

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE NO. G 211 OF 2013**

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5
6 **BETWEEN:**

7 **KISHA LETOYA MCLEAN**

8 **Applicant**

9 **AND:**

10 **THE ATTORNEY GENERAL**
11 **(ON BEHALF OF THE DIRECTOR OF PRISONS)**

12 **Respondent**

13

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16

17 **Appearances:**

Mr. Guy Dilliway-Parry of Priestleys for the Applicant
Ms. Suzanne Bothwell of the Attorney General's Chambers
for the Respondent

20
21 **Before:**

Hon. Justice Richard Williams

22
23 **Heard:**

22nd August 2013

24
25 **Further Written Submissions:** 28th August 2013 and 9th September 2013

26
27 **Draft Judgment circulated:** 19th September 2013

28
29 **Date of Judgment:** 23rd September 2013



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JUDGMENT

33

34 **Introductory**

35 1. The Applicant is a 36-year-old Caymanian national who was convicted by a
36 Mexican Court on 25th April 2006. Regrettably, neither party has been able to
37 produce formal details of the conviction from the Mexican authorities and thereby
38 are unable to precisely confirm what the actual offence was. Although I recognise

1 that there may have been difficulties obtaining these details from the Mexican
2 authorities, I hold the view that the Attorney General should have ensured that he
3 had obtained these details before the warrant was prepared and placed before the
4 Governor. It creates unnecessary uncertainty, especially in a case where one is
5 dealing with an issue of whether an offence is specified in a Schedule, and it sets
6 a poor procedural precedent for future prisoner transfers. Both parties characterise
7 it as being an importation of drugs offence, which could be described as being a
8 drugs trafficking offence in nature. The Applicant termed it as being "*the offence*
9 *of introducing cocaine into Mexico.*" Following conviction, the Applicant was
10 sentenced to seventeen years and six months imprisonment. As of the date of this
11 hearing, the Applicant has been in custody for nine years and five months.

12
13 2. The Applicant made representations to the Cayman Islands Government that she
14 wished to serve out the remainder of her Mexican sentence in the Cayman Islands.
15 This representation was made on 7th November 2006 via the British Embassy in
16 Mexico City.

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18 3. Pursuant to the Repatriation of Prisoners (Overseas Territories) Order 1986 ("the
19 Order"), which extended the powers of Her Majesty in the exercise of her powers
20 under Section 9(4) of the Repatriation of Prisoners Act 1984, the Applicant's
21 transfer process commenced.



1 4. As a part of the transfer process, the Applicant was notified of her release date
2 and other relevant information prior to being transferred pursuant to the
requirements of the Order. Mr. Dwight Scott, the then Director of Prisons (“the
Director”), calculated and provided the release date if she were to serve the rest of
the sentence in the Cayman Islands in accordance with the Imprisonment Law,
1975 and the Prisons (Amendment) Law, 2005 (“the Law”).

7

8 5. These details were provided to the Applicant in an email dated 29th April 2010,
9 and included a breakdown of her parole eligibility date, earliest date of release
10 and the latest date of release. The Director’s calculations set the parole eligibility
11 date at 21th November 2013, the earliest release date at 2nd November 2015 and
12 the latest date of release at 1st September 2021.

13

14 6. In a letter dated 6th December 2010 sent from the Cayman Islands Government
15 Legal Department to the Applicant, she was notified in compliance with Schedule
16 1, Section 1(4)(a) to (e) of the Order of the agreed international arrangements
17 concerning her transfer from Mexico to the Cayman Islands.

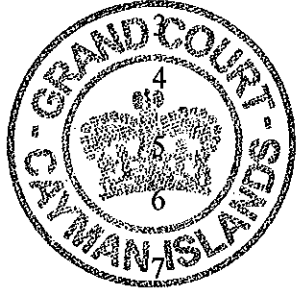
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19 7. The content of the said letter informed the Applicant that the transfer was being
20 carried out pursuant to the Council of Europe Convention on the Transfer of
21 Sentenced Persons (“the Convention”), to which both the United Kingdom and
22 Mexico are signatories. She was informed that the Cayman Islands domestic law
23 concerning the transfer of prisoners was in the Order.

24



1 8. The Applicant was also informed in the letter, pursuant to the Order, in particular,
2 Section 1(4) therein of the following:



- 3 (i) *that the request for transfer could only be made if her request was made*
4 *on a voluntary basis.*
- 5 (ii) *that she understood that the transfer would be carried out pursuant to the*
6 *Convention, Order and the domestic laws of Mexico.*
- 7 (iii) *that she was still serving a prison sentence and that upon transfer, that*
8 *sentence would be governed by the rules, as set out in the Prison Law of*
9 *the Cayman Islands.*
- 10 (iv) *that the Director had calculated her remaining prison sentence based on*
11 *the following information, namely:*
- 12 (a) *that she was arrested and placed in custody from 3rd March 2004,*
- 13 (b) *that she was sentenced on 26th April 2006 to seventeen years and*
14 *six months imprisonment, and*
- 15 (c) *that her appeal against sentence had been dismissed.*

16
17 9. The letter confirmed the content of the April 2010 email by again informing the
18 Applicant that, based on the Director's calculations and the laws in the Cayman
19 Islands, her release dates would be:

- 20 (a) *parole eligibility from 21st November 2013 which was based on her*
21 *having served 5/9 of the sentence before being considered for*
22 *parole,*
- 23 (b) *earliest date of release 2nd November 2015, and*
- 24 (c) *latest date of release 1st November 2021.*

1 10. The Applicant was informed in the letter of the powers of His Excellency the
2 Governor of the Cayman Islands (“the Governor”) under Section 6 of the Order
3 and an extract of Section 6 was attached to the letter. The letter then stated:

4 *“In light of the above, please carefully read and consider this letter and its
attachments. If any information regarding (d)¹ above is inaccurate, as it
relates to your sentence, please provide us with the correct information
through your liaison at the British Embassy in Mexico.*

*Please also ensure that this letter and its attachments are read and
understood and endorsed **before** signing the certificate of transfer to be
provided to you at a separate time by the Mexican authorities.”*

*Please return a signed and dated copy of this letter to the British Embassy
representative assigned to your case, for onward transmission to our
office.”*

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15 11. The letter then contained the following declaration, which the Applicant signed on
16 12th February 2011:

17 *“I, Keisha Letoya McLean have read the content of this letter, fully
18 understand and accept the terms of my transfer and sentence as outlined
19 herein.”*

20

21 And at the bottom of the letter the following statement reads:

22 *“This letter and its attachments are to be read, signed and dated by the
23 prisoner if she is in agreement with its contents. She is then to ensure that
24 this endorsed letter is sent to the British Embassy representative in Mexico
25 for onward transmission to the Cayman Islands Government Legal
26 Department.”*

¹ That being the above information upon which the Director had calculated the remaining prison sentence.



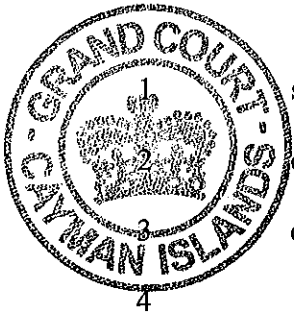
1 12. Pursuant to the warrant issued by the Governor on 23rd May 2012, the Applicant
was received into the custody of the prison in the Cayman Islands on 20th
December 2012. The Governor was satisfied that the requirements for making the
order were fulfilled. The warrant provided that she would serve her sentence
pursuant to the Cayman Islands law.

6

7 13. On 9th January 2013, shortly after the Applicant's transfer, an official calculation
8 of release dates form was completed and then checked on 16th January 2013. The
9 calculation was the same as that made by the former Director and provided to the
10 Applicant when she was in Mexico. The Applicant was furnished with a copy of
11 the calculation and the dates were again explained to her.

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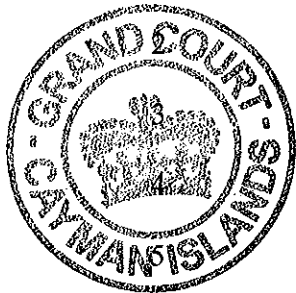
13 14. The information included the earliest and latest dates of release. Importantly for
14 the application before me, in relation to parole eligibility, the Director felt this to
15 be governed by Section 2 of the Law. In principle this is not disputed. Section 2
16 determines parole eligibility based on the sentence a person serves for a specific
17 offence. Section 2 breaks down eligibility requirements into two categories, the
18 first pursuant to Section 2(1)(a) concerns sentences where offences are set out in
19 the Schedule to the Law. These are usually more serious offences and they require
20 that at least 5/9 of the sentence be served before one is eligible for parole or
21 release on licence. The second category, pursuant to Section 2(1)(b), are sentences
22 for all the offences that are not "*specified*" in the Schedule to the Law and require
23 the prisoner to serve only at least one year's imprisonment, or one third of his



1 sentence, whichever is the greater before parole eligibility. The Applicant
2 contends that her offence is not listed in the Schedule, so her eligibility should be
3 determined by reference to Section 2(1)(b).
4

5 15. With this in mind, the Director determined that, for the purpose of parole
6 eligibility, the relevant offence for which the Applicant was convicted in Mexico
7 was a drug trafficking offence. He must have determined that it fell under the
8 entry in the Schedule which stated drug trafficking offences under the Misuse of
9 Drugs Law (2000 Revision) and therefore was a specified offence in the Schedule
10 inserted pursuant to Section 3 of the Law. As a consequence, in calculating the
11 parole eligibility, the Director applied the 5/9 principal, meaning that the
12 Applicant would have to serve 5/9 of her sentence before she became eligible for
13 parole. When calculating the parole eligibility, he also had in mind that the
14 Applicant's sentence was seventeen years and six months (6,392 days), and time
15 spent on remand in Mexico was 784 days. He calculated that 5/9 of her total
16 sentence was 3,551 days and from that he deducted the 784 days spent on remand
17 in accordance with section 2 of the Law. The Director concluded that the balance
18 of time left to be served by the Applicant before becoming eligible for parole
19 would be 2,767 days, the date being 21st November 2013.

20
21 16. On 6th May 2013, the Applicant's attorneys wrote to the Director challenging the
22 basis of his calculations. The attorneys expressed the view that the Applicant's
23 parole eligibility could not be calculated against the Schedule, because the offence



1 was a foreign offence and could not be considered as being a specified offence as
it did not appear in the Schedule attached to the Law. The Attorneys submitted to
the Director that the Applicant's parole eligibility should have commenced after
she had served only one third of her sentence. This is still the position of the
Applicant at the hearing before me, who also adds through Counsel's oral
6 submissions that although the offence for which she was convicted may be
7 characterised as being a drug trafficking offence it is not, as is required for it to be
8 a specified offence, actually one of the offences actually defined under the Misuse
9 of Drugs Law. The Respondent's position at this hearing remains unchanged and
10 is the same as that taken consistently by the various Directors.

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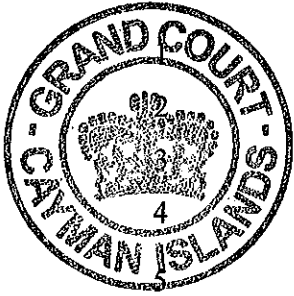
12 17. As a consequence, by a Notice of Motion filed on 10th of July 2013², the
13 Applicant applied for leave to seek judicial review of the decision and sought the
14 following relief:

15 (i) *An order Certiorari quashing the decision reached by the Director of*
16 *Prisons that the Applicant is: a) Subject to the Schedule of the Prisons*
17 *(Amendment) Law 2005; and b) by virtue of 2(1)(a) above not eligible to*
18 *be released on licence.*

19 (ii) *A Declaration that the Applicant has not committed an offence listed in the*
20 *Schedule of the Prisons Law (2005 Revision) and thus the Applicant's*
21 *release on licence is to be governed by Section 2(1)(b); namely, after one-*
22 *third of the sentence.*

23 (iii) *An order of Mandamus that the Director of Prisons determine the*
24 *Applicant's eligibility for release on licence with reference to Section*
25 *2(1)(b) of the Prisons Law (2005 Revision).*

² The copy of the Notice on the Court file is undated.



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- (iv) *Give effect to Article 5(1) of the Bill of Rights, Freedoms and Responsibilities of the Constitution of the Cayman Islands, in that no one shall be deprived by government of liberty where such deprivation is not in accordance with a procedure prescribed by the law.*
- (v) *Damages pursuant to Order 53, Rule 7 for unlawful imprisonment through the failure of the Director of Prisons to observe and protect the statutory and common law rights of the Applicant; and*
- (vi) *Such further consequential or other relief that the Court considers just."*

10 18. I granted leave for the judicial review by Order dated 9th July 2013. The
11 application for leave was heard 'administratively'.

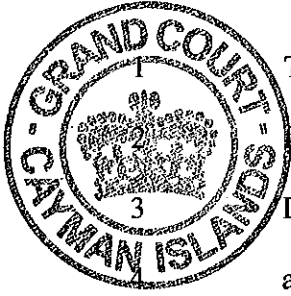
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13 19. At the inter-partes hearing, I considered oral and written submissions from the
14 parties. Following the hearing I afforded the parties the opportunity to make
15 further written submissions concerning Section 2 of the Schedule to the 1984 Act,
16 as well as my observations concerning the Legal Aid, Sentencing and Punishment
17 of Offenders Act 2012 ("LASPO") (in particular Schedule 16 and Schedule 17
18 paragraph 10), Schedule 20B Part 2 paragraph 4 as well as Schedule 15 of the
19 Criminal Justice Act 2003. Thereafter, the attorneys kindly provided further
20 written submissions.

21

22 **The Law in Relation to the Repatriations of Prisoners**

23 20. Prior to addressing the issues concerning the parole date issue, it is helpful for
24 completeness sake and to put the matters into context, to understand the basis
25 upon which the Applicant was transferred to the Cayman Islands from Mexico.



The law governing the transfer was very helpfully summarised and applied to the facts of this case in the written submissions prepared by Ms. Bothwell. Mr. Dilliway-Parry indicated that, as he felt the summary was on the whole a fair and accurate one, he would have no problem with the Court rehearsing the same in the judgment. In light of this, I intend to largely reiterate Ms. Bothwell's lucid and full analysis of the law which underpins repatriation transfers herein.

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8 21. The transfer took place pursuant to the Order.³ The Order brings into Cayman
9 legislation the principles set out in the Council of Europe Convention on the
10 Transfer of Sentenced Persons.⁴ The Convention and the Order are designed to
11 enable a national who is convicted and sentenced abroad to return to his home
12 country to serve the remaining part of his sentence.

13

14 22. The Applicant was transferred pursuant to Article 10(1) of the Convention. The
15 Cayman Islands is able to continue to enforce the Applicant's sentence, pursuant
16 to the principles set out in Article 10. The sentence remains a sentence of the
17 Mexican court and is not converted into a Cayman sentence.

18

19 23. Article 9(1)(a) of the Convention requires that:

20

"The competent authorities of the administering State shall:

21

- a. continue the enforcement of the sentence immediately or
22 through a court or administrative order under the
23 conditions set out in Article 10."*

³ See paragraph 3 above.

⁴ See paragraph 7 above.



Article 9(3) of the Convention provides that:

"The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions."

5

6 25. Article 10(1) states that:

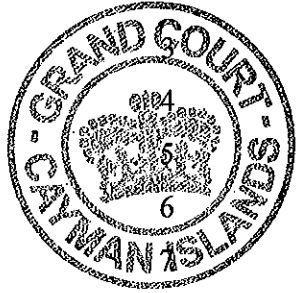
7 *"In the case of continued enforcement, the administering State shall be*
8 *bound by the legal nature and duration of the sentence as determined by*
9 *the sentencing State."*

10

11 26. The Respondent highlights that drug trafficking is an offence recognised by
12 Cayman law. It is submitted that it therefore fulfils the condition in Article 3(1)(e)
13 of the Convention, namely that the conduct for which the sentence has been
14 imposed constitutes a criminal offence according to the law of the Cayman
15 Islands, being the administering state, and would constitute a criminal offence if
16 committed in the Cayman Islands. If this condition were to apply in this matter, I
17 note that there is no requirement for relevant offences in each state to be identical
18 by, for example, being placed in the same category of offence or by use of the
19 same terminology. The purpose of this condition is to prevent the situation where
20 the administering state would be reluctant to implement a sentence for conduct
21 that would not be regarded as criminal domestically.

22

23 27. However, in Framework decision 2008/909/JHA an approach was adopted to
24 make this dual nationality requirement "*less onerous*". Article 7 lists offences,



1

one of which is trafficking in narcotic substances, for which dual criminality is not required,

2

“if they are punishable in the issuing state by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of view issuing State, shall, under the terms of this framework decision and without verification of the double criminality of the act, give rise to the recognition of the judgment and enforcement of the sentence imposed.”⁵

8

9

10 28. When considering Article 10(1) of the Convention there is no issue that the legal
11 nature of the sentence, namely imprisonment, is the same in Mexico and in the
12 Cayman Islands. In respect of the duration of the sentence, it is submitted by the
13 Respondent that there are similarities between the length of sentence imposed by
14 the Mexican Court, and those imposed for like offences in the Cayman Islands.

15

16 29. It is agreed by the parties that the transfer to the administering country was
17 initiated under the Order and a warrant issued by the Governor pursuant to section
18 1(1) of the Order is the instrument used to effect the transfer.

19

20 30. Section 3(1) of the Order provides that:

21 *“The effect of a warrant providing for the transfer of the prisoner into the*
22 *Territory shall be to authorise:*

23 ...

24 (c) *the detention of the prisoner in the Territory in accordance with*
25 *such provisions as may be contained in the warrant, being*

⁵ Page 27 of the United Nations Office on Drugs and Crime Handbook on the International Transfer of Sentenced Prisoners.



provisions appearing to the Governor to be appropriate for giving effect to the international agreements in accordance with which the prisoner is transferred."

4

5 31. Section 3(3) of the Order provides that:

6 *"In determining for the purposes of paragraph (c) of subsection (1)*
7 *above⁶ what provisions are appropriate for giving effect to the*
8 *international arrangements mentioned in that paragraph, the Governor*
9 *shall, to the extent that it appears to him consistent with those*
10 *arrangements to do so, have regard to the inappropriateness of the*
11 *warrant's containing provisions which –*

12

13 *(b) are framed without reference to the length--*

14

15 *(i) of the period during which the prisoner is, but for the*
16 *transfer, required to be detained in that country or*
17 *territory; and*

18

19 *(ii) of so much of that period, as will have been, or be treated*
20 *as having been, served by the prisoner when the said*
21 *provisions take effect."*

22

23 32. Section 3(4) of the Order provides that:

24 *"Subject to subsection (6) below, a provision contained by virtue of*
25 *subsection (1)(c) above in a warrant under this Act shall for all purposes*
26 *have the same effect at the same provision contained in an order made as*
27 *mentioned in sub – paragraph (i) or, as the case may be, sub – paragraph*
28 *(ii) of the subsection (2)(b) above."*

⁶ Referring to section 3 (1) (c) of the Order.



1 33. Section 3(2)(b) provides:

2 *“Subject to section 4(2) to (4) below, a provision shall not be
3 contained by virtue of subsection (1)(c) above and a warrant under
4 this Act. In this, it satisfies the following two conditions, that is to
5 say –*

6 ...
7 (b) *it is a provision which at the time the warrant is issued may be
8 contained in an order made either –*

- 9 (i) *in the course of the exercise of its criminal jurisdiction by a
10 court in the Territory; or*
11 (ii) *otherwise than by a court, but for the purpose of giving
12 effect to an order made as mentioned in sub – paragraph
13 (i) above.”*
14

15 **Position of the Parties**

16 34. What is for determination is summarised in both the Applicant’s and the
17 Respondent’s written skeleton arguments. These were elaborated upon by oral
18 submissions at the hearing.

19
20 35. The Applicant contends that this is a straightforward issue and concerns the
21 appropriate interpretation of the amended Prisons Law. The Applicant maintains
22 that the offence for which the Applicant was convicted in Mexico is not a
23 specified offence as it is not listed in the Schedule to the Law and, as it is a
24 foreign offence, cannot be termed as or inferred to be as being a drug trafficking
25 offence under the Misuse of Drugs Law (2000 Revision). It is contended that the
26 offence is contrary to Mexican, but not Cayman law and there is



"no lawful basis for the proposition that foreign offences can be inferred on to the Schedule."

4 It is argued that the Law is drafted in

5 *"clear and unambiguous terms",*

6

7 and that it is a

8 *"non-flexible and prescriptive statute which is not open to any form of an*
9 *action or latitude."*

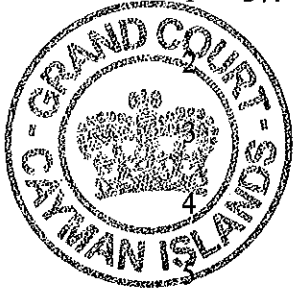
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11 It is submitted that if the Legislature had intended to include the equivalent
12 offences for repatriated prisoners in the Schedule, they would have provided for
13 that in the Schedule. It is contended that the Applicant is not detained under any
14 provision of Law. It is submitted that as the offence cannot be inferred on to the
15 Schedule and that, as is the approach for all offences not specified in the
16 Schedule, section 2(b) of the Law must be applied. It is submitted that this means
17 that the correct term of imprisonment prior to which Ms. McLean would be
18 considered eligible for parole is one third.

19

20 36. The Respondent contends that the position taken by the Applicant is flawed if
21 taken to its conclusion, submitting that in those circumstances in no part of the
22 Law could offence be viewed as a foreign offence. It is rightly submitted, and not
23 contested, that the Convention intends the sentence to be enforced by the law of
24 the Cayman Islands, being the administering state.

25



1 37. The Respondent contends that the Convention did not intend the administering
state to have to change domestic legislation to introduce concepts of foreign
offences when determining how to approach remission for transferred prisoners
and that such transferred prisoners in this regard should be considered the same as
domestic prisoners. This latter submission is not agreed by the Applicant.

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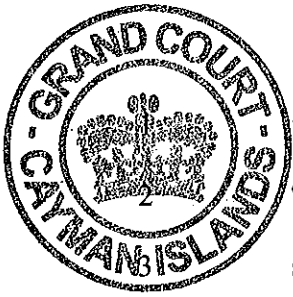
7 38. It is contended that the Respondent, when considering eligibility for parole, is to
8 have regard to the nature of the offence and consider whether it falls within
9 Section 2(a) or Section 2(b) of the Law. In oral submissions this appeared to be
10 agreed by the Applicant, who went on to submit that, after consideration of the
11 sections, foreign offences cannot be said to fall under Section 2(b) as they are not
12 in the Schedule. The Respondent does not accept the submission that because the
13 offence for which the Applicant is serving her sentence is a drug trafficking
14 offence in nature it automatically falls within the Schedule and that Section 2(a)
15 of the Law applies. The Law would have to specifically actually provide for their
16 inclusion in the Schedule.

17

18 **Conclusion**

19 39. The Respondent is right to submit that ordinarily the approach in the Cayman
20 Islands, when determining when a prisoner becomes eligible for release on licence
21 at the discretion of the Governor is to firstly look at the offence and then decide
22 whether it is one specified in the Schedule. If it is one that is "*clearly*"⁷ listed
23 within the Schedule, then to be eligible the prisoner must have served at least

⁷ See paragraph 45 Respondent's skeleton argument.



five-months of his sentence pursuant to Section 2(1)(a) of the Law. If the offence “is not clearly listed⁸” in the Schedule it automatically follows that he will have to serve only one-third of his sentence before becoming eligible.

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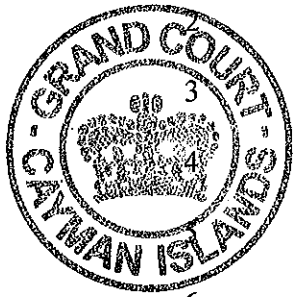
5 40. Ms. Bothwell submits that the Convention does not require administering states to
6 alter their domestic legislation to introduce concepts of ‘foreign offences’ to
7 determine remission periods of transferred periods once they have been
8 transferred. Although there is no clear authority produced for that proposition, it is
9 arguable that the Convention sets out no requirement for a state to do so. It is a
10 matter for the administering state to decide, depending on how it wishes to make
11 clear its intention. Some administering states have recognised the advantages of
12 passing domestic legislation to give clarity in certain areas for such prisoners
13 when it comes to issues surrounding release on licence.

14

15 41. For example, the position in England and Wales where there are still some
16 prisoners who have sentences imposed prior to the 3rd December 2012 enactment
17 of LASPO. LASPO is the statute in respect to the release of prisoners, which
18 generally speaking, provides that prisoners with determinate sentences will be
19 released at the halfway point, in line with the Criminal Justice Act 2003, taking
20 into account time spent on remand and the eligibility of the prisoner for Home
21 Detention Curfew.

22

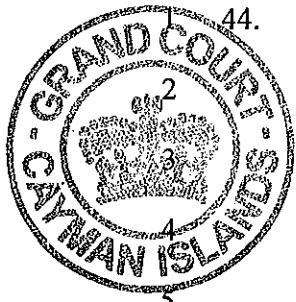
⁸ See paragraph 46 Respondent’s skeleton argument.



1 42. The position for prisoners who were sentenced for offences committed prior to 4th
2 April 2005 depends on when the halfway point of his sentence falls. If it falls on
3 or after 9th June 2008, they will usually be automatically released at that point in
4 line with the 2003 Act. However, having regard to Schedule 16 and Schedule 17
5 Paragraph 10 LASPO, which insert Schedule 20B into the Criminal Justice Act
6 2003, there are certain exceptions to the entitlement to automatic release at that
7 point with prisoners, for example, serving sentences for certain violent or sexual
8 offences⁹ being dealt with under older release arrangements. Such prisoners
9 sentenced on or after 1st October 1992, who are serving four years or more are
10 eligible for release on licence at the halfway point, subject to a Parole Board
11 recommendation. If the Parole Board has not recommended their release by the
12 time they reach the two-thirds point of the sentence, they will be released
13 automatically at that later stage on licence expiring at the three-quarter point of
14 the sentence
15

16 43. Paragraph 4(2) of Schedule 20B sets out conditions that have to be met in relation
17 to both domestic and repatriated prisoners for the duty to release to be at the
18 increased level of two thirds of the sentence. Paragraph 4(3) of Schedule 20B sets
19 out the conditions that need to apply to the domestic prisoner. The conditions
20 concerning the type of offence to be met in relation to repatriated prisoners are
21 contained in paragraph 4(5) and these partly echo paragraph 4(3)(a) of Schedule
22 20B.
23

⁹ Instead prisoners are considered for release on parole from the halfway point of the whole sentence



44. The specified violent and sexual offences which form the basis of the exception are set out in Schedule 15 of the Criminal Justice Act 2003. I note that Schedule 15, rather than defining certain areas of criminal conduct, is very precise when it refers to the vast majority of the relevant offences, namely that for 60 of the 65 offences reference is made therein not only to the Act under which the offence has been committed but also to the relevant section of that Act.¹⁰

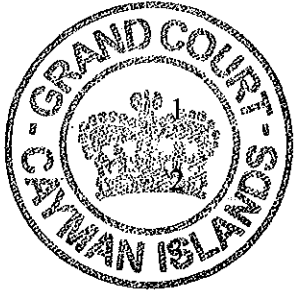
45. The exception similarly applies to a repatriated prisoner who has been convicted of an offence prior to 4th April 2005 that is listed in Schedule 15 of the Criminal Justice Act 2003. Schedule 20B, Part 2 paragraph 4(5) makes it clear that the exception which applies to domestic prisoners also applies to a person serving a sentence by virtue of having been transferred to the United Kingdom in pursuance of a warrant issued before 9th June 2008 under the 1984 Act if

“the offence (or one of the offences) for which the person is serving the sentence corresponds to murder or to any offences specified in Schedule 15 as it had effect on 4 April 2005.”

Paragraph 4(1)(a) requires that the conditions set out in paragraph 4(2) must also be met, and this applies to both domestic and repatriated prisoners.

46. I accept that this statutory provision dealing with the exception for certain specified offences concerns the timing of the entitlement to automatic release on

¹⁰ The five offences being manslaughter, kidnapping, false imprisonment, an attempt to commit murder/conspiracy to commit murder, aiding/abating/counselling/procuring/inciting the commission or conspiring to commit or attempting to commit an offence specified in the schedule 15.

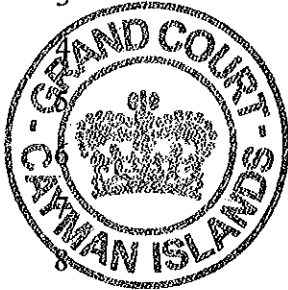


4 licence for both domestic and repatriated prisoners rather than their eligibility to
5 parole. However, it is a clear example of an administering state making provision
6 in their domestic legislation, where there is a repatriated prisoner (who has
7 naturally committed a “foreign offence”) to deal with remission periods after his
8 transfer to that state in fairly similar circumstances to those before me. It reflects
9 an intention that the repatriated prisoner and domestic prisoner be treated the
10 same way in regard to the exception to the general rule on automatic release on
11 licence (remission), which applies to specified offences set out in a Schedule. This
12 is done by making it clear that, although the foreign offence was not committed
13 under the specific relevant English statute referred to in the Schedule, it became a
14 specified offence because it corresponded to one of the offences set out in the
15 relevant Schedule (Schedule 15). The provision was likely felt necessary because
16 the vast majority of the offences set out in Schedule 15 specifically defined the
17 offence being under a certain statute, and therefore the repatriated prisoner could
18 otherwise not be said to be serving a sentence given for that offence under that
19 Act. I accept that this approach in England and Wales is not in any way binding,
20 but it is a helpful example of a sensible approach by an administering state to give
21 clarity in relation to its intention concerning release on licence for repatriated
22 prisoners under its own law.

21 47. The Schedule to the Prisons Act for this particular offence makes direct reference
22 to the specified offence being a drug trafficking offence under the Misuse of

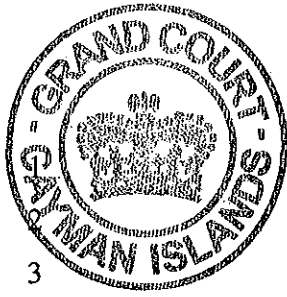
1 Drugs Law (2000). Section 2 of the Misuse of Drugs Act 2000, the definition and
2 interpretation section provides:

3 “Drug trafficking offence” means any of the following -



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- (a) an offence under paragraph (c), (f) or (m) of section 3(1);
- (b) an offence under section 3(1) of attempting any of the matters mentioned in paragraph (a);
- (c) an offence under section 4 (manufacture and supply of scheduled substances);
- (d) an offence under section 11 (assisting in or inducing commission outside the Islands of an offence punishable under a corresponding law);
- (e) an offence under section 19 (using ship for illicit trafficking);
- (f) an offence under section 47 (assisting another to retain the benefits of drug trafficking);
- (g) an offence under section 48 (concealing or transferring proceeds of drug trafficking);
- (h) an offence under section 10(1) of the Customs Law (1998 Revision), in connection with a prohibition on importation or exportation having effect by virtue of section 3;
- (i) an offence under section 310 of the Penal Code (1995 Revision) of conspiracy to commit any of the offences in paragraph (a), (c), (d), (e), (f), (g) or (h);
- (j) an offence under section 308 of the Penal Code (1995 Revision) of attempting to commit any of the offences in paragraph (a), (c), (d), (e), (f), (g) or (h);
- (k) any offence at common law of inciting another to commit any of the offences in paragraph (a), (c), (d), (e), (f), (g) or (h); or



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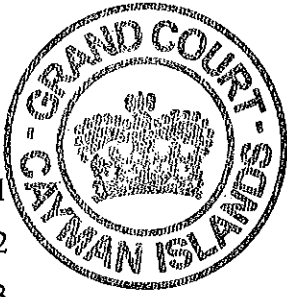
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(l) *aiding, abetting, counselling or procuring the commission of any of the offences in paragraph (a), (c), (d), (e), (f), (g) or (h);”*

48. For completeness sake, Section 2 of the Misuse of Drugs Act (2009) Revision similarly provides:

“Drug trafficking offence” means any of the following -

- (a) *an offence under paragraph (c), (f) or (m) of section 3(1);*
- (b) *an offence under section 3(1) of attempting any of the matters mentioned in paragraph (a);*
- (c) *an offence under section 4 (manufacture and supply of scheduled substances);*
- (d) *an offence under section 11 (assisting in or inducing commission outside the Islands of an offence punishable under a corresponding law);*
- (e) *an offence under section 19 (using ship for illicit trafficking);*
- (f) *an offence under section 12(1) of the Customs Law (2007 Revision), in connection with a prohibition on importation or exportation having effect by virtue of section 3;*
- (g) *an offence under section 321 of the Penal Code (2007 Revision) of conspiracy to commit any of the offences in paragraph (a), (c), (d), (e), or (f);*
- (h) *an offence under section 319 of the Penal Code (2007 Revision) of attempting to commit any of the offences in paragraph (a), (c), (d), (e) or (f);*
- (i) *any offence at common law of inciting another to commit any of the offences in paragraph (a), (c), (d), (e) or (f); or*



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(i) *aiding, abetting, counselling or procuring the commission
of any of the offences in paragraph (a), (c), (d), (e) or (f);
or”*

5 49. The Applicant, although serving a sentence for an offence that may be
6 characterised as being a drug trafficking offence in nature it cannot be stated as
7 being one of the specific drug trafficking offences under the Misuse of Drugs
8 Law. It cannot be said to be one of the offences under a specific section of the
9 Law as is required in the definition given under the Law.

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11 50. The Schedule requires certainty and offences cannot be inferred into the list where
12 the offences in the Schedule refer to the specified offence being an offence under
13 a specific Cayman Islands Law. If the Legislature had given due consideration to
14 the effect of the later Prisons (Amendment) Law on prisoners being repatriated
15 under the earlier Order they should, if they had intended corresponding offences
16 to be included in the Schedule, have made that provision. A failure to do so means
17 that the offences are not included in the Schedule. I do not accept the submission
18 that an administering state should not make provision in their legislation to
19 determine issues of remission, they should where clarity and certainty is required.

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21 51. Accordingly,

22 (i) I make a declaration that the Applicant has not committed an offence
23 listed in the Schedule of the Prison Law (2005 Revision) and thus the



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Applicant's release is to be governed by Section 2(1)(b); namely one-third of the sentence.

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(ii) I order certiorari quashing the decision reached by the Director that the Applicant is:

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(a) subject to the Schedule of the Prisons (Amendment) Law 2005:

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and

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(b) by virtue of 2(1)(a) above not eligible to be released on parole.

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(iii) An order for mandamus that the Director determine the Applicant's eligibility for release on licence with reference to Section 2(1)(b) of the Prisons Law (2005 Revision).

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12 52.

Ms. McLean is at liberty to set down a hearing on the question of damages. However, before deciding whether or not to take that step, the Applicant may wish to carefully consider that it was not until May 2013 that the remission calculations were challenged by her. She may also want to have regard to the content of her signed declaration and acceptance of the terms of her transfer, the contents of which are set out paragraph 11 herein.

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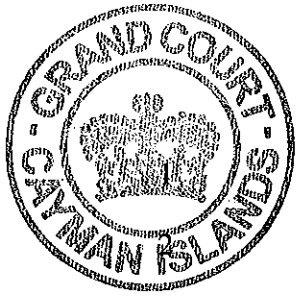
14 53.

In his oral submissions, Mr. Dilliway-Parry rightly highlighted that there was no authority to the effect that if the offence in the Schedule is termed as being one under a named Law of the Cayman Islands, in this case the Misuse of Drugs Law, the Director can simply adjudge it to be a specified offence by looking for "the

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3 *nearest equivalent.*” However, the parties made a number of submissions
4 concentrating on the wider issue of whether any of, what they termed, “*foreign*
5 *offences*” could be regarded as specified offences. The issue is not whether there
6 is an offence, for which the Applicant is serving a sentence, for there clearly is
7 one, but is it one that falls within the Schedule? The majority of the offences in
8 the Schedule simply name the offence or define certain areas of criminal conduct
9 and do not define by statute. Some of the offences in the Schedule will likely be
10 termed the same in certain states, for example arson, rape, kidnapping, abduction,
11 theft robbery, manslaughter. One might argue that for these clear offences that
12 one could determine that they fall within the Schedule, for there is greater
13 certainty that they are the same offence. However, there will be other offences
14 which although having different titles or terminology in each state, will be of the
15 same character, or will correspond to an offence in the Schedule.

15 54. As the Legislature in the Cayman Islands has chosen a mixed Schedule by
16 defining certain offences with reference to the Statute creating the offence and
17 others only by areas of criminal conduct, it would not be appropriate to have two
18 separate approaches to determine whether an offence is a specified offence.
19 Having regard to the above, if proper consideration had been given to the position
20 of repatriated prisoners when the Prisons Law was amended to introduce a
21 different approach for offences included in the Schedule, one would have
22 expected there to have also been a provision clarifying the Legislature’s intention.
23 In the absence of such a provision, it would be wrong to simply infer offences into

1 the Schedule. Clarity could be given by, for example, providing that the "foreign"
2 offence which the repatriated prisoner was serving became a specified offence
3 under the Schedule if it corresponded to one of the offences listed in the Schedule.
4 It would then not matter whether the domestic offence was listed with reference to
5 the relevant Statute or not in the Schedule. It would ensure a unified approach
6 when relating "foreign offences" to all of the domestic offences listed in the
7 Schedule. Most importantly it would give certainty as to the intention of the
8 Legislature and put in place a proper mechanism for dealing with repatriated
9 prisoners in the same way as domestic prisoners when it came to determining the
10 date for parole eligibility.

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Dated this 23rd day of September 2013.



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The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT