IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO: G0209 OF 2013

IN THE MATTER OF THE BILL OF RIGHTS SECTION 5(5) OF THE CAYMAN ISLANDS CONSTITUTION ORDER 2009

AND

IN THE MATTER OF THE GRAND COURT RULES ORDER 77A IN A PETITION BY BRIAN EMMANUEL BORDEN

IN OPEN COURT

BEFORE THE HON. CHIEF JUSTICE

HEARINGS ON THE 20TH DAY OF SEPTEMBER 2013 & 24TH OCTOBER 2013;

JUDGMENT 24th DECEMBER 2013.

Appearances: Nick Hoffman of Priestley's for the Petitioner

Jacqueline Wilson, Solicitor General , and Jennifer Catran, for the Attorney General, Respondent.

JUDGMENT

1. The petitioner is in custody awaiting trial on an indictment alleging the offences of murder and unlawful possession of a firearm. His applications for bail pending trial have been refused, including most latterly by Acting Justice Carol Beswick by a ruling delivered on 13th September 2012.[1]

2. By this petition he seeks to challenge not only that ruling but also the provisions of the Bail Law (2010 Revision) ('the Law') pursuant to which the ruling was decided. His challenge goes to the constitutionality of the Law, asserting that its provisions are incompatible with the Bill of Rights contained in the Cayman Islands Constitution Order 2009 (the "Bill of Rights" and the "Constitution", respectively).

3. He seeks a declaration of incompatibility in the terms allowed by sections 23 and 25 of the Constitution[2].

4. In the course of the arguments – ably presented on both sides - it was agreed and is plainly correct that - the Constitution being the supreme law of the Islands - all laws enacted by the Legislature ("primary legislation" as defined by section 28 of the Constitution) must comply and not be incompatible with the Constitution[3].

[1] His trial date is now set for 20th January 2014.

[2] As set out below.

5. That principle is of course, implicit in section 23 (1) and section 25 of the Constitution – those which are cited by the petitioner[4] - where they provide:

> *"23. If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section of the Bill of Rights and the nature of that incompatibility.*
>
> 25. *In any case where the incompatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part".*

6. Henderson J. of this court has declared in terms which are applicable that[5] :

> *"This section [25] ensures that the court will strive to align an impugned legislative provision with what the Legislature may reasonably be taken to have intended and by this process of "reading down" will seek to avoid a formal declaration of incompatibility but the obligation imposed by section 25 arises only in "unclear or ambiguous" cases. Since the section appears in the Bill of Rights it has the effect of elevating both the rule of construction itself and the limitation upon it to constitutional status. Clear cases of incompatibility are to be left to the Legislature for correction."*

7. He also advised[6] against "wholesale reading down" which may result in the law "bearing little resemblance to the law that Parliament passed" a circumstance which would, instead of indicating the suitability of reading down, give rise to the inference that the law is simply incompatible and should be so declared, leaving it to the legislative branch of government to bring it into line with the constitutional guarantees of the Bill of Rights.

8. The alleged incompatibility of the Bail Law with the Bill of Rights is said to be in its interference with the right to liberty of the petitioner – being a person who is charged but not yet convicted - by its removal of his presumptive entitlement to bail. Mr Hoffman argues that section 17(2) of the Bail Law operates impermissibly to shift the legal burden of proof to defendants to establish that bail should be granted and so is incompatible with the entitlement to bail which is implicit in the constitutional rights of liberty of the person and the presumption of innocence.

9. The relevant provisions of the Bail Law (including the impugned section 17(2)) are the following:

"Part III - Right of Accused Persons and Others to Bail.

17(1) Subject to subsection (2), a person is entitled to bail under this Part if he has been-

(a) accused of an offence but not convicted of the offence;

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[3] The principle actually derives from the fact that the Constitutional Order is made by powers vested by the West Indies Act 1962, an Act of Parliament of the United Kingdom to which, by virtue of section 2 of the Colonial Laws Validity Act 1865, laws passed by colonial legislatures may not be repugnant: see A.G.Ebanks v R 2007 CILR 403, paras 34-37.

[4] The petition itself invokes the jurisdiction of the court pursuant to section 26(1) of the Constitution which provides: "(1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time"

[5] Ex Parte Nairne, GC Causes 10 and 18 of 2013 unreported (though see www.judicial.ky – unreported judgments) - reasons for judgment 17th April 2013.

[6] op. cit.; para 23; applying de Freitas v. Permanent Secretary of Agriculture and Others [1998] UKPC 30.

(b) convicted of an offence and the case has been adjourned by the court to enable inquiries or a report to be made to assist the court to deal with him for the offence; or

(c) convicted of an offence under the Misuse of Drugs Law (2010 Revision) and is appearing or has been brought before a court under section 54 or 57 of that Law.

(2)A person accused or convicted of any of the following offences is not entitled to bail **[Emphasis Added]**
[Note: I set out fully the list of offences as its extensive nature is itself the subject of challenge:]

(a) murder;

(b) manslaughter;

(c) rape, or any other offence of a sexual nature against a person punishable by imprisonment for four years or more;

(d) arson;

(e) wounding or causing grievous bodily harm;

(f) wounding or inflicting grievous bodily harm;

(g) burglary;

(h) robbery;

(i) extortion;

(j) kidnapping;

(k) abduction;

(l) wrongful confinement;

(m) bomb hoax;

(n) aiding a prisoner to escape;

(o) any offence against the Firearms Law (2008 Revision) punishable by imprisonment for four years or more;

(p) any offence against the Misuse of Drugs Law (2010 Revision) (other than the offence of consuming) punishable by imprisonment for four years or more;

(q) any offence against the Terrorism Law (2009 Revision) punishable by imprisonment for four years or more;

(r) conspiracy to commit any of the offences listed in paragraphs (a) to (q);

(s) any attempt to commit any of the offences listed in paragraphs (a) to (q).

18. A court or police officer shall grant bail to a person who is entitled to bail under this Part unless-

(a) the court or police officer is satisfied the person, if released on bail, would-

(i) fail to surrender to custody;

(ii) commit an offence while on bail; or

(iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or another person

(b) the court or police officer is satisfied the person should remain in custody for his protection or welfare; or

(c) in case of a person referred to in section 17 (1)(b), it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the person in custody.

19. A court or police officer, in order to come to a conclusion for the purpose of section 18, may take into consideration (amongst other things):

(a) the nature and seriousness of the offence (and the probable method of dealing with the defendant or offender);

(b) the character, antecedents, associations and community ties of the defendant or offender;

(c) the defendant's or offender's record as respect the fulfilment of his obligations under previous grants of bail (whether granted under this Law or otherwise); and

(d) in the case of a person referred to in section 17 (1) (a), the strength of the evidence of the defendant having committed the offence".

The historical right to bail and the impact of section 17(2)

10. The applicant being a person who is charged and awaiting trial, the foregoing provisions of section 17(1) would recognise and mandate his presumptive entitlement to bail but for the provisions of section 17(2), which provide that he "is not entitled to bail", being a person accused of offences which are listed in that subsection. Otherwise, the petitioner would be immediately entitled to bail subject only to the five exceptions identified in section 18; exceptions which have come to be regarded by the modern case law (to be discussed herein) as defining categorically the bases upon which bail may be denied.

11. Prior to the introduction of section 17(2) of the Bail Law[7], the grant of bail was governed by sections 17(1) and 18; by predecessor statutory provisions or by practice established at common law - all of which reflected the longstanding principles flowing from the writ of habeas corpus, the Habeas Corpus Act 1679 and the Bill of Rights 1689 – that:

"the proper test of whether bail should be granted or refused, is whether it is probable that the defendant will appear to stand his trial, and that bail shall not be withheld merely as a punishment. The suspect's remaining at large is the rule; his detention merely on grounds of suspicion is the exception

[7] By amendment by Law 18 of 2005.

and, even if detention is justified, if he is not put on his trial within a reasonable time, he has to be released".[8]

12. In **Hurnam**[9]**,** the Privy Council recognized that these requirements were necessary to ensure compliance with section 5 of the Mauritius Constitution which, like the Cayman Bill of Rights, is derived from Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[10] ("the ECHR").

13. It is therefore acknowledged by the Solicitor General that, were section 17(2) to be construed as a statutory prohibition on the grant of bail by the court for any of the listed offences by reference - as section 17 (2) implies -simply to the gravity of those offences, section 17(2) would be incompatible with the Constitution as it would infringe the fundamental rights to liberty of the person and the presumption of innocence, long established at common law and which are now protected by the Bill of Rights itself.

14. A trilogy of highly authoritative cases respectively from the European Court of Human Rights ("the ECtHR"), the Privy Council and the House of Lords (as it then was) provide support for that proposition. Indeed, those important cases have already been applied by this court in **R v Whorms**[11], itself a significant case on the construction of the Bail Law and which will be more fully discussed below.

15. The context must first be set by identifying the relevant provisions of the Bill of Rights, which are to be regarded as a codification of the ECHR[12], and noting that the ECHR itself had been extended to the Cayman Islands[13] well before November 2012 when the Bill of Rights was brought into force[14].

16. The relevant provisions of the Bill of Rights are in sections 5 and 7 of the Constitution:

"5. (1) No one shall be deprived by Government[15] of liberty and security of the person

(2) The right to liberty does not extend to the following measures taken in relation to a person in accordance with a procedure prescribed by law-

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(e) on reasonable suspicion that he or she has committed, is committing or is about to commit a criminal offence under any law;

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(5) Any person who is arrested or detained-

(a) for the purpose of bringing him or her before a court in the execution of the order of a court; or

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[8] As explained in Deelchand v D.P.P. [2005] SCJ 215 para 4.14, cited with approval by the Privy Council in Hurnam v State of Mauritius [2005] UKPC 49 at para. 4.

[9] Above(op. cit)

[10] As will become clear below and see the Schedule hereto.

[11] 2008 CILR 188.

[12] Hurnam (above) at para 4. (dealing with the Mauritius constitutional Bill of Rights but by equivalence with the Cayman Bill of Rights as explained below)

[13] By Declaration contained in a letter from the U.K Permanent Representative dated 12 August 1964.

[14] Although introduced as Part 1 of the Constitution in November 2009, the Bill of Rights did not come into effect until November 2012, except for sections 6(2) and (3) which came into effect on 6th November 2013.

[15] Defined by section 1(3): "Government" shall include public officials... and the Legislature but shall not include the courts (except in respect of section 5, 7, 19 and 23 to 27 inclusive)" Thus, the police and the courts are included for present purposes.

(b) on reasonable suspicion of his or her having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought promptly before a court; and if any person arrested or detained in such a case as i(s) mentioned in subsection (2)(e) is not tried within a reasonable time[16] *he or she shall (without prejudice to any further proceedings that may be brought against him or her) be released either unconditionally or on reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he or she appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail."*

and section 7(2):

"Everyone charged with a criminal offence has the following minimum rights-

(a) to be presumed innocent until proved guilty according to law; ...".

17. On a proper and purposive reading of those provisions from sections 5 and 7 of the Constitution, and as the discussion on the authoritative case law will confirm, a person's fundamental right to liberty remains intact notwithstanding the preferment of criminal charges against him. While he awaits trial, a person, if not released immediately from custody pending trial will be entitled, in the words of section 5(5), to be *"brought promptly before a court"* and to have the question of any ongoing detention enquired into and determined by the court and, if not tried within a reasonable time, to be released on bail pending trial.

18. The promptness with which the petitioner had been brought before a court, although itself a fundamental requirement, is not in issue on this application[17].

19. To elaborate, the issue here is whether the terms of section 17(2) of the Bail Law are incompatible with the Bill of Rights in purporting - on the construction of it which Mr Hoffman contends is unavoidable - to prohibit the grant of bail to the applicant as a person who is charged with any of the offences which it lists, and so has the intent and effect of removing his right to have his pre-trial detention considered by a court charged with the responsibility of judicial control over that detention; and operating in that way even after he had been brought promptly before the court.

20. In **Caballero v United Kingdom**[18] the ECtHR was asked to consider, among other things, whether section 25 of the Criminal Justice and Public Order Act 1994 (UK) ("the CJPOA") violated article 5(3) of the ECHR[19] which provides similar protections as to liberty and security of the person as are provided in section 5 of the Bill of Rights.

21. Section 25 of the CJPOA (as it then stood) provided as follows (its material similarity and dissimilarity to section 17(2) of the Bail Law being immediately apparent):

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[16] While itself an important fundamental right, the right to trial within a reasonable time is not engaged on this petition. But it is recognized that a compendium of factors arise which could affect the right to bail. See R v Morin [1992] 1 S.C.R 771 (Canada); Pelissier v France [1999] ECHR 17 at para 67 and AG's Ref No.2 of 2001 per Lord Bingham for the House of Lords(at para 16). Citing ECtHR jurisprudence, Lord Bingham explained the rationale of the reasonable time requirement as being so that an innocent person could clear his name and so that a guilty one was not made to wait too long for justice, with negative effects for his health and family life.

[17] The time limits which the requirements of promptness impose are the subject of another statutory scheme under Section 65 of the Police Law 2010, considered in Nairne (above footnote 4).

[18] (2000) 30 EHRR 643

[19] See the Schedule hereto for the relevant excerpts from Article 5.

" 1. A person who in any proceedings has been charged with or convicted of an offence to which this section applies and in circumstances to which it applies shall not be granted bail in those proceedings.

This section applies, subject to subsection 3 below, to the following offences:

(a) murder;
(b) attempted murder;
(c) manslaughter;
(d) rape; and
(e) attempted rape.

...

3. This section applies to a person charged with or convicted of any such offence only if he has been previously convicted by or before a court in any part of the United Kingdom of any such offence or of culpable homicide and, *in case of a previous conviction of manslaughter or culpable homicide, if he was then sentenced to imprisonment or, if he was then a child or young person, to long term detention under any of the relevant enactments."*

22. As the effect of section 25 of the CJPOA was to prohibit judicial oversight and intervention for the grant of bail to anyone charged with any of the serious offences listed in it, the Government of the United Kingdom conceded that it was in violation of section 5(3) of the ECHR. The ECtHR accepted that concession and expressed its reasoning in the following terms (adopting the earlier opinion of the European Commission)[20]:

"40. The Commission recalls that judicial control of interference by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3) the purpose being to minimize the risk of arbitrariness as regards the pre-trial detention of accused persons. Judicial control is implied by the rule of law which is one of the fundamental principles of a democratic society, which is expressly referred to in the Preamble to the Convention, and from which the whole Convention draws inspiration.

41. The jurisprudence of the Convention organs has, accordingly, outlined certain procedural and substantive guarantees by which that judicial control is provided.

42. In the first place, the judicial officer before whom the accused is "brought promptly", must be seen to be independent of the executive and of the parties to the proceedings because otherwise his impartiality could be capable of appearing open to doubt.

43. Secondly, that judge, having heard the accused himself, must examine all the facts arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty. Those facts must be set out in the decision on the application for the release.

[20] (2000) 30 EHRR 643, paras 40-44. The Commission as it then was prior to 1998, had to support a reference to the ECtHR before the case would be considered by the ECtHR.

For example, the danger of an accused's absconding cannot be gauged solely on the basis of severity of the sentence risked. As far as the danger of re-offending is concerned, a reference to a person's antecedents cannot suffice to justify refusing release.

44. Thirdly, the judge must have power to order an accused's release".

23. Thus, three essential requirements for compliance with Article 5(3) of the ECHR (and so with sections 5 and 7 of the Cayman Bill of Rights) may be distilled from the **Caballero** case: 1. a person detained on charges must have the right to appear promptly before a court for his detention to be examined; 2. The court must be satisfied that the detention is justified in the public interest before it might be continued and; 3. Neither the serious nature of the alleged offence nor the person's antecedents can, in and of itself, be sufficient reason to justify continued detention – the court must be able to consider all the relevant circumstances and decide in the exercise of its discretion whether continued detention is justified.

24. Some six years later in **Hurnam**[21], the Privy Council (per Lord Bingham) provided a further authoritative review of the case law, including the European cases, confirming the correctness of those three principles from **Caballero** while recognizing that there may be five grounds for refusing bail[22]. The case came on appeal from the Supreme Court of Mauritius which had denied the appellant bail on the basis simply of the serious nature of the offence (murder) with which he had been charged and the severity of the penalty, citing the statutory prohibition on the grant of bail. In allowing the appeal and restoring the appellant to bail on the same terms as had been granted by the Magistrate below, the following exposition of the law was delivered:

> *"16. The reasoning of the Supreme Court [of Mauritius] in the Noordally case [1986] MR 204, the Maloupe case [2000] MR 264 (save for the penultimate sentence), the Labonne case [2005] SCJ 38 and the Deelchand case [2005] SCJ 215, ... is consistent with the jurisprudence on the European Convention, which recognizes that the right to personal liberty, although not absolute (X v United Kingdom (Application No 8097/77) (unreported), is nonetheless a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention (Winterwerp v The Netherlands (1979) 2 EHRR 387, para 37, Engel v The Netherlands (No 1) (1976) 1 EHRR 647, para 58 and Bozano v France (1986) 9 EHRR 297, para 54). The European court has clearly recognized five grounds for refusing bail (the risk of the defendant absconding; the risk of the defendant interfering with the course of justice; preventing crime; preserving public order; and the necessity for detention to protect the defendant): see Clayton & Tomlinson, the Law of Human Rights (2000), p 501, para 10.138; the Law Commission Report on Bail and the Human rights Act 1998 (2001) (Law Com No. 269), para 2.29. But it has insisted that a person must be released unless the state can show that there are "relevant and sufficient reasons" to justify his continued detention: Wemhoff v Federal Republic of Germany 91968) 1 EHRR 55. As put by the Law Commission in its report just cited, para 2.28, "Detention will be found to be justified only if it was necessary in pursuit of a legitimate purpose (or ground)". The European Court has, realistically, recognized that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or*

[21] Above; at para 16

[22] Those which resonate in section 18 of the Bail Law as set out above.

reoffending (see, for example, Ilijkov v Bulgaria (application No. 33977/96) (unreported) 26 July 2001, para 80, but has consistently insisted that the seriousness of the crime alleged and the severity of the sentence faced are not without more, compelling grounds for inferring a risk of flight: Neumeister v Austria (No 1) (1968) 1 EHRR 91, para 10, Yagi and Sargin v Turkey (1995) 20 EHRR 505, para 52, Muller v France ; Reports of Judgments and Decisions 1997 1-11, p 374, para. 43 and IA v France; Reports of Judgments and Decisions 1998 1-VII, p 2951, paras 105, 107. In Ilijkov v Bulgaria 26 July 2001 the court repeated, at para. 81, "that the gravity of the charges cannot by itself serve to justify long periods of detention on remand". It went on, at para 84, to reiterate (that):

"Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is per se incompatible with Article 5(3) of the Convention..." **[Emphasis supplied]**.

Thus, a statutory prohibition on the grant of bail was conceded by the United Kingdom in Cabellero v United Kingdom (2000) 30 EHRR 643, para 20, to violate the Convention, a concession which the court accepted in that case (para 21) and held in ***SBC v United Kingdom*** *(2001) 34 EHRR 619, paras 22-24, to have been rightly made. The compatibility with the Convention of the amendment enacted to remedy this violation was considered by the Queen's Bench Divisional Court in* ***R(O) v Crown Court at Harrow*** *[2003] 1 WLR 2756."*

25. The QBD decision was itself later affirmed by the House of Lords in the case to which I next turn – the third in the authoritative trilogy.

26. In **R(O) v Crown Court at Harrow**[23] the appellant had a previous conviction for rape and was being detained in connection with new charges for rape, false imprisonment and indecent assault. He was refused bail even after the court had found that the prosecution had failed to justify an extension of the time limits imposed by the custody time limit legislation[24]. His appeal against the refusal of bail went to the House of Lords.

27. The rationale for the refusal was in the finding of the courts below that section 25 of the CJPOA (as amended following the **Caballero** case[25]) required those defendants who fell within its scope to satisfy the court that there were *exceptional circumstances* justifying release.

28. Their Lordships therefore had to consider whether the post-Caballero amendment was compatible with the ECHR and the Human Rights Act 1998(the "HRA"). They concluded that section 25 placed only an evidential burden (because the appellant fell within its scope as a person having a relevant previous conviction and notwithstanding that custody time limits had expired) on the appellant which was compatible with Article 5(3) of the ECHR and the HRA respectively.

[23] [2007] 1 A.C. 249

[24] The Prosecution of Offences Act 1985 (as amended)

[25] The relevant change was made in subsection (1) which came to read: "A person who in any proceedings has been charged with or convicted of an offence to which this section applies in circumstances to which it applies shall be granted bail in those proceedings only if the court, or as the case may be, the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it." [**Emphasis added**]

29. Lord Brown, in delivering the lead Opinion, explained the legislative history of section 25, including the amendment which was precipitated by the challenges and concessions made in the **Caballero** case (and confirmed to have been properly made in **SBC v United Kingdom**[26]), and continued:

"The two key requirements imposed by article 5(3) are, first, that the prosecution must bear the overall burden of justifying a remand in custody – it must advance good and sufficient public interest reasons outweighing the presumption of innocence and the general presumption in favour of liberty; and, secondly, that the judge must be entitled to take account of all relevant considerations pointing for and against the grant of bail so as to exercise effective and meaningful judicial control over pre-trial detention."

30. As mentioned earlier, these principles have been applied in the relevant Cayman Islands case of **R v Whorms** which was decided before the Bill of Rights came into effect. Having regard to the dicta from **Caballero**; **SBC v United Kingdom and R(O) v Crown Court at Harrow (all above)**, **R v Whorms** provides authority for three propositions which have not been challenged by way of appeal or subsequent decision. The three propositions are:

    (1) Although the literal construction of section 17(2) of the Bail Law could be to deny the presumptive entitlement to bail recognized by sections 17(1) and 18, section 17(2) could not properly be construed as implying a complete prohibition on bail in cases involving those offences listed. Thus, the words in section 17(2) that an accused person shall "not be entitled to bail" could not properly be construed as a prohibition against the grant of bail by the court.

    (2) Nor did section 17(2) shift the onus of satisfying the court that bail should be granted to the defendant – the onus remained on the prosecution to show that bail should not be granted. Any other construction leading to a reversal of the legal burden, would have been contrary to the ECHR which had to be observed in the application of domestic legislation ,although not yet incorporated, unless its observance is necessarily or unambiguously precluded by the domestic legislation. Accordingly, section 17(2) must be construed so as to honour the ECHR and respect the fundamental rights, including the entitlement to judicial consideration of the grant of bail which is conferred by Article 5(3) of the ECHR.

    (3) In practice (and having regard to the fact that the seriousness of the alleged offence and the antecedents of a defendant can be relevant factors as identified in section 19 of the Bail Law), the existence of a judicial discretion with regard to applications for bail, allowed that a showing of exceptional circumstances might be required before bail is granted to persons charged with or convicted of offences listed in section 17(2).

31. I am called upon to examine anew the conclusions reached in **R v Whorms i**n the light of the Bill of Rights which came into effect after it was decided.

32. Mr Hoffman is of course, correct in his assertion that the legal environment has changed such that there is no direct assimilation between the notion of compatibility of domestic law with the ECHR and compatibility with the Bill of Rights – the former not having been incorporated into domestic law while the latter enjoys enshrined constitutional status.

[26] Above

33. Nonetheless, the Solicitor General, pointing to the common legal heritage shared by the ECHR and the Bill of Rights, argues for the ongoing application of the propositions established by **R v Whorms**, emphasising that the authoritative case law which it followed and applied remains as binding (in the form of **Hurnam** as a Privy Council case) and persuasive (in the form of the ECtHR and House of Lords cases) now as before. In particular, and having regard especially to **R(O) v Crown Court at Harrow,** the Solicitor General confirms the Crown's acknowledgement that section 17(2) of the Bail Law was appropriately construed by **R v Whorms,** and so construed, may now be regarded as appropriately "read down" for the purposes of compliance with the Bill of Rights.

34. Still, Mr Hoffman says there is no verisimilitude in that analysis as the House of Lords in **R(O) v Crown Court at Harrow** was dealing with a legislative scheme differently premised upon the requirement of a previous conviction before the purported disentitlement to bail could have applied. By contrast, he says section 17(2) of the Bail Law would purport to remove the entitlement, with even less justification and heightened arbitrariness, by reference simply to the "seriousness" of a randomly wider category of listed offences.

35. Those are the failings says Mr Hoffman, which render section 17(2) incompatible and should be so declared, when examined now in the more searching, revealing and demanding light of the Bill of Rights. Simply "reading down" section 17(2) in the mode of **R v. Whorms**, is no longer acceptable; section 17(2) is plainly incompatible with the Bill of Rights and should be so declared.

36. I agree with the Solicitor General and hold that the principles accepted and applied in **R v Whorms** from the earlier case law (and discussed above from the trilogy of important cases), remain as authoritative and persuasive now as before the advent of the Bill of Rights and lead, entirely properly, to the same result of reading down section 17(2) so as to bring it into conformity with the Bill of Rights. My reasons for this conclusion, while already to be inferred from the foregoing discussion of the cases, become more apparent from the discussion of **R v Whorms** that follows.

"Exceptional circumstances"

37. The reasoning in **R v Whorms** is to be further criticized says Mr Hoffman, for its third proposition – that which would invite a requirement of the showing of "exceptional circumstances" to justify the exercise of the judicial discretion in favour of the grant of bail for an offence listed in section 17(2). This, he says, is because no such requirement is expressed in the Bail Law itself. Further, it is in her treatment of **R v Whorms** as identifying such a requirement that he says Acting Justice Beswick came to an erroneous conclusion in her ruling of 13th September 2012 by refusing bail.

38. But here too there is a misapprehension of what was said in **R v Whorms** (and, in my view, of what Acting Justice Beswick found). The reasoning leading to the third proposition did not proceed on the basis that there was any such express statutory requirement in the Bail Law. Rather, consideration was there being given (and to be noted, simply by way of guidance) to how the judicial discretion might be exercised where a bail application is presented by a defendant who has a previous conviction for an offence listed in section 17(2). Thus, completing the analysis as between the provisions of section 25 of the CJPOA (as amended) and

as considered in **R(O) v Crown Court at Harrow;** and the application of that case to the provisions of section17(2) of the Bail Law.

39. The conclusion in **R v Whorms** is that neither the seemingly added seriousness of a previous conviction nor a discretionary requirement for the showing of exceptional circumstances, could prevent a proper judicial analysis when having regard to the operation of the presumption of innocence and the legal burden remaining throughout upon the Crown, in every case.

40. That view of the third proposition from **R. v. Whorms** is fully borne out by the following passages from the judgment:

    At para. 15:

    > *"(section 17(2) is not) to be construed as infringing upon the judicial discretion to consider whether or not bail should be granted and to do so by having regard to all the circumstances of any given case, including those involving allegations of offences listed under subsection 17(2)"*

    and continuing at paras. 20-24:

    > *"Given that in this jurisdiction we do not have in the Law, a requirement of the showing of exceptional circumstances, nor a further defined category of egregious offences such as may be identified by reference to previous convictions; our legislation points even more clearly, in my view, away from any construction which would reverse the legal burden of proof, by placing it on a defendant.*
>
> *I go further to explain my acceptance of Mr. Dixey's[27] other submissions: that while subsection 17(2) serves to remove the presumption of entitlement to bail for listed offences (without infringing upon the judicial discretion (to grant bail)) it does not place a positive burden upon a defendant to satisfy the court that he should be admitted to bail.*
>
> *I emphasize that any such reversal of the burden would itself be contrary to article 5(3) of the Convention which, by harkening to the presumption of innocence; speaks to the positive entitlement to be released pending trial, if trial does not take place within a reasonable time. The burden may not be reversed by placing it upon a defendant without infringing upon that principle and the presumption of innocence itself. If a person is presumed innocent until proven guilty, he cannot be required to prove that there should be no infringement upon his liberty while his guilt is yet to be established.*
>
> *Moreover, and finally on this point, as there is nothing about subsection 17(2) that expressly mandates the reversal of the burden or interference with the fundamental right to the presumption of innocence, there is strong judicial dicta remonstrating against such a construction (citing* **Ilijkov v Bulgaria** *paras 84-85)[28]----*
>
> *Accordingly, subsection 17(2), in revoking in respect of the listed offences, the former express entitlement to bail which the (Bail) Law provided for all offences; may not be construed as at once*

[27] Counsel for the applicant Whorms.
[28] Above.

also reversing the burden of proof so as to impose upon a detained person a legal requirement that he must establish justification for the grant of bail"

41. It is the following further passage that is now criticized for its reference to "exceptional circumstances" but which, taken in the proper foregoing context, does not bear out the criticisms (ibid para 24):

> *"And even if one acknowledges, as I think it properly can be, that purely as a matter of the exercise of judicial discretion, bail should be granted only in exceptional circumstances to persons who are charged with and who have previous convictions for offences listed in subsection 17(2); that would still not imply any reversal of the burden of proof. Even in such cases, as in all other cases, what would be required on the basis of the case law would be the exercise of judicial discretion having regard to all the relevant circumstances, including the rights of the individual detained; but being especially mindful of the public interests to be protected against the risk of further re-offending. Several of the factors to be taken into consideration in such cases are identified in section 19 of the (Bail) Law".* **[Emphasis added]**.

42. As the words in emphasis make clear, the court was there addressing that category of offences (involving defendants who have previous convictions for any of the listed offences); a category specifically identified in section 25 of the CJPOA but not expressly in the Bail Law itself, seeking to give guidance on how section 17(2) would apply to them. The conclusion, as the passage shows, was that no fundamental difference of approach would be justified or required as such persons would be nonetheless entitled to the presumption of innocence in respect of the present alleged offence (with the legal if not the evidential burden thus remaining upon the Crown throughout) and to the exercise of judicial discretion in light of all the circumstances attending their application for bail. Those circumstances would include the nature of the allegations against them and the duty of the court to be mindful of the public interest to be protected against the risk of re-offending.

43. That guidance is premised squarely upon the views similarly expressed by Lord Brown in **R(O) v Crown Court at Harrow** (at 262, para 34-35):

> *"34. Importantly..., section 25(1) has no substantive effect upon the way in which bail applications by section 25 defendants would in any event fall to be determined under the Bail Act 1976. It serves only to "remind" the courts of the risks normally posed by those to whom section 25 applies and "will merely assist the court to adopt a proper approach" in relation to bail in their cases...*
>
> *35. Whether or not, strictly speaking, section 25 needs to be read down to achieve the agreed result is a question of little moment. I myself, however, have a mild preference for Hooper J's approach [at first instance in the QBD]. Like him I read the section as placing a burden on the section 25 defendant. He has to rebut a presumption and if he fails to do so is to be denied bail. True it is, as Mr Turner (on behalf of the applicant) himself accepted, that in the vast majority of cases the court will reach a clear view one way or the other whether the conditions for withholding bail specified by Schedule 1 of the Bail Act 1976[29] are satisfied. But just occasionally the court will be left unsure as to*

[29] Those in paragraph 1 of Schedule 1 of the Bail Act 1976 are the same in substance as the five (5) grounds set out in section 18 of the Bail Law (above). See per Lord Brown at para 16 of the judgment.

whether the defendant should be released on bail- the only situation in which the burden of proof assumes any relevance- and in my judgment bail would then have to be granted. That must be the default position. Section 25 should in my view be read down to make that plain" **[Emphasis added]**.

44. That Lord Brown was there referring only to the evidential burden (not the legal burden) being upon the defendant (and that is how the case is reported) is plain from his earlier endorsement (at para 33) of the conclusion (at first instance) of Hooper J.:

> *"Hooper J. on the other hand was concerned in particular by the use of the word "satisfied" in section 25(1) and that "section 25, read literally, imposes the burden on the defendant to show exceptional circumstances": para 96. In the result he concluded that the section should be read down* so that the *"burden remains upon the prosecution to satisfy the court that bail should not be granted"".*

45. And the proper judicial approach to the requirement of exceptional circumstances was further explained by Lord Carswell (also endorsing the views of Hooper J. at first instance) in these terms (at 257, c-d):

> *"As the court has to be satisfied that there are exceptional circumstances justifying the grant of bail, I conclude, in agreement with Hooper J, that the phrase connotes a burden or presumption. That being so, it is necessary to apply the technique of reading down section 25, so far as it is possible to do so, in order to avoid a breach of the appellant's Convention rights. It was agreed that this could be done, as Hooper J has set out in para. 99 of his judgment, by imposing an evidential burden on the defendant to point to or produce material which supports the existence of exceptional circumstances. I consider that this is the most appropriate avenue to take to the present appeal, and that it would ensure compatibility with the Convention".*

46. Accordingly, when **R v Whorms** is properly understood against the background of the case law that it followed and applied, it is not to be taken as introducing any burden upon a section 17(2) defendant having a previous conviction(s) for any listed offence, to show exceptional circumstances before being admitted to bail. **R v Whorms** advises that even in such cases, if the court (being mindful of its public duty) were to consider that there should be a showing of exceptional circumstances before bail might be granted, such a concern could operate to place nothing more than the evidential burden upon the defendant to point to the existence of exceptional circumstances.

47. And, I should add, as Lord Brown stated, whenever the court is left in a state of doubt, the "*default position*" will be the grant of bail.

48. For the foregoing reasons, I consider that the construction of section 17(2) of the Bail Law reached in **R v Whorms** remains applicable under the regime of the Bill of Rights.

"Proportionality and arbitrariness"

49. In the course of the hearing on 20th September 2013, and in response to Mr Hoffman's further criticism of section 17(2) of the Bail Law as being "disproportionate" and "arbitrary" because of its random and expansive list of offences; I raised the concern whether it was open to the court to declare legislation to be incompatible with the Bill of Rights for such reasons.

50. I then made reference to section 19 of the Constitution, which speaks directly to the issues of proportionality and arbitrariness (irrationality) in these terms:

> *"19(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.*
>
> *(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given reasons for that decision or act."*

51. Confined as it is to the regulation of official decisions and acts, section 19 provides no power to the court for the regulation of primary legislation.

52. However, I have since directed my attention to section 24 of the Constitution which is directly relevant and provides:

> *"24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorized to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified".*

53. Having seen the further written submissions[30], it is clear nonetheless that the furthest Mr. Hoffman's proposition goes is that to the extent the decision or act of the public official (here the judicial or police officer refusing bail) becomes disproportionate or arbitrary because it seeks to comply with the mandates of primary legislation (here section 17(2) of the Bail Law), then the legislation itself must be regarded as incompatible with the Bill of Rights. Thus, the argument in effect, is that if the legislation can only be applied in a disproportionate or arbitrary manner and so infringes upon a protected fundamental right, it is amenable to being declared incompatible.

54. Plausible though the proposition may seem in light of section 24 of the Constitution, it is not shown to apply to the Bail Law by the case authorities cited in support and which I will mention briefly to illustrate that view of them.

55. At all events though, I make it clear that the conclusions already reached that the Bail Law is not incompatible would remain the same even when considered in the light of sections 19 and 24 of the Constitution: the Bail Law is quite capable of being administered by the court in a proportionate and rational manner by the application of discretion. Thus, neither decisions nor actions that might be taken pursuant to it, nor the Bail Law itself, would necessarily as proposed, be prone to being characterized as disproportionate or arbitrary.

56. Mr. Hoffman's argument relies on European case law for the now settled proposition that the specified conditions in which a deprivation of a person's liberty may be justified are to be interpreted narrowly.

[30] Provided by both counsel on 24th October 2013

57. For this unquestionable proposition, he relies on three cases in particular, the third of which **McKay v United Kingdom**[31] dealt with the subject of bail and provides extensive further guidance which I will come to adopt below.

58. The other two - **Winterwerp v Netherlands**[32] (dealing with the compulsory detention of mentally ill persons) and **Saadi v United Kingdom**[33] (dealing with detention pending immigration or asylum applications) - are illustrative of the requirement that official decisions and acts not be disproportionate or arbitrary. From **Saadi** (paras 68 &69):

> *"68. While the court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute arbitrariness for the purposes of Article 5 para 1, key principles have developed on a case by case basis. It is moreover clear from the case law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved....*
>
> *69. One general principle established in the case law is that detention will be "arbitrary" where despite complying with the letter of the national law, there has been an element of bad faith or deception on the part of the authorities..."*

59. While I regard that dictum as being persuasively relevant to an understanding of sections 19 and 24 of the Constitution, no allegation of arbitrariness in that sense has been raised upon this petition. And, in providing as it is to be read as providing for the lawfulness of the detention of persons awaiting trial and for the prompt judicial oversight and control of their detention for <u>any</u> of the listed offences, the Bail Law may not therefore, in my view, be described as "disproportionate" or "arbitrary" in and of itself.

60. In the Cayman Islands (as elsewhere in the common law world and in Europe itself) the right to liberty (unlike certain other rights[34]) is not absolute.

61. The deprivation of liberty may be justified under any of the exceptions listed in section 5(2) of the Bill of Rights, including section 5(2)(e) where a person may be detained "*on reasonable suspicion that he or she has committed, is committing or is about to commit a criminal offence under <u>any</u> law*".**[Emphasis added]**.

62. The word "any" in emphasis recognizes that the Legislature and the Executive (in the setting of policy) are afforded a margin of appreciation in determining, having regard to local circumstances, that judicial consideration should be brought especially to bear upon whether bail should be granted for different kinds of offences, not just those which may universally be regarded as being of the most serious kind.

63. In the present context, the important check upon such legislative or executive determination remains that which is enshrined in section 5(3) of the Bill of Rights, requiring that a person detained "be brought promptly before a court" for bail to be considered, irrespective of the offence alleged.

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[31] (2007) 44 EHRR 41

[32] Cited above in the excerpt from Lord Bingham's Opinion on behalf of the Privy Council in Hurnam.

[33] (2008) 47 EHRR 17: the applicant, an Iraqi Kurd sought asylum in the U.K. and challenged the decision to detain him for 7 days pending the processing of his application. It was held that the decision to detain him, the system of detention and the circumstances of his detention had not been in violation of Art. 5(1) of the ECHR but the failure of the authorities to give him the specific reasons which had motivated his detention was a violation of Art. 5(2) which gave the right to be informed of the reasons for detention.

[34] Bill of Rights : Such as section 3 – the right to freedom from torture and inhumane treatment ; section 4 : the right to freedom from slavery or forced or compulsory labour.

64. For those reasons, section 17(2) of the Bail Law, properly construed, is subject to that requirement of section 5(3) of the Bill of Rights and so gives rise to no incompatibility with the Constitution simply by virtue of the extensive nature of the offences which it lists.

Further Guidance

65. In appreciation for the industry of research undertaken by counsel and having regard to its relevance to the Bill of Rights no less so than to the ECHR, I will record as worthy of adoption in this jurisdiction the further guidance provided by **McKay v United Kingdom** as follows (summarising the effect of the earlier case law)[35]:

> *"(a) It (is) imperative that a detained person be brought promptly before a judge in the days immediately following his arrest and little flexibility would be afforded in this regard. Likewise, the first review had to be an automatic event and not dependent on an application from the detained person.*
>
> *(b)The first hearing had to be capable of ordering the release of the detained person, hearing the submissions of the detained person and reviewing the lawfulness and justification of the arrest and detention.*
>
> *(c) The first hearing did not have to consider, as a matter of automatic obligation, the release of the detained person pending trial, for reasons other than the lawfulness of the detention or the existence of reasonable suspicion that the detained person had committed a criminal offence. If the detention failed either of these two criteria, then the judge had to be [and is in the Cayman Islands] empowered to order the release of the detained person.*
>
> *(d) During the pre-trial period, there ha(s) to be a presumption in favour of release pending trial. Detention (is) only justified where there (is) a specific public interest which could outweigh the respect for individual liberty [such as a clear risk of re-offending].*
>
> *(e) National judicial authorities (are) charged with ensuring that pre-trial detention (does) not exceed a reasonable time and (are) under an obligation to review the detention of persons pending trial. There (is) no fixed time-frame applicable to each case, simply a need to keep unjustified deprivation of liberty to an acceptable minimum.*
>
> *(f) It would be good practice and highly desirable [as is the case in the Cayman Islands] (that) the judicial officer who conducted the first review of the lawfulness of detention also (has) the power to consider release on bail. However, it could not be said that such a mechanism was required and there is no reason why the issues could not be dealt with by separate judicial officers, as long as the question of bail was still considered with the speed the Convention demanded".*

Conclusion

66. In summary, the Bail Law, notwithstanding the purported disentitlement to bail expressed in section 17(2), may and should appropriately be read down to make it compliant with the Bill of Rights requirement of prompt and continuing judicial oversight, when the court will be entitled to take account of all relevant

[35] As taken from the head note of the reported judgment.

considerations pointing for and against the grant of bail for any of the listed offences. When so construed despite any lack of clarity or ambiguity, section 17(2) of the Bail Law is in and of itself neither disproportionate nor arbitrary, nor is it necessarily prone to being applied in that manner. It is, therefore, not incompatible with the Bill of Rights.

67. The petition is refused with no order as to costs (none would be permissible in any event, as the petitioner is legally aided).

Dated 24th day of December 2013

Hon. Justice Anthony Smellie
Chief Justice
The Cayman Islands

SCHEDULE

In terms bearing close resemblance to section 5 of the Bill of Rights, Articles 5.1.c and 5.3 of the ECHR provide:

> *"5.1 Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> ----
>
> *c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority in unreasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *5.3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a Judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantee to appear at trial".*