, I would add, simply fails to explain the delay in making it.

55. The judge acknowledged that the Secretary of State had the power to release the appellant under the prerogative power, and that in principle, the issue of the Royal Prerogative of mercy was engaged. Further, he said the exercise of this prerogative power would not go behind, or undermine, the sentence imposed by the Crown Court. In my opinion however, the two principal points that led him then to consider that the respondents' failure to exercise the Royal Prerogative of mercy in this case could not be the subject of criticism, provided a sound and correct basis for that conclusion. In this case, as the judge was at pains to point out, there was a notable absence of evidence as to why the issue of the Germany days was not raised earlier, and why no application was ever made to the Court of Appeal, Criminal Division where the appellant would have been required to explain the reasons for the long delay in raising the issue of the Germany days. In addition, there was the important practical consideration that the German authorities had only confirmed the appellant's period of detention in Germany two or three days before the hearing before Holgate J. I should add that nothing has been advanced on the appellant's behalf in the course of this appeal, that remotely undermines the factual finding by the judge made after a careful assessment of the evidence, that there had been no culpable failure by the respondents in not ascertaining the period of detention in Germany any sooner than they did.

56. As Watkins LJ, giving the judgment of the court, observed in *ex parte Bentley* the prerogative of mercy is a flexible power, the exercise of which can and should be adapted to meet the circumstances of the particular case and it provides a constitutional safeguard against mistakes. In the form of 'Special Remission' it can be used in relation to an error of calculation by the Prison Service, which can be

corrected administratively, as Chapter 13 of the instructions issued by the National Offender Management Service makes clear. This case was not however one of an error of calculation on the part of the Prison Service which could be corrected administratively. Flexible as the power to exercise it is, the prerogative of mercy is not a simple substitute for conventional routes provided by statute, available to correct errors in the sentencing process such as occurred in this case; nor is there a requirement that the prerogative must be exercised if those routes of appeal are not pursued in cases such as this one, without any, let alone any adequate explanation. In agreement with the judge, I consider that the imposition of a duty, enforceable through the process of judicial review in these circumstances, would have the undesirable consequences he identified of circumventing the statutory route of appeal and the time limits the legislation prescribes, as well as the principled approach to granting extensions of time that has been developed and is applied by the courts.

57. The position here was that until his release was ordered by Holgate J, the appellant was lawfully detained by the Prison Service in accordance with the Order of Imprisonment from the Crown Court at Derby, which accurately set out what that court had ordered (namely that on the 31 January 2014 the court had ordered under section 226A of the 2003 Act that the appellant serve an extended sentence of 8 years comprising a custodial term of 4 years and extension period of 4 years). Mr Grandison is right to submit, as he did to the judge, that the prison governor, in calculating the date of release, acted throughout within the terms of the sentence pronounced by the Crown Court and could not have done otherwise; and that the remedy available to the appellant lay in an appeal to the Court of Appeal, Criminal Division.

58. *R v. Governor of Her Majesty's Prison Brockhill Ex parte Evans (No 2)* [2001] 2 AC 19 was cited to us as it was to the judge but does not support any aspect of the appellant's case. The applicant in *ex parte Evans* was sentenced inter alia to two years in prison. Because of the period she had spent in prison before trial she was entitled to a reduction in the actual period to be served pursuant to section 67 of the Criminal Justice Act 1967. It was for the governor of the prison where she was detained, not the sentencing judge, to work out the reduction and hence her release date. The governor calculated the release date as 18 November 1996 in accordance with earlier decisions of the Divisional Court which the Home Office and the governor thought they were bound to follow. However, on 15 November 1996, on the applicant's application for judicial review, the Divisional Court overruled the earlier decisions and held the applicant was unlawfully detained as on a correct calculation she should have been released on 17 September 1996. The applicant brought proceedings claiming damages for false imprisonment for her continued detention after her correctly calculated release date. The House of Lords decided any detention after that date was unlawful and the defence of justification for that imprisonment could not succeed.

59. At page 33 C-E Lord Hope said:

> "I do not think that the situation which arose in this case can be compared with those where the defence of justification is advanced on the ground that the alleged tortfeasor was acting within the four corners of a warrant issued which had been issued to him by the court. The order for imprisonment which was made by the Crown Court in this case recorded simply that

> on 12 January 1996 "it was ordered that the defendant be sentenced to two years' imprisonment". This was a sufficient authority to the governor to accept the applicant upon her arrival at the prison for which he was responsible as a person who had been lawfully committed to his custody. But it did not give him any instructions about her conditional release date. Under the system laid down by section 67 of the Criminal Justice Act 1967 as amended it was for the governor, not the sentencing judge, to calculate the length of the period of discount…From the moment when her application was served on him the governor was on notice that he was at risk of it being held that his calculation was erroneous."

60. The Solicitor General in his argument to their Lordships had relied on *Olliet v Bessey* (1682) T Jones' Rep 214, *Greaves v Keene* (1879) 4 ExD 73 and *Olutu v Home Office* [1997] 1 WLR 328, a line of authority which supported the proposition that a gaoler is entitled to detain a person in reliance upon a court order until the order is set aside. Lord Hope said at page 34 H to 35A that this did not apply by analogy to the position of the governor. The order which was issued by the Crown Court did no more than set out the date when the sentence of imprisonment was imposed and the length of that sentence. It did not identify the applicant's conditional release date. That was because the calculation of the release date was a matter that had been committed by the statute to the governor. It was for him to make the calculation, so the responsibility for any error in the calculation lay with him and not with the court which imposed the sentence of imprisonment. Lord Hope went on to say at page 35 C:

> "[The governor's] position would have been different if he had been able to show that he was acting throughout within the four corners of an order which had been made by the court for the applicant's detention. The justification for the continued detention would then have been that he was doing what the court had ordered him to do."

61. As Lord Hobhouse also observed at page 45 H (and see also page 44A to E and 46C to H) in the same case:

> "The argument of the Solicitor-General persistently confused a valid order for detention which is subsequently set aside with a valid order which is misinterpreted; it also confused a valid order which has not yet been set aside with an order which was never valid. These distinctions are basic to any legal system. An appeal against a conviction or sentence may lead to the conviction being quashed or the sentence being set aside or varied. But up to that time there were lawful orders of the sentencing court which were orders which had to be obeyed. This point was clearly and correctly made by Lord Woolf M.R in the Court of Appeal in the present case [1999] Q.B. 1043,

> 1063, even though the sentencing court may have exceeded its powers in passing the sentence which it did (See also the judgment of Judge L.J.). A prison governor must obey an order unless it is on its face unlawful…"

62. At para 80 and following, the judge set out his conclusions on the substance of the claim. In my judgment, these were correct. He said:

> "80. My conclusion on these issues is therefore as follows. On ordinary principles of interpretation, section 243(2) means what is says, and only days which have been specified in open court can count towards sentence. The European principle of conforming interpretation cannot be applied so as to lead to any different conclusion, for to do so would be to interpret contra legem. It follows that the omission in this case to specify in open court the number of days of detention in Germany has the consequence that the Claimant was not entitled to credit for the Germany days. In calculating the release date without reference to the Germany days, the prison governor was therefore acting entirely in accordance with the lawful order of the court and, contrary to Mr Rule's repeated submission, there was no error of calculation. That submission confuses an alleged calculation error by the prison governor with a failure by the Crown Court to specify the Germany days when pronouncing sentence in open court. That failure by the Crown Court was regrettable, but it was not a "gross and obvious" error in the sentencing process because it does not appear that any submission had been made inviting the recorder to specify the Germany days, and it appears therefore that he sentenced in ignorance of the fact that the Claimant was entitled to credit for the period during which he had been detained pending his extradition.
>
> 81 Given that no days had been specified under s.243(2), there was in my judgement no error of law on the part of the prison governor, such as there had been in *Ex Parte Evans (No.2)* [2001] 2 AC 19, [[2000] 3 WLR 843]. On the contrary, there was no lawful basis on which the prison governor could have gone behind the order of the Crown Court and acted as if the Germany days had been specified in open court when they had not been. The claimant was lawfully detained pursuant to a sentence which remained valid and subsisting unless and until it was set aside. It would have been constitutionally improper for either the prison governor or a member of the Crown Court office staff to re-write the sentence which had been pronounced, however clear it may have seemed to be that the recorder had fallen into error. The suggestion that such a course should have been taken, informally by an administrative act, is in my view an attempt to circumvent the proper system of appeal against a sentence.

> 82 In coming to that conclusion, I have had well in mind Mr Rule's overriding submission that there would be an injustice to the claimant if he were deprived, through an error in the Crown Court which was not of his making, and/or through the suggested failures on the part of the defendant, of credit for the Germany days to which he was entitled. I accept of course that the Crown Court should have been informed that the claimant had been detained in Germany and was entitled to have that period of detention taken into account in calculating his release date, and I accept that if the court had been so informed the recorder would have been required to specify the Germany days in open court pursuant to s.243(2) . Section 243 does not make that announcement a matter of discretion: the purpose of specifying the number of days in open court is not to announce a discretionary decision made by the sentencer, but rather—as I have indicated in [78] above—to make a public announcement, for the assistance of the prison service and all other interested parties, of the length of a period of detention which would not otherwise be known to the prison service. But it does not follow that this court must grant relief by way of judicial review. It is important to emphasise that the omission made in the Crown Court was one for which the claimant had a remedy by way of the slip rule or by way of an application to the CACD for an extension of time to make an application for leave to appeal against sentence. Even at a late stage, he could have applied for a very long extension of time if he had good grounds for doing so. Even taking into account the delay in obtaining precise dates as to the period in custody in Germany, that appeal process could have been initiated in good time before the date on which the claimant contends he should have been released. On an appeal to the CACD, the focus would have been on the omission of the court (contributed to by all the lawyers in the case) to specify the relevant number of days in accordance with s.243. No explanation has been given of the claimant's failure to follow that route. Instead the claimant commenced these proceedings, after the date when he would have been released if the Germany days were taken into account, in which he has sought to direct the focus onto the defendant and to argue that she is liable because either the court staff or the prison governor should have gone behind the order of the court. For the reasons I have given above, I do not accept that it would have been lawful for either the court staff or the prison governor to act as the claimant contends they should have done."

63. Mr Rule argues that even if his other grounds do not succeed, the appellant's continued detention on or after 17 July 2016 was nonetheless in breach of article 5 of the Convention as it was arbitrary or the result of a gross and obvious error by the

sentencing court. He further argues this is a matter covered by the equivalent provision to article 5, namely article 6 of the Charter of Fundamental Rights of the European Union (the Charter)[9] and refers further to para 63 of the majority judgment in *R (Miller and another) v Secretary of State for Exiting the European Union (Birnie and others intervening)* [2017] UKSC 5.

64. In my judgment, however this ground is framed (whether under article 5 of the Convention, or under article 6 of the Charter) it has no purchase on the facts. There was at all material times a speedy means available to the appellant to correct the error made by the sentencing court, but which, for reasons unexplained in evidence, he did not take up, including when his lawyers were contemplating bringing proceedings well before the date when he would have been released had the Germany days been credited. As the judge pointed out, the error by the recorder could not be characterised as a gross and obvious one in circumstances where it is well-established that (i) it is the duty of those appearing at a sentencing hearing, including defence advocates, who have proper information about their client, to ensure that such information relevant to sentence is before the sentencing court; (ii) none of the lawyers raised the issue with the recorder, and (iii) the recorder therefore sentenced in ignorance of the fact that the appellant was entitled to credit for the period during which he had been detained pending his extradition. Nor in my judgment, could the judge's decision be described as an arbitrary decision for the purposes of deciding there had been a violation of article 5 of the Convention.

65. As the ECtHR made clear in *Benham v UK* (1996) 22 EHRR 293 at para 42:

> "A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason, the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law (see the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 23, para.55, and the report of the Commission of 9 March 1978 on application no. 7629/76, Krzycki v. Germany, Decisions and Reports 13, pp. 60–61)."

66. See further, *Mooren v Germany* (2010) 50 EHRR 23 at paras 74 to 79, *Saadi v United Kingdom* (2008) 47 EHRR 17 at paras 68 to 71; *R (Bayliss) v Parole Board* [2014] EWCA Civ 1631, at 29 to 37, where Sir Brian Leveson P. reviewed the principles of the lawfulness of detention outside the rules of the sentencing regime and *Wright v Lord Chancellor* at para 22 to 24. In short, the passing of a sentence of imprisonment as a criminal penalty will justify detention unless and until that sentence is varied by the court or quashed by the Court of Appeal. Such a variation or quashing does not generally render the original sentence invalid. A sentence passed in good faith, even if

[9] Article 6 of the Charter provides: "Everyone has the right to liberty and security of person".

in error, does not without more amount to a gross and obvious error, nor is an error enough to support an allegation that the court acted in an arbitrary manner. This was not for example, a case involving deception or one where the judge had acted in bad faith or with no attempt to apply the law correctly; nor could it be said that there was no causal connection between the appellant's detention and a lawful conviction.

67. Article 52 provides for the scope of guaranteed rights under the Charter. Article 52.3 of the Charter provides that:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

68. Mr Rule does not provide any or any adequate explanation as to how article 6 of the Charter provides more extensive protection than is provided by article 5 of the Convention. In my view however, article 6 of the Charter takes the appellant's case no further. In short, article 6 of the Charter provides no further grounds for holding that, irrespective of the lawfulness of the domestic legislation, there is nevertheless a right to redress and/or damages in this case.

69. Finally, it is apparent from the judgment below, including the passages cited above, that in rejecting the case for the appellant, the judge paid careful attention to the chronology and the evidence, and in my opinion, the criticisms advanced in this connection provide no basis for interfering with his decision to dismiss the claim.

70. For the reasons given, I would dismiss this appeal.

Lord Justice Simon:

71. I agree.

Lady Justice Thirlwall:

72. I also agree.